

1995

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## Recommended Citation

Peter Nash Swisher, *The Last-in-Time Marriage Presumption*, 29 Fam. L.Q. 409 (1995).

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# The Last-in-Time Marriage Presumption

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PETER NASH SWISHER\* and  
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## I. Introduction

The typical scenario for the last-in-time marriage presumption is not as unusual as one might expect: A husband (or wife) has unexpectedly died, and the bereaved surviving spouse is in the process of bringing a legal proceeding that may include a probate action, a wrongful death action, a suit for social security benefits, a workers' compensation action, a life insurance action, or another legal action for related compensatory, probate, or insurance benefits. However, during the pendency of these actions a former wife comes forward, claiming that she has never been divorced from her deceased spouse and that she, rather than the subsequent wife, should recover in any legal proceeding as the legal wife. Which wife should prevail?

To many, the initial conclusion might be that because American family law in the vast majority of states prohibits bigamy and other plural marriages,<sup>1</sup> the first-in-time spouse should recover all the proceeds. But this conclusion would be wrong.

The last-in-time marriage presumption is based upon "one of the strongest presumptions known to the law" that an existing marriage, once shown, is valid. A subsequent marriage, therefore, raises the very strong presumption

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1. See, e.g., *Rance v. Rance*, 587 N.E.2d 150 (Ind. Ct. App. 1992); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985) (applying Utah law). See also THE UNIFORM MARRIAGE AND DIVORCE ACT § 207(a)(1), 9A U.L.A. 147 (1987). See generally HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 64-70 (2d ed. 1987) [hereinafter CLARK]; JOHN D. GREGORY, PETER N. SWISHER & SHERYL L. SCHEIBLE, UNDERSTANDING FAMILY LAW 39-40 (1993) [hereinafter UNDERSTANDING FAMILY LAW].

that any former marriage was terminated by death, annulment, or divorce. Once this presumption arises, the *former* spouse has the burden of proving that no death, annulment, or divorce occurred to terminate the prior marriage.<sup>2</sup> Thus, if the former spouse fails to rebut this last-in-time marriage presumption by searching all divorce records where the deceased resided, or might reasonably have resided, the subsequent spouse will prevail.<sup>3</sup> This marital presumption is based not upon logical arguments, but upon underlying public policy arguments, and the last-in-time marriage presumption therefore continues to be recognized and applied in current judicial decisions as well.<sup>4</sup>

Surprisingly, for a presumption that is often characterized as “one of the strongest known to the law,”<sup>5</sup> there has been very little legal analysis regarding this unique marriage presumption. This article, therefore, analyzes and discusses the theoretical and practical aspects of the last-in-time marriage presumption by examining its underlying rationale, and the legal result when the last-in-time presumption conflicts with other legal presumptions. The article then discusses the availability and application of the last-in-time marriage presumption including who can invoke it, when it becomes available, and the various kinds of legal actions where it may properly be utilized. The article further addresses burden of proof issues involving the last-in-time marriage presumption, including the factual elements that must be proven and the stan-

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2. *See, e.g.*, *Parker v. American Lumber Co.*, 56 S.E.2d 214, 216 (Va. 1949):

The decided weight of authority, and we think the correct view, is that where two marriages of the same person are shown, the second marriage is presumed valid; that such presumption is stronger than and overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. When both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumes morality and legitimacy, and not immorality and bastardy.

3. Under the generally prevailing view in most jurisdictions, a prior spouse will only be able to rebut this last-in-time marriage presumption by searching all of the divorce records where the deceased spouse resided—or could have resided—in order to prove that no divorce decree was ever granted to the deceased spouse. *See, e.g.*, *Miller v. Harley-Davidson Motor Co.*, 328 N.W.2d 348 (Iowa Ct. App. 1982); *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1980). However, if the prior spouse successfully does present evidence that no divorce proceedings were instituted in any jurisdiction where the deceased spouse might reasonably have pursued them, then the presumption would be rebutted. *See, e.g.*, *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975).

4. *See, e.g.*, *In re Estate of Pope*, 517 N.W.2d 281 (Mich. Ct. App. 1994); *Munson v. United States*, 30 Cl. Ct. 830 (1994) (applying California law); *Chandler v. Central Oil Corp.*, 853 P.2d 649 (Kan. 1993); *Leonard v. Leonard*, 560 So. 2d 1080 (Ala. Ct. App. 1990).

5. *See, e.g.*, *Stewart v. Hampton*, 506 So. 2d 70, 71 (Fla. Dist. Ct. App. 1987). *See also* CLARK, *supra* note 1, at 71 (“The presumption that the latest of successive marriages is valid is more important than the other presumptions validating marriage”).

dard and quality of proof which must be established to overcome the presumption. Finally, an analysis of the case of *Hewitt v. Firestone Tire & Rubber Company* will illustrate the underlying principles, application, and defenses involving the last-in-time marriage presumption.

## II. Legal Bases and Conflicts

The last-in-time marriage presumption<sup>6</sup> is a legal theory which allows the courts to presume that a later in time marriage is a valid marriage whenever there is a legal conflict with any previous marriage to the same spouse. This presumption, in reality, is a two-prong presumption. The first prong presumes that the earlier marriage was terminated by the death of the former spouse. If the former spouse is shown to be living at the time of the subsequent marriage, then the second prong presumes that the former marriage was terminated by divorce or annulment. Once a subsequent marriage is shown, therefore, the presumption effectively places the burden of proof on the party attacking the subsequent marriage to prove that the former marriage was *not* terminated by death, divorce, or annulment.

### A. Public Policy Rationales

The primary reasons supporting the last-in-time marriage presumption historically have been based upon three underlying public policy rationales. These include the presumptions of innocence, morality, and the legitimacy of offspring, all of which favor the parties of the last-in-time marriage since “the law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy.”<sup>7</sup> In other words, the courts will not presume that

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6. The courts and commentators have not been uniform in how they have defined this marital presumption. See, e.g., Annotation, *Presumption as to Validity of Second Marriage*, 14 A.L.R.2d 7 (1950) and Later Case Service (defined as a presumption related to the validity of a second marriage); 52 AM. JUR. 2D *Marriage* § 140-149 (1970) (defined as a presumption of the validity of a second or subsequent marriage); 55 C.J.S. *Marriage* § 43(c)(3) (1948) (defined as a presumption affecting the validity of conflicting marriages to the same spouse); CLARK, *supra* note 1, at 71 (defined as the latest of successive marriages); UNDERSTANDING FAMILY LAW, *supra* note 1, at 35-36 (defined as the last-in-time marriage presumption). Since this presumption is not limited to a second marriage and may include subsequent or successive marriages, the term “last-in-time marriage presumption” will be utilized throughout this article for purposes of convenience and consistency.

7. See, e.g., *In re Rash's Estate*, 53 P. 312, 313 (Mont. 1898) (citing with approval *Teter v. Teter*, 101 Ind. 129 (1885)). See also *Pittinger v. Pittinger*, 64 P. 195, 197 (Colo. 1901) (stating that the presumption “arises because the law presumes morality and not immorality, and that every intendment is in favor of matrimony.”); *Parker*, 56 S.E.2d at 216 (stating that “the law presumes morality and legitimacy, not immorality and bastardy.”).

the parties would purposefully enter into an existing bigamous or polygamous marriage or that they would intentionally illegitimize their children.<sup>8</sup>

Although the underlying presumptions of innocence and morality are the most commonly cited rationales for recognizing and enforcing the last-in-time marriage presumption,<sup>9</sup> a number of courts also recognize the legitimacy of offspring as another underlying rationale. A Texas court, for example, held that the presumption of innocence should be recognized in the context of the last-in-time marriage presumption, "especially when the presumption is necessary to protect the legitimacy of children."<sup>10</sup> However, although this presumption of legitimacy may be an important underlying factor in invoking the last-in-time marriage presumption, a New York court held that it was erroneous to apply the presumption *only* in those cases where the legitimacy of offspring of a subsequent marriage was at issue.<sup>11</sup>

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8. *See, e.g.*, *Newburgh v. Arrigo*, 443 A.2d 1031, 1034 (N.J. 1982) (stating that the presumption "reflects a belief that parties would not willingly commit bigamy or illegitimize their children."). *See also* *Rainer v. Snider*, 369 N.E.2d 666, 668 (Ind. Ct. App. 1977) (stating that the "policies upon which this presumption rests are that the law presumes innocence, not criminality (bigamy); morality, not immorality; and marriage, not concubinage.").

*See also* CLARK, *supra* note 1, at 71-72:

A careful reading of the numerous cases applying the presumption leaves a very strong impression that in all probability the prior marriage had not ended, but that the courts were holding that it must be presumed to have ended for the purpose of protecting the legitimacy of children or honoring the financial or property claims of women who had assumed for many years that they were married and had performed the obligations of marriage. This is another instance of the law's treating the *de facto* assumption of the marital status as paramount to compliance with legal forms.

9. *See, e.g.*, *Mayo v. Mayo*, 326 S.E.2d 283, 285 (N.C. Ct. App. 1985). These underlying presumptions of innocence and morality, however, are not considered to be rigid presumptions. *See, e.g.*, *Welch v. All Persons*, 254 P. 179, 182 (Mont. 1927). Nevertheless, a majority of courts have found that they "should always be indulged in passing judgment upon the acts of our fellowman." *Fowler v. Texas Exploration Co.*, 290 S.W. 818, 822 (Tex. Civ. App. 1926).

10. *Fowler*, 290 S.W. at 822. *See also* *Bowman v. Little*, 61 A. 223, 225 (Md. Ct. App. 1905):

After it has been shown that there was an actual marriage, solemnized in the method which the law prescribes, and followed by birth of issue, every inference is invoked in support of its validity and against an alleged antecedent marriage, because the presumptions of the law are always in favor of innocence and legitimacy.

*See also In re Estate of Pope*, 517 N.W.2d 281 (Mich. Ct. App. 1994) (noting that the last-in-time marriage presumption is particularly strong where children are born of the later marriage).

11. *In re Salvin's Will*, 173 N.Y.S. 897 (Surrogate's Ct. Kings Co. 1919). A more recent case applying New York law, however, has held that the last-in-time marriage presumption is not as strong in cases where no children are involved. *See Milano v. Secretary of Health & Human Services*, 586 F. Supp. 1431, 1434 (E.D.N.Y. 1984). *But see infra* Section II.D.

In addition to these traditional underlying rationales of innocence, morality, and legitimacy of offspring, a number of courts and commentators have identified other important public policy bases underlying and supporting the last-in-time marriage presumption. The Ninth Circuit Court of Appeals, for example, found an important purpose of the last-in-time marriage presumption to be one of protecting and strengthening the social and moral standards of the community at large.<sup>12</sup> Likewise, the New Jersey Supreme Court stressed an important need for the presumption in light of an increasing incidence of divorce and remarriage in order to comport with the reasonable marital expectations of the parties and to lend stability to human affairs.<sup>13</sup> This “reasonable expectations” underlying rationale for the last-in-time marriage presumption constitutes another extremely strong public policy argument since the overwhelming majority of state courts will attempt to validate the parties’ reasonable marital expectations whenever possible.<sup>14</sup> An overwhelming number of American courts continue to validate the reasonable marital expectations of the parties whenever possible.<sup>15</sup> One commentator, analyzing the development of the last-in-time marriage presumption under Georgia law, theorizes that the presumption achieves socially desirable results by fulfilling the reasonable

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12. *Tatum v. Tatum*, 241 F.2d 401, 406 (9th Cir. 1957) (interpreting California law). *See also* *Rainer v. Snider*, 369 N.E.2d 666, 669-70 (Ind. Ct. App. 1977):

The presumption rests upon strong social policies which give effect to the expectations of the parties. Parties to a marriage are entitled to a security provided by the law. The legal premise permits them to assume validity so that they may plan and order their lives accordingly.

13. *Newburgh v. Arrigo*, 443 A.2d 1031, 1034 (N.J. 1982).

14. *See, e.g., Phillips v. Phillips*, 31 S.W.2d 134, 135 (Ark. 1930):

Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him [or her] throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption, that it is illegal and void.

*See also* *McClougherty v. McClougherty*, 21 S.E.2d 761, 765 (Va. 1945):

[I]n the interest of morality and decency the law presumes marriage between a man and a woman when they lived together as man and wife, demeaning themselves toward each other as such, and that status in society is recognized by their friends and relatives. While it is true, however, that cohabitation and repute do not constitute marriage, they do constitute strong evidence tending to raise a presumption of marriage, and the burden is on him who denies the marriage to offer countervailing evidence. *See also* *Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1228 (D. Wyo. 1985) (stating the last-in-time marriage presumption is especially strong since public policy favors reliance on the validity of marital relationships).

15. *See generally* UNDERSTANDING FAMILY LAW, *supra* note 1, at 26-27 [formal statutory marriages], 27-29 [informal common law marriages], 47 [marital conflict of laws issues]. *See also* CLARK, *supra* note 1, at 40:

[T]he cases find the policy favoring valid marriages sufficiently strong to justify upholding [certain defective marriages]. This seems the correct result. Most such cases arise long after the parties have acted upon the assumption that they are

expectations of the parties and by protecting apparent spouses in economically vulnerable positions from becoming welfare recipients.<sup>16</sup> Arguably, then, this underlying public policy rationale of validating the existing marital expectations of the parties is just as strong a public policy basis for validating the last-in-time marriage presumption as the underlying public policy bases of innocence and morality.

Although legitimacy of offspring is no longer as important a public policy argument as it once was due to subsequent statutory developments,<sup>17</sup> the interrelated public policy rationales of innocence and morality, validating the reasonable expectations of the parties, and strengthening and stabilizing the social and moral standards of the community still remain strong and viable underlying public policy bases for the last-in-time marriage presumption.

### B. *Recognition of the Last-in-Time Marriage Presumption*

Based upon a number of strong and persuasive underlying public policy rationales, the overwhelming majority of American jurisdictions<sup>18</sup> continue to

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married, and no useful purpose is served by avoiding the long-standing relationship. . . . The same policy of upholding marriages [in general] underlies the presumption of validity of second marriages. . . .

16. See E. Hunter Taylor, Jr., *Repeal of the Presumption of the Validity of Subsequent Marriages: Another Irrational Step Toward Increasing the Welfare Roles*, 21 MERCER L. REV. 465, 467 (1970) [hereinafter Taylor].

17. Almost every American jurisdiction has now enacted a state statute legitimizing children of void or voidable marriages, so this public policy basis for the last-in-time marriage presumption is not as compelling as it once was. See generally HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 19-20 (1971) (listing these state statutes). See also UNIFORM PARENTAGE ACT 9A U.L.A. 587 (1979).

18. See, e.g., *Lockett v. Coleman*, 308 So. 2d 689 (Ala. 1975); *Wilson v. Wilson*, 399 P.2d 698 (Ariz. Ct. App. 1965); *Cole v. Cole*, 462 S.W.2d 213 (Ark. 1971); *Vargas v. Superior Court*, 88 Cal. Rptr. 281 (Cal. Ct. App. 1970); *Gainey v. Flemming*, 279 F.2d 56 (10th Cir. 1960) (applying Colo. law); *Metropolitan Life Ins. Co. v. Manning*, 568 F.2d 922 (2d Cir. 1977) (applying Conn. law); *Williamson v. Williamson*, 104 A.2d 463 (Del. 1954); *Johnson v. Young*, 372 A.2d 992 (D.C. Ct. App. 1977); *In re Estate of Lee*, 360 So. 2d 1111 (Fla. Dist. Ct. App. 1978); *In re Application of Tomasa Ragrao Soriano*, 35 Haw. 756 (1940); *Nicholas v. Idaho Power Co.*, 125 P.2d 321 (Idaho 1942); *Baer v. De Berry*, 175 N.E.2d 673 (Ill. Ct. App. 1961); *Ross v. Red Cab Co.*, 14 N.E.2d 333 (Ind. Ct. App. 1938); *Miller v. Harley-Davidson Motor Co.*, 328 N.W.2d 348 (Iowa Ct. App. 1982); *Harper v. Dupree*, 345 P.2d 644 (Kan. 1959); *Rose v. Rose*, 118 S.W.2d 529 (Ky. 1938); *Zanders v. Zanders*, 434 So. 2d 1213 (La. Ct. App. 1983); *Browning v. Browning*, 168 A.2d 506 (Md. 1961); *In re Adams' Estate*, 107 N.W.2d 764 (Mich. 1961); *Smith v. Weir*, 387 So. 2d 761 (Miss. 1980); *Estate of Holloway v. Whitaker*, 679 S.W.2d 551 (Mo. Ct. App. 1985); *Crosby v. Ellsworth*, 431 F.2d 35 (9th Cir. 1970) (applying Montana law); *Villalon v. Bowen*, 273 P.2d 409 (Nev. 1954); *Raspa v. Raspa*, 504 A.2d 683 (N.J. Super. Ct. 1985); *Allen v. Allen*, 651 P.2d 1296 (N.M. 1982); *Fishman v. Fishman*, 369 N.Y.S.2d 756 (App. Div. 1975); *Stewart v. Rogers*, 133 S.E.2d 155 (N.C. 1963); *Norton v. Coffield*, 357 P.2d 434 (Okla. 1960); *Smith v. Smith*, 131 P.2d 447 (Or. 1942); *Commonwealth ex rel. Alexander v. Alexander*, 284 A.2d 721 (Pa. 1971); *Yarbrough v. Yarbrough*, 314 S.E.2d 16 (S.C. Ct. App. 1984); *Troxel v. Jones*, 322 S.W.2d 251 (Tenn. Ct. App. 1958); *Texas Employers Ins. Ass'n v. Elder*, 282 S.W.2d

recognize and apply the last-in-time marriage presumption. This presumption, however, has not been universally accepted, and a small minority of states have rejected the presumption in whole or in part. For example, the Ohio Supreme Court, while conceding that a large number of states do in fact recognize the last-in-time marriage presumption, nevertheless held that a "more reasonable" approach was to place the burden of proof on the subsequent spouse, rather than on the prior spouse, by recognizing the conflicting presumption of the continuation of a prior marriage as a superior presumption.<sup>19</sup> The court gave three reasons as to why it was more appropriate to place the burden of proof on the subsequent, rather than on the prior, spouse. First, the court found it was not possible for the prior wife to follow the recreant husband all over the country, or all over the world, in order to prevent a subsequent unlawful marriage.<sup>20</sup> Second, the court held that it was within the power of the later or subsequent wife to make adequate inquiry into the past life of her future husband.<sup>21</sup> Third, the court stated that a presumption should not be recognized that would "further augment the much-discussed divorce evil" or encourage marriage between "comparative strangers" without any inquiry into their past lives.<sup>22</sup>

Wisconsin also has refused to give any special recognition to the last-in-time marriage presumption. The Wisconsin Supreme Court held that no absolute presumption of Wisconsin law recognizing a subsequent or last-in-time marriage was warranted.<sup>23</sup> The court opined that each case should be decided upon its own particular facts and circumstances and upon any other inferences that could fairly be drawn from those facts and circumstances.<sup>24</sup>

Massachusetts, likewise, has rejected any special application of the last-in-time marriage presumption. For example, the Massachusetts Supreme Court held that the last-in-time marriage presumption will only be applied in a situation where no extrinsic evidence is presented either way.<sup>25</sup> But once a subsequent marriage is attacked and impeaching evidence is introduced, the validity of the last-in-time marriage becomes only "a question of fact to be proved in

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371 (Tex. 1955); *Martin v. Martin*, 510 P.2d 1102 (Utah 1973); *DeRyder v. Metropolitan Life Ins. Co.*, 145 S.E.2d 177 (Va. 1965); *Davis v. Davis*, 101 P.2d 313 (Wash. 1940); *Meade v. State Compensation Comm'r*, 125 S.E.2d 771 (W.Va. 1962); and *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D.Wyo. 1985) (applying Wyoming law).

19. *Industrial Commission of Ohio v. Dell*, 135 N.E. 669, 673-74 (Ohio 1922). The presumption of the continuance of a marriage presumes that a marriage, once properly and legally solemnized, continues until terminated by death or divorce. *Id.* This rejection of the last-in-time marriage presumption in favor of the continuance of a prior marriage presumption has been followed by later Ohio courts as well. *See, e.g.*, *Dibble v. Dibble*, 100 N.E.2d 451 (Ohio Ct. App. 1950).

20. 135 N.E. at 674.

21. *Id.*

22. *Id.*

23. *Williams v. Williams*, 23 N.W. 110, 114 (Wis. 1885).

24. *Id.*

25. *Turner v. Williams*, 89 N.E. 110 (Mass. 1909).

the light of all the circumstances and reasonable inferences arising therefrom, regardless of the presumptions of innocence, or the death or divorce of one of the parties to the prior marriage, in order to support the second one."<sup>26</sup>

Finally, the Georgia courts have found that the last-in-time marriage presumption has been largely nullified by a Georgia state statute<sup>27</sup> which holds that the presumption only exists until the former marriage is established, and the former spouse is shown to be living at the time of the subsequent marriage. Once these facts have been demonstrated, the burden of proof then shifts to the party who is claiming the validity of the subsequent marriage to prove that a divorce was in fact obtained prior to the subsequent marriage.<sup>28</sup>

Nevertheless, with all due respect to these judicial and statutory precedents, none of them have adequately addressed—nor have they persuasively rebutted—the important underlying bases for the last-in-time marriage presumption including: the presumptions of innocence and morality, the legitimacy of children, validating the reasonable marital expectations of the parties, strengthening the social and moral standards of the community at large, and lending predictability and stability to marital affairs. Accordingly, these five public policy arguments still remain as viable and persuasive underlying bases for the last-in-time marriage presumption, in spite of the short-sighted and unperceptive approaches taken by a small minority of courts to the contrary.

### C. *Strength of the Last-in-Time Marriage Presumption*

The last-in-time marriage presumption is often described as a very strong presumption, and numerous courts have called it "one of the strongest presumptions known to the law."<sup>29</sup> However, the courts have also stressed that

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26. *Id.* at 111. The court went on to state that in Massachusetts law "jealously regards the marriage relation and makes reasonable assumptions in its favor, but it has no special regard for second in preference marriages. . . . There is no 'sacramental force' in the presumption of innocence over the presumption of the continuation of life or any other [marital presumption]." *Id.* at 112.

27. GA. CODE ANN. § 19-3-2(3) (1982).

28. See *Glover v. Glover*, 322 S.E.2d 755, 756-757 (Ga. Ct. App. 1984). The enactment of this Georgia statute, however, has been severely criticized. See Taylor, *supra* note 16 and accompanying text.

29. See, e.g., *Stewart v. Hampton*, 506 So. 2d 70, 71 (Fla. Dist. Ct. App. 1987); *McKnight v. Schweiker*, 516 F. Supp. 1102, 1105 (D. Md. 1981); *Mayo v. Ford*, 184 A.2d 38, 41 (D.C. App. Ct. 1962); *Anderson v. Anderson*, 240 P.2d 966, 968 (Utah, 1952). See also *Clark v. Clark*, 719 S.W.2d 712, 714 (Ark. Ct. App. 1986). *But see* *Panzer v. Panzer*, 528 P.2d 888, 891 (N.M. 1974):

It is . . . inappropriate to categorize the strength of the presumption of validity of a [subsequent] marriage as being "strong", "very strong", "extremely strong", or "one of the strongest known to the law". . . . Such statements are a confusing blend of two concepts, viz: which party has the burden of proof and the quantum of proof necessary to carry it.

the last-in-time marriage presumption is rebuttable rather than a conclusive,<sup>30</sup> and therefore should not be applied to reach a strained result.<sup>31</sup> On the other hand, these same courts continue to emphasize that a last-in-time marriage presumption grows even stronger with the passage of years,<sup>32</sup> and with the birth of subsequent children.<sup>33</sup>

For example, one court held that the presumption of the validity of a last-in-time marriage should be upheld when the equities weighed in its favor; and in discussing what equities should be considered, the court found the duration of the subsequent marriage and the birth of children within that marriage to be particularly relevant factors.<sup>34</sup> Likewise, a Washington court reiterated that although the last-in-time marriage presumption grows stronger with each passing year, nonetheless it is not conclusive and is still capable of being overcome by contrary evidence.<sup>35</sup>

#### D. *Conflicts with Other Marital Presumptions*

There are two counter-presumptions that often arise and come into conflict with the last-in-time marriage presumption: (1) the presumption that a marriage, once established, is presumed to continue, and (2) the presumption that a former spouse remains alive in the absence of contrary evidence. Generally, it appears that the last-in-time marriage presumption will prevail over both of these conflicting counter-presumptions.

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30. See, e.g., *DeRyder v. Metropolitan Life Ins. Co.*, 145 S.E.2d 177, 181 (Va. 1965) (. . . presumption . . . may be rebutted by evidence of invalidating facts); *Walsh v. Walsh*, 255 S.W.2d 240, 242 (Tex. Civ. App. 1952) (the presumption . . . is rebuttable, and the burden is placed upon the person attacking its validity); *Villalon v. Bowen*, 273 P.2d 409, 413 (Nev. 1954) (the presumption of the validity of a subsequent marriage, however strong, is still rebuttable); *Rainer v. Snider*, 369 N.E.2d 666, 669 (Ind. Ct. App. 1977) (the presumption is rebuttable and not conclusive).

31. See, e.g., *Lott v. Toomey*, 477 So. 2d 316, 320 (Ala. 1985):

The presumption of the dissolution of a prior marriage, whether by death or divorce, should be indulged with caution. We apprehend that such presumptions sometimes have been made with very little justification. A rule of law which allows an artificial or technical force to be given evidence which warrants such presumptions, beyond its natural tendencies to convince the mind, and requires courts and juries to presume as true what is false, cannot but be fraught with dangerous consequences.

32. See, e.g., *Compton v. Davis Oil Co.*, 607 F. Supp. 1221, 1228 (D. Wyo. 1985) (stating that after a passage of many years, the presumption is especially strong since public policy favors reliance on the validity of marital relationships).

33. See, e.g., *In re Estate of Pope*, 517 N.W.2d 281 (Mich. Ct. App. 1994) (holding that this presumption is particularly strong where there are children born of the later marriage).

34. *Boyd v. Heckler*, 588 F. Supp. 31, 34 (E.D.N.Y. 1984). *Milano v. Secretary of Health and Human Services*, 586 F.Supp. 1431, 1434 (E.D.N.Y. 1984) (noting that the presumption is not as strong in cases where no children are involved).

35. *Estate of Grauel*, 425 P.2d 644, 645 (Wash. 1967).

The vast majority of courts hold that the last-in-time marriage presumption will always prevail over the presumption of the continuance of a former marriage.<sup>36</sup> The underlying reason is that “the presumption of innocence, morality, and legitimacy will counterbalance and preponderate against the presumption of former [marital] relations.”<sup>37</sup>

On the other hand, several courts have been wary of adopting a blanket per se rule that the last-in-time marriage presumption will always outweigh the presumption of the continuance of a former marriage. For example, in *In re Estate of Watt*,<sup>38</sup> the Pennsylvania Supreme Court found that the last-in-time marriage presumption “standing alone” should not be able to destroy the presumption of the continuance of an existing marriage without proof of *additional* facts and circumstances supporting the last-in-time marriage presumption and detrimental to the presumption of the continuance of a former marriage.<sup>39</sup> Thus, in a later case, the Pennsylvania Supreme Court concluded the following:

On the one hand, with reference to the first marriage . . . the law presumes that it continues until the death of one of the parties or a divorce. On the other hand, the law recognizes the presumption of innocence in contracting a second marriage, as well as a presumption of the validity of the second marriage. In *Watts Estate* [185 A.2d 781 (Pa. 1962)] we stated that the second presumption, in itself, does not overcome the first presumption, but that “[t]he real thrust of the several presumptions is to place the burden of proving the invalidity of the second marriage upon the person who claims such invalidity and to require proof of some nature that the first marriage was not dissolved by death or divorce at the time of the second marriage”.<sup>40</sup>

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36. See, e.g., *Chandler v. Cent. Oil Corp. Inc.*, 853 P.2d 649 (Kan. 1993) (holding that the last-in-time marriage presumption is stronger than and overcomes or rebuts the presumption of the continuance of the previous marriage). See also *In re Winder's Estate*, 219 P.2d 18, 25 (Cal. Ct. App. 1950); *In re Adams Estate*, 107 N.W.2d 764, 766 (Mich. 1961); *Ellis v. Ellis*, 277 So. 2d 102, 103 (Ala. Ct. App. 1973); *Denson v. C.R. Fish Grading Co.*, 220 S.E.2d 217, 219 (N.C. Ct. App. 1975); *Anderson v. Anderson*, 240 P.2d 966, 968 (Utah, 1952); *Meade v. State Compensation Comm'r*, 125 S.E.2d 771, 775-776 (W.Va. 1962).

37. *Sloss-Sheffield Steel & Iron Co. v. Alexander*, 3 So. 2d 46, 48 (Ala. 1941). See also *Mayo v. Mayo*, 326 S.E.2d 283, 285 (N.C. Ct. App. 1985).

38. 185 A.2d 781 (Pa. 1962).

39. *Id.* at 785-86 (citing *Madison v. Lewis*, 185 A.2d 357, 360 (Md. Ct. App. 1962)). Additional facts and circumstances which the court thought compelling included: (1) a long lapse of time, (2) children born to the later marriage, (3) the remarriage of the former spouse, and (4) the recognition by the decedent spouse of the validity of the subsequent marriage. *Id.* The court feared that always recognizing the last-in-time presumption as a per se rule over the presumption of the continuance of a prior marriage might result in a method “of validating every case of meretricious relations.” *Id.*

40. *Commonwealth ex rel. Alexander v. Alexander* 284 A.2d 721, 723-24 (Pa. 1971).

A similar view was expressed by a New York surrogate court, which held that the conflicting presumptions of the last-in-time marriage presumption and the presumption of the continuation of a former marriage were of equal strength—and in effect neutralized one another—leaving the burden of proof on the parties to further demonstrate the validity or invalidity of the subsequent marriage.<sup>41</sup> The court did concede, however, that “the fact of a long separation conjugally of the parties of the first marriage and a long continued cohabitation following the later marriage [will be considered] of great weight in favor of the presumption of validity of the later marriage.”<sup>42</sup>

These concerns expressed by the Pennsylvania and New York courts, however, are more apparent than real. In the vast number of legal disputes involving the last-in-time marriage presumption, cohabitation with the former spouse has in fact ceased, and a continuous cohabitation with the subsequent spouse has in fact occurred. Hence, the so-called “additional” factual requirements of cohabitation with the subsequent spouse and recognition of the subsequent marriage by the decedent spouse are almost always present within those judicial decisions where the last-in-time marriage presumption is applied as a *per se* rule over the presumption of the continuance of a former marriage. Under either evidentiary rule, therefore, the last-in-time marriage presumption would still prevail over the presumption of the continuation of a former marriage.

The presumption that a former spouse remains alive is also generally overcome by the last-in-time marriage presumption whenever these two presumptions conflict.<sup>43</sup> Essentially the preponderance of the last-in-time marriage presumption is aided by a legal presumption recognized in many states that a former spouse’s life continues until seven years have elapsed after a person was last heard from.<sup>44</sup> However, once again, this is not a conclusive presumption, particularly in the face of conflicting evidence.<sup>45</sup>

Although seven years normally must elapse before the presumption of death arises, the courts have held that no inference or presumption arises as to when—within the seven year period—the death actually occurred. This concept becomes especially important when the subsequent marriage was entered into prior to the conclusion of the seven-year period. In such a situation, the stronger

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41. Application of Carr, 134 N.Y.S.2d 513, 517-18 (Surrogate’s Ct. Chautauqua Co. 1953).

42. *Id.*

43. See, e.g., *In re Marriage of Summers*, 645 S.W.2d 205 (Mo. 1983); *In re Estate of Steinberg*, 578 P.2d 487 (Or. 1978); *Meade v. State Compensation Comm’r*, 125 S.E.2d 771 (W.Va. 1962); *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985).

44. See, e.g., *Smith v. Fuller*, 115 N.W. 912, 915 (Iowa 1908); *In re McCausland’s Estate*, 62 A. 780, 781 (Pa. 1906). See also *Stamper v. Stanwood*, 159 N.E.2d 865 (Mass. 1959); *Cann v. Cann*, 632 A.2d 322 (Pa. Super. Ct. 1993).

45. See, e.g., *Tyll v. Keller*, 120 A. 6, 7 (N.J. Ct. App. 1923). See also *In re Watt’s Estate*, 185 A.2d 781 (Pa. 1962).

presumptions of innocence and morality will support the legal theory that the former spouse's death occurred before the subsequent marriage.<sup>46</sup>

Finally, although not constituting a legal presumption, there exists a procedural rule in almost all American states that a defendant in a divorce action must be provided with due process notice of any pending divorce action.<sup>47</sup> A former spouse might therefore argue that the lack of any such due process notice relating to an alleged divorce should also rebut the last-in-time marriage presumption. However, the last-in-time marriage presumption has been held to be strong enough to prevail even over this strict due process notice requirement. For example, the Florida Supreme Court held that although the former wife had never been served with divorce papers,<sup>48</sup> the subsequent wife nevertheless prevailed based upon the last-in-time marriage presumption. The court stated:

While the alleged first wife is not required to eliminate every remote possibility that a divorce might have been secured by her husband, it is necessary that she tender evidence which when weighed collectively establishes the absence of a reasonable probability that her husband actually secured the divorce.<sup>49</sup>

Likewise, a Michigan appellate court held that "the presumption is not rebutted by testimony of the first spouse that, to the best of her knowledge, her husband never attempted to procure a divorce from her, and that she had never received or had been served with divorce papers."<sup>50</sup>

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46. *See, e.g.*, *Tyll v. Keller*, 120 A. 6, 7 (N.J. Ct. App. 1923) (stating that where the presumption of continued life would render a party guilty of bigamy and stamp a child as illegitimate, then the presumptions of innocence and morality will overcome the presumption of continued life of the former spouse, even though the seven-year period has not elapsed). *See also* *Hunter v. Hunter*, 43 P. 756, 757 (Cal. 1896); *Gilpin v. Gilpin*, 105 N.Y.S.2d 170, 173 (Sup. Ct. N.Y. Co. 1951); *Anderson v. Anderson*, 240 P.2d 966, 968 (Utah, 1952).

47. Due process requires that service of process on the defendant in a divorce action be made in strict compliance with state statutes. If the defendant is not properly served in a manner reasonably calculated to give notice, the divorce may be attacked and invalidated for lack of adequate notice. *See, e.g.*, CLARK, *supra* note 1, at 421-422; UNDERSTANDING FAMILY LAW, *supra* note 1, at 204.

48. *Teel v. Nolen Brown Motors, Inc.*, 93 So. 2d 874, 875 (Fla. 1957).

49. 93 So. 2d at 876.

50. *In re Estate of Pope*, 517 N.W.2d 281, 282 (Mich. Ct. App. 1994) (citing with approval *In re Williams Estate*, 417 N.W.2d 556 (Mich. Ct. App. 1987)). *See also* *In re Estate of Borneman*, 96 P.2d 182 (Cal. 1939); *Jackson v. Jackson*, 275 So. 2d 683 (Ala. Ct. App. 1973); *Rainier v. Snider*, 369 N.E.2d 666 (Ind. Ct. App. 1977); *In re Booker's Estate*, 557 P.2d 248 (Ore. Ct. App. 1976). *See also* CLARK, *supra* note 1, at 74, indicating that there is general agreement that

the testimony by one spouse that he never got a divorce himself, that he never received service or notice of divorce proceedings by the other spouse, and that he never was guilty of conduct which would be grounds for divorce is not sufficient to rebut the presumption.

### III. Availability of the Presumption

#### A. Who May Invoke the Presumption?

In general, the last-in-time marriage presumption may be invoked by the innocent spouse of the later marriage. This general rule is based upon the rationale that it is more equitable to require an attacking party to prove the invalidity of the later marriage, rather than place the burden on the innocent subsequent spouse to validate the later marriage.<sup>51</sup> Whether a party is innocent or not would depend on the facts and circumstances of each particular case, and key issues might include whether or not a party married in good faith and whether or not such party had the means to affirmatively prove or disprove the dissolution of the prior marriage.<sup>52</sup>

On the other hand, the last-in-time marriage presumption will be denied to any party who deserted or abandoned a prior spouse and who remarried a subsequent spouse in bad faith, having no reason to believe that the first marriage had been legally dissolved. If such a party was found to have remarried in bad faith, then the presumption *cannot* be invoked by that party, and the burden would remain on the party defending the validity of the second marriage to prove that the first marriage was in fact terminated by death, divorce, or annulment.<sup>53</sup> A last-in-time marriage presumption also will *not* arise when the circumstances of the subsequent marriage give rise to an inference of duress or mental incapacity on the part of the subsequent spouse,<sup>54</sup> nor in those circumstances where the parties are before the court and are in a unique position to know whether or not the former marriage was actually terminated by death or divorce.<sup>55</sup>

#### B. When the Presumption Becomes Available

As a general rule, the last-in-time marriage presumption becomes available once the innocent spouse defending the validity of the subsequent marriage

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51. See, e.g., *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358, 1364 n.14 (E.D. Va. 1980). See also *Pittinger v. Pittinger*, 64 P. 195, 197 (Colo. 1901) (holding that the presumption of the validity of a subsequent marriage applies with particular force in favor of one who is unable to prove affirmatively that the man she married in good faith was divorced from a former wife).

52. See, e.g., *Lampkin v. Travelers Ins. Co.*, 52 P. 1040 (Colo. Ct. App. 1898). See also *Succession of City v. Succession of Manuel*, 469 So. 2d 467 (La. Ct. App. 1985).

53. See, e.g., *Lands v. Equitable Life Assurance Society*, 120 So. 2d 74, 77 (La. 1960); *Brantley v. Skeens*, 266 F.2d 447, 452-53 (D.C. Cir. 1959). See also *Succession of City v. Succession of Manuel*, 469 So. 2d 467 (La. Ct. App. 1985) (holding that the last-in-time marriage presumption would not run in favor of a spouse who had a prior undissolved marriage unless that spouse could show good faith in contracting the marriage; however, the innocent spouse of a subsequent marriage would still be entitled to rely on the validity of the presumption).

54. See, e.g., *Christy v. Clarke*, 45 Barb. Ch. 529 (N.Y. Ch. 1866).

55. See, e.g., *Bancroft v. Bancroft*, 50 P.2d 465, 468-69 (Cal. Ct. App. 1935) (implying that the presumption is not available when a party before the court has unique information within his own knowledge, and knew or should have known when and where the alleged divorce took place).

establishes the existence of that marriage.<sup>56</sup> Most courts agree that once this subsequent marriage is shown to exist, the last-in-time marriage presumption may then be invoked, and the subsequent marriage is presumed to be legally valid.<sup>57</sup> This in turn would shift the burden of proof on to the party attacking the validity of the subsequent marriage to prove that an earlier marriage existed and was not terminated by death or divorce.<sup>58</sup>

The courts in Iowa, however, follow an ill-reasoned minority approach that requires an additional showing of inconsistent conduct by *both* parties of the first marriage before the last-in-time marriage presumption may be invoked. This unwarranted evidentiary rule, popularly known as the "Iowa Doctrine," requires that in addition to proof of the existence of a subsequent marriage, "[t]here must be something based on the acts and conduct of both parties [of the prior marriage] inconsistent with the continuation of [that] marriage relation before the presumption should be indulged."<sup>59</sup> Thus, the Iowa Supreme Court held that the last-in-time marriage presumption would only be applicable in situations such as where the parties to the second marriage lived as husband and wife in the same locality as the first wife, where they were acquainted with each other, and where no protest or complaint was ever made by the first wife.<sup>60</sup> The "Iowa Doctrine" has *not* been adopted in the vast majority of American jurisdictions since it

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56. *See, e.g., Mayo v. Mayo*, 326 S.E.2d 283, 286 (N.C. 1985); *Yarbrough v. Yarbrough*, 314 S.E.2d 16, 18 (S.C. Ct. App. 1984).

57. *See, e.g., Kearney v. Thomas*, 33 S.E.2d 871, 876 (N.C. 1945).

58. *See, e.g., Mayo*, 326 S.E.2d at 286; *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358, 1362 (E.D. Va. 1980).

59. *See Ellis v. Ellis*, 13 N.W. 65, 66 (Iowa 1882). In *Ellis*, the husband left his first wife to "go west" and seek his fortune. He continued to correspond with his first wife, and in his correspondence he treated their marital relationship as continuing. The first wife therefore had no cause to believe that her husband had divorced her, and she was not aware that he had contracted a second marriage until after his death. Since the plaintiff's first wife did not have actual knowledge of the decedent's subsequent marriage and cohabitation and because the decedent treated the marital relationship with his first wife as continuing, the Iowa Supreme Court held that the facts and circumstances were insufficient to invoke the last-in-time marriage presumption, and declared the first wife as the decedent's lawful widow, rather than the subsequent wife. *Id. See also Gilman v. Sheets*, 43 N.W. 299 (Iowa 1889) (again holding under the Iowa Doctrine that there must be something based on the acts and conduct of *both* parties to the first marriage inconsistent with the continuance of the marriage relation before the last-in-time presumption should be recognized).

60. *Leach v. Hall*, 64 N.W. 790 (Iowa 1895). Thus, while the acts of only *one* party to the first marriage may not be enough to warrant a presumption of divorce under the last-in-time marriage presumption, at least according to the "Iowa Doctrine," when the acts of *both* parties are inconsistent with the continuance of the prior marriage, then the last-in-time marriage presumption may be invoked. *See, e.g., Tuttle v. Raish*, 90 N.W. 66 (1902). *See also Eygabrood v. Gruis*, 79 N.W.2d 215, 217-218 (Iowa 1956) (the last-in-time marriage presumption was applied since *both* of the parties of the former marriage subsequently remarried other spouses).

effectively negates most of the important underlying public policy arguments supporting the last-in-time presumption.

Not surprisingly, subsequent Iowa courts have attempted to temper and broaden the scope of this doctrine. For example, it may be argued that the "Iowa Doctrine" is now limited only to legal disputes involving a claim by the first wife to her husband's property—and that the "Iowa Doctrine" would have no application in other legal disputes or claims—such as a dispute involving the decedent husband's life insurance benefits.<sup>61</sup>

In recent years the "Iowa Doctrine" may have been subject to a more liberal interpretation and application by the Iowa courts. For example, in the 1982 case of *Miller v. AMF Harley-Davidson Motor Co.*,<sup>62</sup> an Iowa appellate court held, according to the traditional majority view, that:

The rule in Iowa is that where there are supposedly conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage, and the party attacking the second marriage has the burden of proving its invalidity and of showing a valid prior marriage; and where a valid prior marriage is shown, it is presumed to have been dissolved by divorce or death so that the attacking party has the burden of adducing evidence to the contrary. . . . This is so whenever there are facts consisting of acts or conduct of both parties upon which the presumption can be legitimately founded.<sup>63</sup>

But what exactly constituted such "acts or conduct" of both parties to the prior marriage in *Miller* which allowed the last-in-time marriage presumption to become effective? In this case there were *no* inconsistent acts or conduct on the part of the prior wife. Instead, it was the attorneys for the defendant Harley-Davidson who searched the divorce records in California in an unsuccessful attempt to rebut the last-in-time marriage presumption under Iowa law.<sup>64</sup> Moreover, the *Miller* dispute involved a personal injury action by the subsequent spouse against a third-party tortfeasor, rather than a property action by the prior spouse against the decedent husband's estate. Thus, the minority "Iowa Doctrine" as it relates to the availability of the last-in-time marriage presumption remains an unpersuasive and insupportable legal doctrine riddled with judicial inconsistencies which most American courts have wisely refrained from adopting.

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61. See, e.g., *Parsons v. Grand Lodge A.O.U.W.*, 78 N.W. 676 (Iowa 1899) (applying the last-in-time marriage presumption, and holding for the subsequent wife in a dispute with the insurance company, by distinguishing the *Ellis* case as only applying when the prior wife was making a claim on the husband's property). However, with probate claims or other property rights, if the prior wife believed in good faith that she was still married to the decedent husband, and conducted herself according to that belief, then the Iowa Doctrine as enunciated in the *Ellis* case would still be applicable. See, e.g., *In re Estate of Weems*, 139 N.W.2d 922, 924 (Iowa 1966).

62. 328 N.W.2d 348 (Iowa Ct. App. 1982).

63. *Id.* at 351.

64. *Id.* at 352.

A second minority approach is the so-called "California Rule." Although California courts recognize the last-in-time marriage presumption,<sup>65</sup> once a prior spouse presents evidence of a valid marriage, the burden of proof apparently then shifts to the subsequent spouse to prove that the prior marriage was invalid or was terminated by death or divorce. For example, in the case of *Tatum v. Tatum*,<sup>66</sup> the Ninth Circuit Court of Appeals, purportedly applying California law, disagreed with the subsequent spouse that the availability of the last-in-time marriage presumption always places the burden of proof on a former spouse to demonstrate by strong and convincing evidence that the prior marriage was not dissolved by death or divorce as recognized in the vast majority of American jurisdictions today.<sup>67</sup> Instead, the Ninth Circuit Court of Appeals stated:

It is further argued that appellees [who were upholding the validity of the prior marriage] were required to negative all possible defects which would render the first marriage invalid. . . . Indeed, it appears that the California rule is just the contrary; that is, despite the strength of the presumption of the validity of the later marriage, it merely requires the advocate of a prior marriage to establish by competent evidence a prima facie case of a regularly solemnized marriage. . . . Then with two presumptively valid marriages in existence, the ultimate burden rests on the party who advocates the *second* marriage to prove the invalidity of the first.<sup>68</sup>

There are two major problems with this so-called "California Rule" as enunciated by the *Tatum* court. First, a careful reading of California precedent cited as supporting authority by the *Tatum* court<sup>69</sup> does *not* expressly support the *Tatum* rule of "merely requiring" that the prior spouse establish the validity of the first marriage in order to shift the burden of proof on to the subsequent

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65. *See, e.g., In re Smith's Estate*, 201 P.2d 539, 540 (Cal. 1949):

It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is on the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of the spouse or by divorce or had not been annulled at the time of the second marriage.

66. 241 F.2d 401 (9th Cir. 1957) (applying Cal. law).

67. *See, e.g., Mayo v. Ford*, 184 A.2d 38, 41 (D.C. Ct. App. 1962) (the presumption favoring the validity of the subsequent marriage is one of the strongest known to the law, and while not conclusive, can only be rebutted by strong, distinct, and conclusive evidence); *Minter v. Bendix Aviation Corp.*, 97 A.2d 715, 717-18 (N.J. Super. Ct. 1953) (the presumption of validity of the subsequent marriage can only be overcome by clear and convincing proof); *Williamson v. Williamson*, 104 A.2d 463, 464 (Del. 1954) (the presumption of the validity of the subsequent marriage is so strong that proof of a former subsisting marriage, in order to overcome the presumption, must be so cogent and conclusive as to fairly preclude any other result). *See generally infra* Section IV.

68. *Tatum*, 241 F.2d at 406.

69. *See Hunter v. Hunter*, 43 P. 756 (Cal. 1896), and *In re the Estate of Smith*, 201 P.2d 539 (Cal. 1949).

spouse.<sup>70</sup> Moreover, a number of other California decisions have expressly held *contra* to this so-called “California Rule.” For example, a California appellate court held that:

In the case of conflicting marriages of the same person, the presumption of validity operates in favor of the second marriage. Accordingly, the burden of showing the validity of the first marriage is on the party asserting it, *and even when this is established* it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage.<sup>71</sup>

Likewise, another California court also held that the mere proof of a prior marriage was *not* sufficient to make a case against a second ceremonial marriage.<sup>72</sup>

Arguably, then, the *Tatum* court may have seriously misstated the actual “California Rule” regarding the availability of the last-in-time marriage presumption. However, assuming arguendo that *Tatum* correctly states the “California Rule,” *Tatum’s* underlying public policy rationale still remains unpersuasive for the same reasons as the “Iowa Doctrine,” and thus, the *Tatum* approach also has been wisely rejected by the majority of American jurisdictions.

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70. For example, the *Tatum* court only cited to “*Hunter, supra*” without any specific page reference to the actual *Hunter* case. In fact, *nowhere* in the *Hunter* decision is there any express mention of this so-called holding. Instead, the *Hunter* court held: “A more correct statement perhaps would be that the burden is cast on the party asserting guilt or immorality [i.e., the *prior* wife] to prove the negative—that the first marriage has not ended before the second marriage.” *Hunter v. Hunter*, 43 P. 756, 757 (Cal. 1896).

Likewise, in *Smith*, the prior wife did *more* than merely show evidence of a valid former marriage. She searched the divorce records in both San Francisco and Los Angeles and was unable to find any record of divorce dissolving the marriage. Thus, the trial court “could reasonably infer” that had a divorce been granted, “such a decree would have been discovered in the search of the records of the various counties of the state.” *In re Smith’s Estate*, 201 P.2d at 540-541. So clearly, these two cases do *not* support the broad burden of proof assumptions made by the *Tatum* court.

71. *In re Borneman’s Estate*, 96 P.2d 182, 184 (Cal. Ct. App. 1939) (emphasis added) (citing with approval 38 CAL. JUR. 1328).

72. *Marsh v. Marsh*, 250 P. 411, 413 (Cal. Ct. App. 1926). The *Marsh* court continued:

It has been stated time and again by the Supreme Court of this state that mere proof of a prior marriage and the continued life of both spouses is *not* sufficient to make a case against a second ceremonial marriage—that there must be a *further showing* that the first marriage has not been set aside by judicial decree.

*Id.* at 413. See also *In re Winder’s Estate*, 219 P.2d 18, 25 (Cal. Ct. App. 1950) (holding that mere proof of a former marriage and the continued life of both spouses is *not* sufficient to show the invalidity of the second marriage, and there must be a *further showing* that the first marriage has not been set aside by judicial decree).

*C. How the Presumption Is Applied to  
Formal and Informal Marriages*

Although all American states recognize the validity of formal ceremonial marriages,<sup>73</sup> only twelve jurisdictions also recognize the validity of informal common law marriages if contracted within that state.<sup>74</sup> All that is required for a valid common law marriage is a present intent and agreement of the parties to enter into a matrimonial relationship, and in the absence of any express evidence of this present intent and agreement, most courts will infer such intent and agreement through cohabitation and community repute as husband and wife.<sup>75</sup> Moreover, even though the vast majority of American states do not recognize common law marriages if contracted within their own state, they will nevertheless recognize common law marriages if contracted in one of the jurisdictions that do legally recognize common law marriages.<sup>76</sup> The rationale for this recognition of sister state common law marriages is the doctrine that a marriage valid where celebrated is valid everywhere unless it is in violation of a state's strong public policy.<sup>77</sup> Furthermore, common law marriages which validate the present marital expectations of the parties do not generally violate a sister state's strong public policy which is to promote and protect marriages in general.<sup>78</sup>

Although some courts have held that the party claiming a common law marriage must have resided in or must have established a significant relationship with the common law marriage state,<sup>79</sup> other courts have held that visits of short duration to a common law marriage state, where the parties held themselves out as husband and wife, would suffice to create a legally valid common law marriage.<sup>80</sup> This latter view is a better reasoned approach since it validates the reasonable marital expectations of the parties and reaffirms state public policy of promoting and protecting marriages in general.<sup>81</sup>

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73. See generally CLARK, *supra* note 1, at 21-44, and UNDERSTANDING FAMILY LAW, *supra* note 1, at 25-27.

74. The following jurisdictions still recognize common law marriage if contracted within that state: Alabama, Colorado, Georgia, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Texas, and the District of Columbia.

75. See, e.g., Adams v. Adams, 559 So. 2d 1084 (Ala. 1990); *In re Estate of Fischer*, 176 N.W.2d 801 (Iowa 1970). See generally Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems* 9 J. FAM. L. 271 (1969); J.C. Hall, *Common Law Marriage*, 46 CAMBRIDGE L.J. 106 (1987).

76. See, e.g., Michelli v. Michelli, 527 So. 2d 359 (Fla. Dist. Ct. App. 1991); Brack v. Brack, 329 N.W.2d 432 (Mich. Ct. App. 1983).

77. See RESTATEMENT (SECOND) CONFLICTS OF LAW § 283(2) (1971).

78. See, e.g., Metropolitan Life Ins. Co. v. Holding, 293 F. Supp. 854 (E.D. Va. 1968). See generally CLARK, *supra* note 1, at 45-62.

79. See, e.g., Hesington v. Estate of Hesington, 640 S.W.2d 824 (Mo. Ct. App. 1982); Kennedy v. Damron, 268 S.W.2d 22 (Ky. 1954).

80. See, e.g., Renshaw v. Heckler, 787 F.2d 50 (2d Cir. 1986); Metropolitan Life Ins. Co. v. Holding, 293 F. Supp. 854 (E.D. Va. 1968).

81. See generally UNDERSTANDING FAMILY LAW, *supra* note 1, at 27-29.

How then does the last-in-time marriage presumption apply in a situation involving both a formal statutory marriage and an informal common law marriage? A majority of courts do not distinguish between formal ceremonial marriages and informal common law marriages for purposes of recognizing the last-in-time marriage presumption. Thus, the presumption would apply regardless of whether the earlier, the later, or both marriages were common law marriages.<sup>82</sup>

There is, however, also a questionable minority view where some courts have expressed doubt as to whether the last-in-time marriage presumption should apply to a common law marriage. For example, the District of Columbia Circuit Court queried whether the presumption would arise when the subsequent marriage was a common law marriage, stating, "Granting that there is a presumption, upon a second marriage, that a prior marriage has been dissolved, a serious question arises as to whether such a presumption arises in cases where the second marriage is a so-called common law marriage."<sup>83</sup> Nevertheless, the court held that assuming *arguendo* "such a presumption

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82. See, e.g., *Welch v. All Persons*, 254 P. 179, 182 (Mont. 1927) ("Every presumption will be indulged in favor of the legality of a common law marriage in the same way and to the same extent as the law indulges them in favor of a ceremonial marriage."). See also *Lott v. Toomey*, 477 So. 2d 316, 320 (Ala. 1985); *Warner v. Warner*, 283 P.2d 931, 935 (Idaho 1955); *Hill v. Shreve*, 448 P.2d 848, 851 (Okla. 1968); *Troxel v. Jones*, 322 S.W.2d 251, 256-57 (Tenn. Ct. App. 1958); *Texas Employers' Ins. Ass'n v. Elder*, 282 S.W.2d 371, 374-75 (Tex. 1955). See also *In re Estate of Benjamin*, 355 N.Y.S.2d 356, 359 (N.Y. 1974) (holding that cohabitation and community repute raise the presumption of a common law marriage, but such a prior marriage yields to the stronger presumption attaching to a subsequent ceremonial marriage).

83. *Brantley v. Skeens*, 266 F.2d 447, 453 (D.C. Cir. 1959) (citing as authority *DiGiovanni v. DiGiovannantonio*, 233 F.2d 26, 29 (D.C. Cir. 1956)). The *DiGiovanni* court opined: "It is true that, where a ceremonial marriage is established and it is shown that one of the parties was previously married, in the absence of proof on the point it is generally presumed that the previous marriage was dissolved by divorce or death. It may be doubtful that any such presumption arises in respect to a later alleged common law marriage", quoting from *SELECTED ESSAYS ON FAMILY LAW* 288 n.9 (1950).

With all due respect to a fellow law professor, why *shouldn't* a valid common law marriage be treated with as much respect as a valid ceremonial marriage—especially if the subsequent common law marriage was validating the marital expectations of the parties? To quote another prominent family law professor:

In short, most of the objections to common law marriage mistake its purpose. As a doctrine it has little or no effect at the outset of the parties' relationship. It comes into play after that relationship has existed for some time, for the purpose of vindicating the parties' marital expectations. There are other legal devices having the same purpose, but common law marriage plays an important part. Without it there would be more injustice and suffering in the world than there is with it. This is particularly true among those social and economic classes who have not accepted middle class standards of marriage. Certainly American marriage law should tolerate this much cultural diversity.

CLARK, *supra* note 1, at 60.

exists in the case of a second and common law marriage," the appellant could not prevail in this particular case, since the last-in-time marriage presumption was found to be rebutted by the district court.<sup>84</sup>

#### D. *Types of Legal Actions Where the Presumption Might Arise*

The last-in-time marriage presumption can be invoked in many types of civil actions.<sup>85</sup> The most common cases where the presumption arises normally occur when one spouse of a subsequent marriage dies and the surviving spouse attempts to bring a legal claim based upon one of the following actions: (1) a personal injury action,<sup>86</sup> (2) a wrongful death action,<sup>87</sup> (3) a related products liability claim,<sup>88</sup> (4) an action involving life insurance benefits<sup>89</sup> or workers' compensation benefits,<sup>90</sup> or (5) a probate action involving the decedent's will or intestate succession.<sup>91</sup> The presumption also has been invoked in annulment<sup>92</sup> and divorce<sup>93</sup> actions and in actions involving the legitimacy of children.<sup>94</sup>

When a surviving spouse seeks payment under a social benefit program, that spouse generally will be attempting to defend his or her claim for such benefits against a governmental agency which has denied the claim based upon

In short, the dicta in both the *Brantley* and *DiGiovanni* cases is ill-reasoned and unpersuasive, and a majority of courts have wisely refrained from adopting this approach.

84. *Brantley*, 266 F.2d at 453-454.

85. The last-in-time marriage presumption however is *not* recognized to benefit a defendant in a criminal prosecution for bigamy. *See, e.g.*, *Wright v. State*, 81 A.2d 602, 607 (Md. Ct. App. 1951) (holding that the last-in-time marriage presumption applies only in civil cases and has no place in a defense relating to a bigamy prosecution). *See also* *People v. Vogel*, 299 P.2d 850 (Cal. 1956) (same holding).

The rationale for this rule precluding the last-in-time marriage presumption from applying to bigamy prosecutions apparently is based upon state public policy and social convenience: that the state should not have to search all the divorce records to negate this civil presumption in a criminal law action. *See, e.g.*, *Fletcher v. State*, 81 N.E. 1083 (Ind. 1907); *Bennett v. State*, 56 So. 777 (Miss. 1911).

86. *See, e.g.*, *Miller v. AMF Harley-Davidson Motor Co.*, 328 N.W.2d 348 (Iowa Ct. App. 1982).

87. *See, e.g.*, *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1980).

88. *See, e.g.*, *Curry v. Caterpillar Tractor Co.*, 577 F. Supp. 991 (E.D. Pa. 1984).

89. *See, e.g.*, *DeRyder v. Metropolitan Life Ins. Co.*, 145 S.E.2d 177 (Va. 1965).

90. *See, e.g.*, *Meade v. State Compensation Comm'r*, 125 S.E.2d 771 (W.Va. 1962).

91. *See, e.g.*, *In re Estate of Pope*, 517 N.W.2d 281 (Mich. Ct. App. 1994).

92. *See, e.g.*, *Smiley v. Smiley*, 448 S.W.2d 642 (Ark. 1970); *Leslie v. Leslie*, 53 Cal. Rptr. 402 (Cal. Ct. App. 1966).

93. *See, e.g.*, *Jackson v. Jackson*, 275 So. 2d 683 (Ala. Ct. App. 1973); *Warner v. Warner*, 283 P.2d 931 (Idaho 1955).

94. *See, e.g.*, *Ladner v. Pigford*, 103 So. 218 (Miss. 1925).

a purported unlawful marriage or when a prior spouse has come forward to challenge the subsequent spouse's right to those benefits. Examples of such benefits that the surviving spouse might claim include military benefits,<sup>95</sup> social security benefits,<sup>96</sup> and workers' compensation benefits.<sup>97</sup>

Alternatively, a surviving spouse may have to defend his or her claim to the decedent spouse's property devised or bequeathed under the decedent's will or inherited by intestate succession.<sup>98</sup> In such cases, a subsequent spouse generally would be defending her claim against a prior spouse who has appeared to seek a share of the proceeds. The subsequent spouse may be defending her claim against interested third parties such as the decedent's children who may allege that the subsequent spouse is ineligible to take any proceeds based on the purported invalid second marriage.

Finally, the last-in-time marriage presumption has been invoked in cases where the parties to the subsequent marriage are both alive and are involved in a divorce proceeding. In such divorce actions, one spouse (typically the wife) will file for divorce and request spousal support and marital property rights, and the other spouse (typically the husband) will counter that these spousal support and marital property rights are unavailable since the subsequent marriage was invalid and void.<sup>99</sup> In these divorce proceedings, the courts generally have held that the last-in-time marriage presumption is still available in favor of the innocent subsequent spouse, and the party claiming that the subsequent marriage is invalid still must meet his strong burden of proof to rebut that presumption.<sup>100</sup>

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95. *See, e.g.*, *Munson v. United States*, 30 Cl. Ct. 830 (1994).

96. *See, e.g.*, *Milano v. Secretary of Health & Human Services*, 586 F. Supp. 1431 (E.D. N.Y. 1984); *Day v. Secretary of Health & Human Services*, 519 F. Supp. 872 (D.C. S.C. 1981); *McKnight v. Schweiker*, 516 F. Supp. 1102 (D.C. Md. 1981).

97. *See, e.g.*, *Chandler v. Central Oil Corp.*, 853 P.2d 649 (Kan. 1993); *Courtlands North Am. Inc. v. Lott*, 403 So. 2d 240 (Ala. Ct. App. 1981).

98. *See, e.g.*, *Claveria v. Claveria*, 615 S.W.2d 164 (Tex. 1981); *In re Estate of Pope*, 517 N.W.2d 281 (Mich. Ct. App. 1994); *Holloway v. Whitaker*, 697 S.W.2d 551 (Mo. Ct. App. 1985); *Mayo v. Mayo*, 326 S.E.2d 283 (N.C. Ct. App. 1985); *In re Estate of Perez*, 470 So. 2d 48 (Fla. Dist. Ct. App. 1985).

99. *See, e.g.*, *Leonard v. Leonard*, 560 So. 2d 1080 (Ala. Ct. App. 1990); *Stewart v. Hampton*, 506 So. 2d 70 (Fla. Ct. App. 1987); *Clark v. Clark*, 719 S.W.2d 712 (Ark. Ct. App. 1986); *Cann v. Cann*, 632 A.2d 322 (Pa. Sup. Ct. 1993).

100. *See, e.g.*, *Stewart v. Hampton*, 506 So. 2d 70, 72 (Fla. Ct. App. 1987) (holding that the husband's testimony that he had never divorced his former wife was not enough to overcome the last-in-time marriage presumption in favor of his subsequent wife since the court would not allow the husband to void the subsequent marriage without strong additional evidence sufficient to overcome the presumption that the second marriage was legal and valid). *See also* *Leonard v. Leonard*, 560 So. 2d 1080, 1082-83 (Ala. Ct. App. 1990) (holding that husband's self-serving statements that his previous marriage had not been dissolved were not enough to rebut the last-in-time marriage presumption, since the husband had to search the appropriate court records where the parties to the first marriage resided in order to prove that there was no divorce).

## IV. Burden of Proof

### A. *The Burden of Going Forward with the Evidence*

Generally, the party claiming the validity of the last-in-time marriage must demonstrate the existence of this subsequent marriage in order to invoke the presumption. However, once the subsequent marriage is shown to exist, the burden of proof then shifts to the party attacking the validity of the subsequent marriage to prove the existence of a prior marriage and its continuing validity at the time of the subsequent marriage.<sup>101</sup>

Two exceptions to this general rule are found in the questionable "Iowa Doctrine," which unnecessarily requires additional proof of "inconsistent marital conduct" on the part of both prior spouses and in the questionable "California Rule," which purportedly shifts the burden of proof to the subsequent spouse once a prior spouse presents evidence of a valid former marriage. For various reasons cited previously, both of these minority approaches are unpersuasive and have not been adopted in the vast majority of states.

Once the last-in-time marriage presumption is invoked, the burden of proof shifts to the party attacking the subsequent marriage to prove the existence of a prior marriage and the continuation of the prior marriage at the time the subsequent marriage was contracted. To successfully meet this burden of proof, the attacking party must further prove that the prior marriage was not dissolved either by death or divorce. This heavy burden of proof on the attacking party therefore implicitly requires proving two negatives.<sup>102</sup>

### B. *Standard of Proof Required to Rebut*

It is generally recognized that the last-in-time marriage presumption is a rebuttable, not a conclusive, presumption. There is a split of authority, how-

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101. See, e.g., *Lott v. Toomey*, 477 So. 2d 316, 320 (Ala. 1985) (holding that once a subsequent marriage is shown, the burden shifts to the attacking party to prove its invalidity); *Yarbrough v. Yarbrough*, 314 S.E.2d 16, 18 (S.C. Ct. App. 1984) (holding that once a subsequent marriage is shown to exist, the person attacking it has the burden to show its invalidity).

102. See, e.g., *Panzer v. Panzer*, 528 P.2d 888, 892 (N.M. 1974):

The authorities which we consider to be sound require proof of the prior marriage plus the fact that it has not been terminated by death or divorce. . . . "To overcome the prima facie case established by the showing of a subsequent marriage, proof of a former marriage is required, and also evidence from which it may be concluded that it has not been dissolved by death or divorce." It is generally recognized that in many fact situations these elements place a heavy, sometimes an impossible, burden on the attacker to prove two negatives—no death and no divorce. This is especially true in mobile societies with transitory marital relationships. Nevertheless, we approve these requirements. See also *Clark v. Clark*, 719 S.W.2d 712, 714 (Ark. Ct. App. 1986) ("The presumptions of divorce from or death of a previous spouse are so strong that they exist despite the fact that overcoming them involves proof of a negative, ie. proof of no divorce and/or proof that the previous spouse is still living.").

ever, as to the strength of the last-in-time marriage presumption.<sup>103</sup> Most courts appear to require some form of a clear and convincing evidence standard to rebut the last-in-time marriage presumption, but this is a difficult generalization to make because the courts often use unnecessarily confusing and conflicting terminology when describing this standard of proof.

Some courts expressly hold that the evidence presented must be clear and convincing in order to rebut the last-in-time marriage presumption.<sup>104</sup> A similar, but not identical, standard of proof has been utilized by the Florida courts. To meet the burden of rebutting the last-in-time marriage presumption under Florida law, the party attacking the validity of the later marriage is not required "to eliminate every remote possibility" but only to tender evidence "which when weighed collectively establishes the absence of reasonable probability" that a divorce was actually secured.<sup>105</sup> It is unclear whether this Florida standard of proof rises to the level of requiring clear and convincing evidence, but it does approximate the general rule.

Other courts have been more equivocal regarding the standard of proof required to rebut the last-in-time marriage presumption. The Kansas Supreme Court, for example, stated that "every reasonable possibility of validity must be negated, and the evidence to overcome the presumption of validity of the subsequent marriage must be clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt."<sup>106</sup> A Texas court similarly held that the presumption "must prevail until rebutted by evidence which negates the effective operation of every possible means by which a dissolution of the prior marriage could have taken place";<sup>107</sup> however, the invalidity of a later marriage under Texas law need not be proven "absolutely or to a moral certainty."<sup>108</sup>

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103. See, e.g., *Rainer v. Snider*, 369 N.E.2d 666, 668-69 (Ind. Ct. App. 1977) ("[T]he difference of opinion relates to the quantum of proof required to rebut the presumption. Thus, the proof necessary to rebut varies [among jurisdictions] from positive proof, that is proof precluding any other result, to proof raising a reasonable inference that the first marriage was not dissolved.").

104. See, e.g., *Smith v. Heckler*, 707 F.2d 1284, 1286 (11th Cir. 1983); *In re Estate of Williams*, 417 N.W.2d 556, 559 (Mich. Ct. App. 1988); *Schall v. Schall*, 642 P.2d 1124, 1126 (N.M. Ct. App. 1982). See also *Newberg v. Arrigo*, 443 A.2d 1031, 1035 (N.J. 1982) (holding that the "challenger must disprove every reasonable possibility that vitiates the prior marriage.").

105. See, e.g., *Jenkins v. Jenkins*, 384 So. 2d 266, 268 (Fla. Dist. Ct. App. 1980). See also *In re Estate of Perez*, 470 So. 2d 48 (Fla. Dist. Ct. App. 1985).

106. See, e.g., *Chandler v. Central Oil Corp.*, 853 P.2d 649, 652-53 (Kan. 1993). See also *Newburgh v. Arrigo*, 443 A.2d 1031, 1035 (N.J. 1982) (stating that the challenger "must disprove every reasonable possibility that vitiates the marriage").

107. See, e.g., *Texas Employers' Ins. Ass'n v. Elder*, 274 S.W.2d 144, 147 (Tex. Ct. Civ. App. 1954).

108. See, e.g., *Simpson v. Simpson*, 380 S.W.2d 855, 858 (Tex. Ct. Civ. App. 1964). But see also a rather extreme minority holding of the Maryland courts, which have articulated a standard of proof requiring evidence rebutting the last-in-time marriage presumption to be sufficient so as to amount to a "moral certainty" in order to overcome the presumption. See, e.g., *McKnight v. Schwieker*, 516 F. Supp. 1102,

Finally, the Virginia courts apparently have adopted a less stringent standard than clear and convincing evidence; however, the Virginia test is similar to that of the Kansas and Texas courts. In practice, the Virginia test approximates a clear and convincing evidence test. For example, in the case of *DeRyder v. Metropolitan Life Insurance Co.*,<sup>109</sup> the Virginia Supreme Court stated:

The cases are not entirely in harmony as to the force and effect to be given to the presumption in favor of the validity of the second marriage. Generally, it is said to be a strong presumption but one that may be rebutted by evidence of invalidating facts. . . . [M]any cases are cited to support the statement that in order to overcome the presumption of validity "the evidence must be strong, distinct, satisfactory, and conclusive." A less stringent and, as we think, a more logical and better supported rule is this. . . . "The presumption arising in favor of the validity of a second marriage is not a conclusive presumption, but is what is known as a rebuttable presumption, and the one contending against the legality of the second marriage is not required to make plenary proof of a negative averment. It is enough that he introduces such evidence as, in the absence of all counter testimony, will afford reasonable grounds for presuming that the allegation is true, and when it is done the *onus probandi* will be thrown on his adversary."<sup>110</sup>

These apparent inconsistencies in the standard of proof necessary to rebut the last-in-time marriage presumption might initially appear to prohibit the articulation of a predominant or overarching rule that would please jurists, law professors, and practitioners alike. However, these standard of proof variations in actuality are more apparent than real since once a former spouse is shown to be alive, the vast majority of courts then require that the party attacking the validity of the subsequent marriage affirmatively make a search of the divorce records where the decedent spouse resided—or where the decedent spouse reasonably could have resided—in order to rebut the last-in-time marriage presumption, regardless of the purported standard of proof that a particular court might enunciate.<sup>111</sup>

For example, the Arkansas Supreme Court held that although the presump-

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1105 (D.C. Md. 1981). This Maryland standard of proof to rebut the last-in-time marriage presumption appears to be the most stringent standard, by requiring a quantum of proof *greater* than that of a clear and convincing standard.

109. 145 S.E.2d 177 (Va. 1965).

110. *Id.* at 181. See also *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1980) and *Parker v. Am. Lumber Corp.*, 56 S.E.2d 214 (Va. 1949). Arguably, Illinois has also adopted this standard. See *Grey v. Heckler*, 721 F.2d 41, 45 (2d Cir. 1983) (applying Illinois law).

111. See CLARK, *supra* note 1, at 74; and UNDERSTANDING FAMILY LAW, *supra* note 1, at 35-36. See, e.g., *Lott v. Toomey*, 477 So. 2d 316 (Ala. 1985); *Cole v. Cole*, 462 S.W.2d 213 (Ark. 1971); *Stewart v. Hampton*, 506 So. 2d 70 (Fla. Dist. Ct. App. 1987); *Henderson v. Finch*, 300 F. Supp. 753 (W.D. La. 1969); *Schall v. Schall*, 642 P.2d 1124 (N.M. Ct. App. 1982); *Brokeshoulder v. Brokeshoulder*, 204 P. 284 (Okla. 1921); *Dixon v. Gardner*, 302 F. Supp. 395 (E.D. Pa. 1969); *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975); *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1981); *In re Graul's Estate*, 425 P.2d 644 (Wash. 1967).

tion of the validity of a subsequent marriage is “one of the strongest in our law,” nevertheless the presumption was rebutted by the former wife’s search of the divorce records in Lee County, Arkansas, where the decedent husband has lived “nearly all his life.”<sup>112</sup> Likewise, the Texas Supreme Court found that the last-in-time marriage presumption was successfully rebutted by the former wife through evidence that a search of the legal records in two Texas counties and a search of the records in Queensland, Australia, and Singapore showed there was no divorce by the decedent husband.<sup>113</sup> The Texas Supreme Court went on to state:

It is not necessary in order to rebut the presumption that Mary Nell prove the nonexistence of divorce in every jurisdiction where proceedings could have been possible; it is only necessary to rule out those proceedings where Charles might reasonably have been expected to have pursued them.<sup>114</sup>

Finally, the Virginia Supreme Court—a state court that purportedly applies a “less stringent” standard of proof in rebutting the last-in-time marriage presumption—nevertheless also applies this same practical test. For example, in the case of *DeRyder v. Metropolitan Life Insurance Co.*,<sup>115</sup> the former wife attempted to rebut the last-in-time marriage presumption by demonstrating that a search of the divorce records in Orange County, New York, and in Norfolk, Hampton, and Elizabeth Counties, Virginia, where the decedent husband had resided, showed no record of a divorce. The Virginia Supreme Court, however, found that the husband was also stationed at Camp Peary with the Navy Seabees in 1942 in York County, Virginia, and therefore since the former wife had not searched the divorce records in York County, James City County, or Williamsburg, Virginia, where the husband might also have obtained a divorce, the last-in-time marriage presumption had not been rebutted.<sup>116</sup>

Thus, no matter what standard of proof the various courts have enunciated to rebut the last-in-time marriage presumption, a practical application of rebutting proof in the vast majority of states still requires that the former spouse search the divorce records where the deceased spouse resided or reasonably could have resided in order to successfully rebut the presumption.<sup>117</sup>

Other courts, however, do not always follow this general rule when circum-

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112. *Cole v. Cole*, 462 S.W.2d 213, 216 (Ark. 1971).

113. *Davis v. Davis*, 521 S.W.2d 603, 605 (Tex. 1975).

114. *Id.* at 605.

115. 145 S.E.2d 177 (Va. 1965).

116. *Id.* at 182. *See also* *Brokeshoulder v. Brokeshoulder*, 204 P. 284 (Okla. 1921).

117. *See, e.g.*, *Lott v. Toomey*, 477 So. 2d 316, 321 (Ala. 1985) (stating that searches should be made of court records in all places where the first marriage partners are shown to have resided); *Schall v. Schall*, 642 P.2d 1124, 1127 (N.M. Ct. App. 1982) (holding that the presumption was not rebutted because the decedent travelled extensively during a ten-year interval between separation and remarriage, and that a search of New Mexico legal records was therefore insufficient to establish that the decedent did not obtain a divorce elsewhere). *See also* *Smith v. Heckler*, 707 F.2d

stances exist which enable the court to conclude that no divorce was obtained through alternative evidence and without an extensive search of the divorce records. For example, a Florida appellate court, although recognizing that a majority of courts do require the production of "no divorce" certificates from every jurisdiction where the former spouse resided, nevertheless held that none of these cases precluded a negation of the last-in-time marriage presumption by other kinds of proof as well.<sup>118</sup> The court held that the decedent husband had travelled so extensively that it would be manifestly unfair to require the former wife to produce divorce records from every place he had ever visited. The court held that the last-in-time marriage presumption was rebutted because the former wife had established a "reasonable probability" that the decedent husband never obtained a divorce by producing evidence that no divorce was obtained in any location where the decedent had primarily resided, including Florida, Texas, and Cuba.<sup>119</sup>

The Michigan appellate court in *In re Estate of Pope*<sup>120</sup> also held that the last-in-time marriage presumption could be rebutted by evidence of circumstances surrounding the initial marriage and remarriage without involving an extensive search of the divorce records. In *Pope*, the decedent husband had married two women, had lived openly with both of them, had received mail at both houses, and had filed two complaints for divorce but had never followed through on either one of them. Additionally, the subsequent wife testified that she telephoned and met with the former wife at the decedent's residence prior to the second marriage. The court held that the last-in-time marriage presumption was rebutted under these circumstances without a search of any divorce records.<sup>121</sup>

In conclusion, evidence that will rebut the last-in-time marriage presumption normally requires that the attacking party must search the divorce records in all the locations where the other spouse might reasonably have pursued the action. In the alternative, the last-in-time marriage presumption also may be rebutted by evidence of circumstances surrounding the initial marriage and remarriage without making an exhaustive search of the divorce records, as long as the attacking party's evidence meets the particular state's standard of proof requirement to rebut the presumption.

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1284 (11th Cir. 1983) (where the court emphasized that, to the extent possible, available public records should be exhausted to show the lack of any divorce. The court mentioned that state Bureaus of Vital Statistics were potential sources of information since these agencies are able to provide information as to whether or not a party obtained a divorce anywhere in the state, without necessitating a county by county search. Because the defendant in this particular case failed to produce certificates of search from the agencies in all the states where the decedent spouse may have obtained a divorce, the court found that the last-in-time marriage presumption had not been rebutted). *Id.* at 1288.

118. *In re Estate of Perez*, 470 So. 2d 48, 51 (Fla. Dist. Ct. App. 1985).

119. *Id.* at 51.

120. 517 N.W.2d 281 (Mich. Ct. App. 1994).

121. *Id.* at 282, 283.

## V. An Illustration: *Hewitt v. Firestone Tire & Rubber Company*

The case of *Hewitt v. Firestone Tire & Rubber Co.*<sup>122</sup> is used as an illustrative judicial decision analyzing and applying the last-in-time marriage presumption for two reasons. First, the multifaceted and complex legal and factual issues involved in the *Hewitt* case have resulted in this particular legal opinion being cited as an illustrative decision in at least two family law casebooks.<sup>123</sup> Second, one of this article's authors was an attorney of record in the *Hewitt* case, who is able to offer supplemental analysis of this particular legal dispute.<sup>124</sup>

### A. *The Facts of the Case*

In June of 1966 John Carthel Hewitt, a twenty year old soldier in the United States Army, married Barbara Cullum Hewitt, also twenty, in Texas. John and Barbara resided together as husband and wife until 1969, with the exception of John's two tours of duty in South Vietnam. John and Barbara lived together in Maryland and Texas until September of 1969, when John suddenly deserted his wife Barbara and their son John Carthel Hewitt, Jr. At the time of John's desertion, Barbara was pregnant with their second child, Larry Dwayne Hewitt, who was subsequently born on March 3, 1970.<sup>125</sup>

Barbara next heard from John in December of 1969 when he telephoned from an undisclosed location. In this telephone conversation, John stated that he cared for Barbara but that he would not return home. He also told Barbara, falsely, that financial support would be forthcoming. The last time Barbara allegedly talked to John was in August of 1973 when the parties discussed a divorce. In the course of this telephone conversation, according to Barbara, John assented to a divorce and allegedly told Barbara to have a lawyer "draw up the papers" and send them to him. He said he would sign the papers and return them to the lawyer with his fee. Barbara stated that she saw a lawyer in Paris, Texas, that the lawyer drafted the pleadings and mailed them to John, but that John never returned either the papers or the fee. Barbara could not recall the name or location of the office of the attorney she purportedly visited.<sup>126</sup>

Meanwhile, in October of 1969, John had met Nancy Anne Threatt in Aberdeen, Maryland. On December 26, 1969, after a brief courtship, John and Nancy were married in Fayetteville, North Carolina, at the home of Nancy's

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122. 490 F. Supp. 1358 (E.D. Va. 1980) (applying Va. law) [hereinafter *Hewitt*].

123. See, e.g., HOMER H. CLARK, JR. & CAROL GLOWINSKY, DOMESTIC RELATIONS: CASES AND PROBLEMS 115 (4th ed. 1990); and PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS, AND PROBLEMS 197 (1990).

124. Professor Swisher was the attorney of record for Nancy Anne Hewitt, the last-in-time wife. Seven other law firms were also involved in this case. The *Hewitt* case also served as a catalyst for one other legal endeavor. See PETER N. SWISHER, VIRGINIA AND WEST VIRGINIA WRONGFUL DEATH ACTIONS (1985).

125. *Hewitt*, *supra* note 122, at 1359-1360.

126. *Id.* at 1360.

parents. Nancy and her parents were aware of John's previous marriage to Barbara and his child, John, Jr. John, however, represented to Nancy and her family that his first marriage to Barbara had ended in divorce. Nancy thus married John in good faith, unaware of any legal impediment that prohibited John from entering a second marriage. John and Nancy lived together continuously as husband and wife for the next eight years until John's death. They lived first in Aberdeen, Maryland, then in Hopewell, Virginia, and finally in North Carolina. John and Nancy had three children, and John provided for this family out of his earnings as an over-the-road truck driver.<sup>127</sup>

On November 17, 1977, John Carthel Hewitt was killed when his tractor-trailer truck left the road and overturned near Woodbridge, Virginia. At the time of his death, John Hewitt was thirty-one years old, in good health, and gainfully employed as a truck driver by the Great Coastal Transport Corporation, a trucking company located in Richmond, Virginia.<sup>128</sup>

Barbara Hewitt learned about John's death through relatives and immediately, within a month, filed an application for social security benefits as John's widow. Cognizant of John's later marriage to Nancy Hewitt, the Social Security Administration sought information as to the existence of a divorce decree dissolving the marriage of John and Barbara Hewitt. No decree was located, and on this basis, the Social Security Administration awarded widow's, as well as surviving children's benefits, to Barbara Hewitt and her family.<sup>129</sup>

In March of 1979, a products liability action for the wrongful death of John Carthel Hewitt was commenced against the Firestone Tire and Rubber Company in the Federal District Court for the Eastern District of Virginia, based upon an allegedly defective truck tire that was manufactured and sold by Firestone and that allegedly caused the death of John Carthel Hewitt. The complaint was filed by Nancy Anne Hewitt and Jerome Lonnes as co-administrators of the Estate of John Carthel Hewitt. After extensive discovery and negotiations, the parties reached a settlement, and pursuant to Virginia statutory law,<sup>130</sup> the parties tendered the terms of the settlement to the court for its approval. Under this settlement, the defendant Firestone Tire and Rubber Company, while denying any liability, agreed to pay \$400,000 to the adminis-

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127. *Id.*

128. *Id.* at 1361. Additional facts presented at trial were that at the time of the accident John Carthel Hewitt had an excellent safety record as a truck driver, the weather was clear, and the road and road conditions were excellent. The proximate cause of John's death was alleged to be a defective truck tire manufactured and sold by the Firestone Tire & Rubber Company. *See* Plaintiff's Complaint, at 1-2, *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1979) (No. 79-0267-R).

129. *Hewitt, supra* note 122, at 1361. Appended to post-trial briefs submitted on Barbara's behalf were photostats of documents from the Social Security Administration indicating that searches conducted in various localities—including parts of Texas, North Carolina, Maryland, and New Jersey—failed to uncover any record of a divorce between John and Barbara Hewitt. *Id.* at 1363 n.11.

130. VA. CODE ANN. § 8.01-55 (Michie 1982).

trators for a release of all claims against Firestone arising from the death of John Carthel Hewitt.<sup>131</sup>

Counsel for the co-administrators then learned about John Hewitt's earlier marriage to Barbara and his children by that marriage when legal counsel representing Barbara Hewitt became involved in this lawsuit. Advised that there were conflicting claimants to the settlement proceedings, Judge D. Dortch Warriner appointed guardians ad litem for the two sets of children and set the matter for a hearing to determine the rightful beneficiaries.<sup>132</sup>

The \$400,000 settlement that was previously placed in the registry of the court was deposited into an interest-bearing account. Since there was now a possible conflict of interests between the estate of John Carthel Hewitt and Nancy Anne Hewitt, Nancy obtained independent legal counsel to represent her individual interests. The parties then sought a judicial determination of the rightful beneficiaries and how the settlement funds should be distributed.<sup>133</sup> The judge requested supporting memoranda of law from legal counsel for Nancy Anne Hewitt and legal counsel for Barbara Hewitt.

### B. The Legal Issues Presented

Counsel for Nancy Anne Hewitt in his initial Memorandum of Law in Support of Nancy Hewitt<sup>134</sup> argued that Nancy Anne Hewitt was the legal wife of John Carthel Hewitt based upon the last-in-time marriage presumption,<sup>135</sup>

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131. *Hewitt*, *supra* note 122, at 1361.

132. *Id.* at 1361. At that time, none of the parties, their legal counsel, nor the judge was aware of the existence of any legal presumption favoring the last-in-time marriage, and the conventional thinking of the parties was that Barbara Hewitt might be the legal wife of John C. Hewitt. *See, e.g., supra* note 1 and accompanying text. So when counsel for the estate of John C. Hewitt initially approached counsel for Barbara Hewitt to suggest a settlement between the respective wives, counsel for Barbara Hewitt rejected the offer.

133. "In the case at bar two women, Barbara Hewitt and Nancy Hewitt, claim to be the surviving spouse of John Carthel Hewitt. Both cannot be. *See Reynolds v. United States*, 98 U.S. 145 (1879); VA. CODE ANN. § 20-38.1 (Michie Supp. 1979) (declaring bigamous marriages to be void *ab initio*). Accordingly, the Court must determine which of the two claimants is the surviving spouse and the rightful beneficiary." *Hewitt*, *supra* note 122, at 1361.

Virginia's Death by Wrongful Act statute, a direct descendent of Lord Campbell's Act, provides that damages shall be distributed to "the surviving spouse . . . [and] children of the deceased. . . ." VA. CODE ANN. § 8.01-53 (Michie Supp. 1979). "The classes of beneficiaries named in the statute are exclusive; a court is not at liberty to consider additional or alternative beneficiaries." *Id.*

134. Memorandum of Law in Support of Nancy Anne Hewitt, *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1979) (No. 79-0267-R).

135. "In Virginia, as in most jurisdictions, a presumption exists that a marriage last-in-time is valid, and that any prior marriage was terminated by death or divorce." *Hewitt*, *supra* note 122, at 1362.

citing relevant Virginia authority on point,<sup>136</sup> and arguing that Barbara Hewitt had not effectively rebutted this strong presumption.

Counsel for Barbara Hewitt in their initial Memorandum of Law in Support of Barbara Hewitt<sup>137</sup> conceded that the last-in-time marriage presumption was recognized under Virginia law. Counsel for Barbara Hewitt argued, however, that this presumption had been successfully rebutted since: (1) Virginia law recognizes the so-called "California Rule,"<sup>138</sup> so once Barbara Hewitt establishes evidence of her prior marriage to John C. Hewitt, the burden of proof then shifted to Nancy Anne Hewitt;<sup>139</sup> (2) the search by the Social Security Administration of the divorce records in parts of Texas, North Carolina, Maryland, and New Jersey had located no divorce decree for John Carthel Hewitt;<sup>140</sup> and (3) John Carthel Hewitt allegedly had discussed the possibility of divorce with Barbara Hewitt over the telephone in 1973, so John could not possibly have been divorced from Barbara in 1969 when he married Nancy Anne Hewitt.<sup>141</sup>

In his Reply Memorandum of Law in Opposition to the Memorandum of Law in Support of Barbara Hewitt,<sup>142</sup> counsel for Nancy Anne Hewitt countered that: (1) Virginia does not recognize the minority "California Rule,"<sup>143</sup> and therefore the decision of *Woolery v. Metropolitan Life Insurance Co.*, that counsel for Barbara Hewitt cited as authority, was misinterpreted and misapplied by another coordinate federal district court judge;<sup>144</sup> (2) the Social Security Administration records which were attached to Barbara Hewitt's Memo-

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136. Counsel for Nancy Anne Hewitt cited as mandatory Virginia authority *DeRyder v. Metropolitan Life Insurance Co.*, 145 S.E.2d 177, 181 (Va. 1965), and *Parker v. American Lumber Corp.*, 56 S.E.2d 214, 216 (Va. 1949). Annot., 14 A.L.R.2d 7 (1950) was also cited as persuasive authority.

137. Memorandum of Law in Support of Barbara Hewitt, *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1979) (No. 79-0267-R) [hereinafter Memorandum of Law in Support of Barbara Hewitt].

138. See *supra* notes 65-72 and accompanying text.

139. Counsel for Barbara Hewitt argued as authority the case of *Woolery v. Metro. Life Insurance Co.*, 406 F. Supp. 641, 644 (E.D. Va. 1976): "This presumption, however, is simply a rule of evidence and may be rebutted by evidence sufficient to overcome it. This burden is met if the evidence, in the light of all reasonable inferences, shows that the first marriage was not dissolved or annulled. [citing as authority *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957)]." Memorandum of Law in Support of Barbara Hewitt, *supra* note 137, at 6.

140. This information was submitted to the court attached to the Memorandum of Law in Support of Barbara Hewitt as "Exhibit I".

141. Memorandum of Law in Support of Barbara Hewitt, *supra* note 137, at 5-6.

142. Reply Memorandum of Law in Opposition to the Memorandum of Law in Support of Barbara Hewitt, *Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358 (E.D. Va. 1979) (No. 79-0267-R) [hereinafter Reply Memorandum of Law].

143. Citing the strong burden of proof required in *DeRyder v. Metro. Life Ins. Co.*, 145 S.E.2d 177 (Va. 1965).

144. "As such, it is Nancy Anne Hewitt's contention, with all due respect, that the court in *Woolery v. Metropolitan Life Insurance Co.*, 406 F. Supp. 641 (E.D. Va. 1976—Alexandria Division) misinterpreted and misapplied the minority holding

randum of Law as "Exhibit I" were not properly entered into evidence by her legal counsel because they did not provide Nancy Anne Hewitt with any due process right to cross-examination,<sup>145</sup> there was no identification as to who actually prepared these records,<sup>146</sup> and the records, if they were admitted into evidence, still failed to overcome Barbara Hewitt's burden of proof in rebutting Nancy Anne Hewitt's last-in-time marriage since Barbara failed to properly search the divorce records in all the places where John C. Hewitt resided or reasonably could have resided,<sup>147</sup> and (3) there was no corroborating evidence as to the alleged 1973 telephone call made between John C. Hewitt and Barbara Hewitt.<sup>148</sup>

### C. The Decision of the Court

In his judicial opinion dated June 10, 1980, Judge D. Dortch Warriner found that Nancy Anne Hewitt was John C. Hewitt's surviving spouse since Barbara Hewitt had failed to successfully rebut Nancy Anne Hewitt's last-in-time marriage presumption.<sup>149</sup> The judge gave several reasons for his decision:

[I]n Virginia the presumption in favor of the validity of the second or later marriage is more than, as counsel for Barbara Hewitt contend, "simply a rule of evidence". The strength of the presumption, which was emphasized by the Court in *DeRyder*<sup>150</sup> necessitates that the evidence in rebuttal be itself strong. The presumption, furthermore, is not one which disappears, or "goes out the window" (to quote my law school Professor Nash), when met with rebuttal evidence. Rather, it is a presumption that continues to

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of *Tatum v. Tatum* since that holding is contrary to the established Virginia precedent found in the *Parker* and *DeRyder* cases, *supra*." Reply Memorandum of Law, *supra* note 174, at 3.

145. Citing as authority McCORMICK ON EVIDENCE 34-36 (Edward W. Cleary et al. eds., 1972) and FED. R. EVID. 701 and 703. Reply Memorandum of Law, *supra* note 142, at 5-7.

146. Citing as persuasive authority *Osmark v. American Can and Foundry Co.*, 40 S.W.2d 714 (Mo. 1931) (holding that the testimony of an attorney alleging that an unsuccessful search had been made for husband's divorce records was not admissible in court in the absence of "the best proof" including "the testimony of the custodian of those records.'). Reply Memorandum of Law, *supra* note 142, at 5. See also *Smith v. Heckler*, 707 F.2d 1284 (11th Cir. 1983).

147. Nancy Anne Hewitt's prior "Statement of Claimant" stated under oath that John Carthel Hewitt had also lived in Fort Campbell, Kentucky, Havre de Grace, Maryland, and Hopewell, Virginia after he separated from Barbara Hewitt. Conspicuously missing from the Social Security records in "Exhibit I" was any indication of a search for John C. Hewitt's divorce records made in either Kentucky, Virginia, or other parts of Texas. Reply Memorandum of Law, *supra* note 142, at 8-9.

148. Reply Memorandum of Law, *supra* note 142, at 9-10.

149. *Hewitt*, *supra* note 122, at 1365.

150. *DeRyder v. Metro. Life Insurance Co.*, 145 S.E.2d 177 (Va. 1965). The Court in *DeRyder* specifically referred to the presumption as a "strong presumption," 145 S.E.2d at 181, and required a search of the divorce records where the deceased husband resided or could have resided. *Hewitt*, *supra* note 122, at 1364 n. 13 and 1365.

have weight, due to the strength of the policies that give it purpose,<sup>151</sup> in the face of contrary evidence.<sup>152</sup> The nature and the amount of evidence that will provide reasonable grounds for finding that the first marriage has not been dissolved will vary from case to case. As a rule, however, the contesting party must attempt to document in every reasonable manner the absence of a divorce. . . . The court does not suggest that it is incumbent upon the party seeking to overcome the presumption of the validity of the second marriage to document the absence of a divorce dissolving the first marriage in every jurisdiction where a divorce could possibly have been obtained. Were such a rule recognized in this day of divorce-on-demand the presumption favoring the second marriage would not be rebuttable, but effectively irrebuttable. The Virginia litigant seeking to negate the existence of a divorce generally does have a burden, however, of showing that no divorce was entered in jurisdictions where the parties resided or where on any reasonable basis a decree might have been obtained.<sup>153</sup>

Thus, Judge Warriner refused to recognize the so-called "California Rule" as enunciated in *Woolery v. Metropolitan Life Insurance Co.*<sup>154</sup>

Next, Judge Warriner held that the Social Security Administration records, attached to Barbara Hewitt's Memorandum of Law as "Exhibit I," were inadmissible for a number of reasons.<sup>155</sup> Therefore, counsel for Bar-

151. Here, Judge Warriner, in footnote 14 of his opinion, stated:

The presumptions supporting the validity of the second marriage arise "because the law presumes morality and legitimacy, not immorality and bastardy." *Parker v. American Lumber Corp.* 190 Va. 181, 195, 56 S.E.2d 214, 216 (1949). Another reason given for presuming the validity of the second marriage is that it is more equitable to require the party attacking the second marriage to prove its invalidity than to put the innocent party thereto to proof of the capacity of the other contracting party. *See Lampkin v. Travelers Ins. Co.*, 11 Colo. App. 249, 52 P. 1040 (1898).

*Hewitt*, *supra* note 122, at 1364.

152. *Id.* at 1364.

153. *Id.* at 1365.

154. 406 F. Supp. 641 (E.D. Va. 1976). In footnote 12 of his opinion, Judge Warriner stated:

In *Woolery*, Judge Lewis ruled that evidence of a prior marriage was sufficient to rebut the presumption of the validity of a later marriage and to shift the burden to the second wife of showing that the prior marriage had been terminated. 406 F. Supp. at 645. In so ruling, Judge Lewis rejected the contention of the last wife that the prior wife, in order to overcome the presumption favoring the later marriage, had an obligation to proffer some documentary evidence showing that no divorce or annulment had been granted dissolving the prior marriage. *Id.* This court is reluctant to reject the rationale of a coordinate court of the same jurisdiction. Nonetheless, for the reasons advanced in the text of this opinion, this Court believes that the *Woolery* decision is at variance with established Virginia law.

*Hewitt*, *supra* note 122, at 1364 n. 12.

155. In footnote 11 of his decision, Judge Warriner stated:

For several reasons, the Court must discount arguments based on the documents of the Social Security Administration. First and foremost, the documents were not introduced and have not been admitted in evidence. Although the Court expresses no opinion about the admissibility of Social Security records, it is plain

bara Hewitt had “failed to come forward with any documentary evidence from any jurisdiction which establishes that no divorce decree was entered dissolving the marriage of John and Barbara Hewitt.”<sup>156</sup> Third, Judge Warriner rejected the claim of Barbara Hewitt’s legal counsel that John could not have obtained a divorce during the three months that lapsed from September 1969, when he left Barbara, to December 1969, when he married Nancy. The judge stated:

This claim cannot be supported [since d]ivorce laws existing in the fifty states in 1969 demonstrate that John could have obtained an *ex parte* divorce in at least six jurisdictions, including Texas. The possibility of a foreign divorce, though not decisive here, also must be acknowledged.<sup>157</sup>

Finally, Judge Warriner discounted Barbara Hewitt’s testimony that John C. Hewitt allegedly had telephoned Barbara in Texas in 1973 about a possible divorce action, which would have been four years after his marriage to Nancy Anne Hewitt:

Indeed, if the Court had evidence which would lend credibility to Barbara’s testimony about the 1973 phone call, the Court might conclude that the presumption had been rebutted and the burden transferred [to Nancy Hewitt]. But no evidence is before the Court which corroborates Barbara’s claim. Barbara testified that she saw a lawyer about a divorce, and that he prepared divorce papers. Barbara, however, is unable to remember the lawyer’s name, or the location of his office. She did not produce the papers or copies of them. She had not re-contacted the lawyer for his corroborative evidence. The Court cannot be persuaded by the uncorroborated, though easily corroborated, testimony of interested witnesses who make claims that are practically incapable of contra-diction.<sup>158</sup>

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to the Court that it would be unfair to consider the records now. Counsel for Nancy Hewitt has had no opportunity to challenge the documents. Moreover, even assuming the documents had been properly offered and admitted, the Court would regard them—with nothing more—as unpersuasive. None of the information contained in the records has been verified or authenticated. What is more, the records themselves do not indicate that those who conducted the search were qualified to conduct a competent search.

*Hewitt*, *supra* note 122, at 1363 n. 11.

156. *Id.* at 1363.

157. *Id.* at 1363 and 1316 at nn. 9 & 10.

158. *Id.* at 1362. In footnote 8 of his opinion, Judge Warriner further stated:

Barbara was living in Paris, Texas, a rural town located approximately one hundred miles northeast of Dallas, when allegedly she saw an attorney about a divorce from John. Assuming she called on a local attorney—an assumption that admittedly may be inaccurate—the Court has difficulty understanding why that attorney cannot be identified. Paris, Texas, presently supports but three law firms, consisting of a total of seven lawyers. MARTINDALE-HUBBELL LAW DICTIONARY (1980). If the bar of Paris has enjoyed *any* growth in recent years, one must accept that the number of lawyers practicing there in 1973 was small indeed, and that the names of those lawyers are readily ascertainable.

*Id.*

Thus, at least two significant evidentiary facts that might have rebutted the last-in-time marriage presumption in this particular case were not properly submitted into evidence nor were they properly corroborated. Counsel for Barbara Hewitt therefore could not rebut the last-in-time marriage presumption, and accordingly Nancy Anne Hewitt was found by the court to be the surviving spouse of John Carthel Hewitt and his beneficiary under Virginia's Wrongful Death Act.

#### D. *Post-Trial Motions, Appeal, and Settlement*

Counsel for Barbara Hewitt then made a Motion for Relief under Federal Rule of Civil Procedure 60(b) based upon "mistake, inadvertence, and excusable neglect,"<sup>159</sup> arguing that counsel for Barbara Hewitt was materially and prejudicially "surprised" when counsel for Nancy Hewitt raised the last-in-time marriage presumption and based upon "newly discovered evidence"<sup>160</sup> in the form of a newly made—and corroborated—search of the divorce records.

Counsel for Nancy Anne Hewitt countered that there was no "surprise" since counsel for Barbara Hewitt were fully informed of the last-in-time marriage presumption in the initial Memorandum of Law in Support of Nancy Anne Hewitt, and since in their own subsequent Memorandum of Law in Support of Barbara Hewitt they conceded that counsel for Nancy Anne Hewitt "correctly stated the law" regarding the last-in-time marriage presumption. Consequently, there could be no "surprise," "mistake," or "excusable neglect." The motion was denied.<sup>161</sup>

Counsel for Barbara Hewitt also attempted to admit "newly discovered evidence" pertaining to a corroborated search of the divorce records in order to rebut the last-in-time marriage presumption and evidence of attorney consultation in Paris, Texas. Counsel for Nancy Anne Hewitt countered that such evidence was not "new," that it could have been discovered prior to trial with due diligence, and that the case was thus *res judicata*. Judge Warriner denied Barbara Hewitt's Motion on these grounds.<sup>162</sup>

159. Fed. R. Civ. P. 60(b)(1).

160. Fed. R. Civ. P. 60(b)(2).

161. See generally JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 576 (2d ed. 1993) ("Relief is allowed on the basis of mistake, inadvertence, or neglect only when it appears to be reasonable under the circumstances and is not the result of gross negligence on the part of the moving party or his lawyer. In practice, this means that the rule most frequently is invoked successfully in the default setting or when the plaintiff's suit was dismissed for failure to prosecute and judgment was entered by mistake. . . . Outside the default setting, negligent errors of counsel are treated less sympathetically and relief frequently is denied on the ground that the negligent act was inexcusable.").

162. *Id.* ("Federal Rule 60(b)(2), authorizing relief on grounds of newly discovered evidence, requires something more than simply the development of a new theory and newly discovered facts. A party seeking to rely on this provision must show that the evidence and the fact to which it relates were in existence at the time of trial, and that the party was unable to discover them at that time despite the exercise of due diligence in preparing the case.").

After various other unsuccessful post-trial motions, counsel for Barbara Hewitt then appealed the trial court decision to the U.S. Court of Appeals for the Fourth Circuit.<sup>163</sup> By this time, based upon a wise investment by the clerk of the court of the initial \$400,000 settlement proceeds in U.S. Treasury Bonds, the total amount of the settlement now approximated \$500,000. The parties then agreed to a second court approved settlement, and they jointly brought a Motion for Voluntary Dismissal in both the U.S. district court and the U.S. court of appeals. Under the terms of this settlement, Nancy Anne Hewitt and her children received \$400,000, and Barbara Hewitt and her children received \$100,000.

## VI. Conclusion

The last-in-time marriage presumption continues to serve an important legal and societal function. Its underlying public policy bases are premised on presuming the innocence and morality of the parties, protecting the legitimacy of their offspring, validating the reasonable marital expectations of the subsequent spouses, and strengthening and stabilizing the social and moral standards of the community. These interrelated factors remain strong and viable public policy rationales for continuing to apply the last-in-time marriage presumption in today's contemporary society.

In the vast majority of jurisdictions—with the notable exceptions of states following the ill-reasoned “Iowa Doctrine” or the “California Rule”—the last-in-time marriage presumption continues to be recognized as a strong, though rebuttable, presumption. The courts appear to differ regarding the evidentiary strength and standard of proof required to rebut the last-in-time marriage presumption; however, in practice these differences are more apparent than real since a large majority of states recognize that the attacking party may only successfully rebut the last-in-time marriage presumption through a search of the divorce records in those jurisdictions where the decedent spouse resided or might reasonably have resided.

In the alternative, an attacking party also may present evidence of other circumstances surrounding the initial marriage and remarriage without making an exhaustive search of the divorce records as long as the attacking party's evidence meets the state's particular standard of proof required to rebut the last-in-time marriage presumption. The persuasiveness of such alternative evidence normally is determined by the court on a case-by-case basis.

Finally, as illustrated in the case of *Hewitt v. Firestone Tire & Rubber Company*, it is crucially important that legal counsel for the former spouse ensure that all significant evidence is properly submitted to the court, and is properly corroborated, in order to rebut the last-in-time marriage presumption.

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163. *Barbara Hewitt v. The Firestone Tire & Rubber Co., Nancy Anne Hewitt and Jerome L. Lonnes, Co-Administrators of the Estate of John Carthel Hewitt, Deceased v. Nancy Anne Hewitt Civil Action No. 80-1871* (4th Cir. 1980).