Question 4 – February 2016 – Selected Answer 1

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1. Travis County should not grant Mary's motion to transfer venue because venue is proper in Travis County.

Under Texas law, an individual in suit for divorce must be a resident of Texas for six months and must have resided in the county of venue for the preceeding 90 days. The suit, so long as no other county court has a pre-existing claim of jurisdiction and the petitioner meets the residency requirements, may not be transferred to a county of a subsequent suit. Here, Travis county is proper because Joe resided in the county for four months prior to filing the petition and thus venue is proper.

2. Joe and Mary were not a common-law married couple.

Under Texas law, an informal, or common-law, marriage exists between two individuals who agree to be presently married, live together after the agreement, and hold themselves out to others as a married couple. The burden of proof is on the party seeking to establish the marriage and must be proved by clear and convincing evidence. Here, Joe cannot establish the first element, that he and Mary agreed to be presently married on December 1, 2010, when they began living together. Joe and Mary simply agreed to live together, and did not make any promise to be presently married at that time and only made a promise to marry each other in the future in December 2014. Their cohabitation or subsequent engagement, particularly as the wedding was not to take place until April 2015, does not indicate that the couple ever agreed to be married at any present time.

Additionally, Joe may only be able to tenuously establish the second and third elements of the test. Joe and Mary lived together for several years prior to their separation, but this fact alone, particularly since there is not enough evidence to suggest that the couple agreed to be married immediately in December 2010 or at any future time, does not meet the second element. Joe may meet the third element, but not conclusively, as they only held themselves out as married "on occasion" and only Joe acted to hold Mary out as his spouse with regard to the insurance forms. Mary's designation of Joe as her emergency contact is irrelevant.

Therefore, Joe and Mary were not a married couple because they do not meet all three elements of an informal marriage under Texas law.

(1):

Jurisdiction for a divorce suit is proper in Texas when either of the "spouses" (in quotation marks due to the nature of Mary and Joe's relationship as alleged common law spouses) have resided in the state for the previous six months. In this case, both Joe and Mary have been residents of Texas for far longer than six months, so Texas courts have jurisdiction over this divorce proceeding. In order for a county to have *venue* over a divorce proceeding, one of the "spouses" must have resided there for at least 90 days leading up to the divorce action. Joe has lived in Travis County for more than 90 days; therefore, venue is proper in Travis County. Since this divorce action is not coupled with a suit affecting the parent child relationship, the court must make no further mandatory venue considerations. A court may transfer a proceeding based on convenience, however. If Bexar County is a more convenient forum, then the Travis County Court has the *discretion* to transfer the proceeding to Bexar County. It is discretionary, though. This case will likely center on the classification of Mary and Joe's marriage as common law spouses. Mary will likely contest this classification, so witnesses will likely be called in order for Joe to attempt to prove his case. During the time that Joe and Mary lived together, they lived in Bexar County. Most of their friends that witnessed the couple at social events and spent time with them are likely located in Bexar County. Bexar County might prove a more convenient forum for this witnesses. However, Austin and San Antonio are not such a great distance that makes the cost of travel for the witnesses located in Bexar County extremely burdensome. Therefore, the Travis County Court should (and likely would) deny Mary's motion to transfer venue to Bexar County.

(2):

Texas law recognizes the theory of "common law marriage," though it is statutorily defined in the Texas Family Code. In order for a couple to qualify as common law spouses, they must: (1) cohabitate (live together) in Texas; (2) the couple must enter into an agreement between each other that they are married; and (3) the couple must hold each other out as husband and wife to others. As to the first element, Joe can easily prove that he and Mary cohabitated from December 1, 2010 until March 1, 2015. However, it will prove more of a challenge for Joe to prove that Mary and Joe entered into an agreement as to their marriage (because Mary will likely dispute this fact). This will become a fact question for the jury's determination. The fact that the couple later became engaged is not dispositive. This agreement must be with the *present* intent of forming a marriage- not a future intent. And though Joe designated Mary as his "spouse" and sole beneficiary on his life insurance application, Mary had no part in this. Life insurance forms are filled out by the holder of the policy alone. Had the couple filed a joint tax return, that may have sufficed, but a life insurance policy likely would not. On these facts, Joe would likely be unable to prove the second element of his claim. The third element is the element in which Mary and Joe's friends will be called to the stand to witness as to whether or not Joe and Mary called each other their spouses. Phrases such as "the love of my life" and "my soul mate" likely would not qualify as holding each other out as spouses, but calling each other "Mr. and Mrs. Smith" may. Again, this would become a question for the jury's determination; for this element, the jury would likely find that Mary and Joe did hold each other out as husband and wife.

(1) No, the court should not grant Mary's motion to transfer venue. Venue is proper for divorce proceedings in the county of residence of either spouse if the filing spouse has been a Texas resident for 6 months and resided in the county for 90 days. Here, Joe moved to Travis county in March 1 and filed suit for divorce on July 1, about 120 days. Thus, venue is proper in Travis county. Mary may make a motion for forum non convens and argue that much of the evidence for the case will be located in Bexar county, as that is where they lived together, where their friends (and potential witnesses) live, doctors records exist, etc. However, the court is unlikely to grant this motion as the inconvenience to Mary is not so great such as to substantially prejudice Mary.

(2) For an informal marriage, Joe must establish existence an agreement to be married and intent that they were married, that they lived together in Texas as husband and wife, and that they held one another out as spouses in Texas. Joe is likely to be able to prove each element except for the agreement. The agreement is going to be a close call, and I believe Joe will ultimately lose on this item.

Regarding the requirement that they lived together, the facts indicate that Joe and Mary lived together in Bexar county from December 2010 until March 2015. The living arrangement was not one of convenience, rather, they maintained the household and did things ordinarily done by a husband and wife. This requirement is fulfilled.

Regarding the requirement that they held one another out as spouses, there is evidence going both ways for this requirement, but I believe that it has been fulfilled. Among their friends, who likely knew them early in the relationship, they did not refer to one another explicitly as "wife" or "husband." However, the terms of endearment they used could be interpreted as suggesting a married relationship (love of my life and soulmate are often used to describe one's spouse). It is possible they choose not to refer to one another as husband and wife among their friends because they already had established their reputation as a couple. However, when introducing one another at social functions with strangers, Mary and Joe used the phrase "Mr. and Mrs. Smith," clearly indicated to others that they are married, as Mary's actual last name is Hall. Finally, Joe listed Mary as his spouse on his insurance policy, holding out to the insurance company that Mary was his wife. Arguably, Mary's use of Joe as an emergency contact could be considered her holding him out as a spouse, but this argument is weak. It is possible that someone may list a roommate as an emergency contact if, for example, the person's relatives are all out of state.

Finally, regarding the agreement to be married and intent that they are currently married, this is primarily fact-based inquiry. There is a presumption that an agreement to be married does NOT exist if the couple has ceased living together for two years or more. Here, this presumption does not apply because Mary and Joe have only been living apart for 4 months. Looking at the facts: in addition to the ones discussed above regarding holding one out as a spouse, there is also the evidence of the engagement ring and wedding plans. Generally, people who get engaged do so to show the world that they intend to be married. Joe's use of the term "engagement ring" when giving the ring to Mary suggests not that it was to serve as a wedding band, but that he was promising to marry her. This is further supported by evidence that they were planning a formal wedding. While it is true that some married couples may have a formal wedding celebration to celebrate an earlier justice of the peace wedding, this is not as likely to be the case with informal marriages.

However, the most telling evidence may be Joe's timing. Joe did not file for divorce until after he found out that Mary won the lottery. This suggests that the filing of divorce was not to finalize the end of any informal marriage that may have existed, but to get his hands on Mary's now-substantial estate under the guise of community property. Joe's allegation of an informal marriage beginning on December 1, 2010, when they first moved in together is unnecessary and likely inappropriate. An informally married couple may stipulate to the start of their marriage through a court filing. However, this cannot be done unilaterally. Mary's denial of the marriage will mean that the marriage will have started, if ever, when the court finds based on the facts.