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TRANSAMERICAN V. FUENTES

LAWYER: This case is an appeal from a summary judgment in which the TC correctly held that respondent's claims for the wrongful death of her alleged common law husband were barred by the 1 year statute of limitations provided by §1.91b of the Texas Family Code. The TC correctly understood that §1.91 expressly applies to "any judicial, administrative, or other proceeding," in which a party seeks to prove a common law marriage, and that respondent sued under the wrongful death act and under the worker's compensation act for gross negligence against Julio Fuentes' employer was such a proceeding since respondent had to prove her marital status in order to show her standing to sue.

The San Antonio CA erroneously reversed and remanded the summary judgment simply refusing to apply §1.91b to respondent's claims in spite of the statute's acknowledged plain language. The Court's sole basis for disregarding this clear statutory language was a perceived conflict between §1.91b and the 2-year statute of limitations provided by §16.003b of the Civil Practice & Remedies Code.

Petitioners submit that there is no direct conflict between these statutes, and that any alleged incidental conflict does not justify a judicial disregard of the explicit statutory directive contained in §1.91b.

CORNYN: Should we look to the legislative debates to determine the legislature's intent? The arguments been made that it only applies to divorce cases, and that's all they were thinking about. They didn't intend to defeat wrongful death lawsuits.

LAWYER: I think that when the statute is unambiguous and clear as in this case we don't need to look behind the statute to the legislative intent. Because the court could have used as Justice Baker pointed out, the court couldn't have used more explicit language to limit it to the family code, or to divorce, or other types of proceedings and they didn't. And I also think that one thing we need to take into account is that at the time they amended §1.91b to provide this limitations period in 1989, courts had been applying §1.91, the criteria for establishing a common law marriage to all sorts of proceedings including wrongful death. The San Antonio CA had actually applied §1.91a to prove a common law marriage in a wrongful death case in 1985. And there were other cases out there at the time they amended the statute. So I think that given the authority existing at the time of its amendment, the legislature's deliberate decision to use such broad language should not be ignored or arbitrarily limited in its scope.

ENOCH: If this is not a statute of limitations in regard to attempting to establish the marriage,

but simply is that you can at no time after 1 year, after your spouse has died can you ever establish that you were married. Could the state after a year of the death of...where there's no question about common law marriage, the spouse dies, the property transfers to the spouse, could the state come in and seek to _____ the assets of the estate after that one year expires, and the spouse who received the property be unable to establish the common law marriage as a matter of law? I mean doesn't that pose a bit of a problem?

LAWYER: Well I don't think it poses a problem in the sense that the legislature's made a policy decision that they don't want these claims coming up after 1 year. And if this alleged spouse tried to intervene and assert a right to the property, I think the legislature has said we don't want to hear that claim. If we are going to let you have a claim, you've got to press it quickly...

ENOCH: I wasn't thinking in terms of any claims by the spouse. Among the family members there is no dispute when the property passes. I am just talking about where some person comes independent of that, like the state, they could claim the assets, because it's not claimed by anybody else with the authority to claim it. But this occurs a year after the death and so the state really initiates proceedings to claim the assets of the living spouse and interposes 1.91 saying: this spouse can never prove her right because a year has passed, she didn't establish by a proceeding that she was the wife, and so as a matter of law we get the assets.

LAWYER: You're saying in a situation where the family members have agreed among themselves what to do with the property and, no one's ever gone to court?

ENOCH: Right.

LAWYER: I don't know the exact answer to that question. It's a possibility. I think that a common law spouse could avoid that affect easily by applying for an affidavit of heirship or filing a kind of proformer proceeding in probate court to say this is what we're going to do with the estate. I don't think that's an owner's burden in order to satisfy the state's interest in proving this.

ENOCH: But under your view of the statute, it would be advisable for spouses to do that even though the probate code would not otherwise require it?

LAWYER: Yes sir. I think that the plain language of §1.91b could result in that.

HECHT: Why was it inappropriate to apply the requirements of the family code in Garza but not in this case?

LAWYER: In Garza the family code provisions they were dealing with didn't have any indication that they were meant to apply to any proceeding. And I know this court in Garza specifically said we are not going to apply legitimation provisions to the wrongful death act absent a legislative indication that we should do so. And I think that §1.91 on the other hand does have

such an indication of the legislature's intent that it applies. I also think that Garza involved the right of illegitimate children to sue for wrongful death. And as the US SC has held, that they are subject to a heightened constitutional scrutiny and that a state may not deny the right of illegitimate children to sue for wrongful death while at the same time granting it to legitimate children. So incorporating the family and probate codes definition of a child, which at that time excluded unrecognized illegitimate children, might have had that constitutional and prohibitive effect.

HECHT: And you don't think there would be the same problem with common law spouses?

LAWYER: Well I don't think they are a constitutionally protected class in the sense that illegitimate children are.

HECHT: Why not?

LAWYER: I think that illegitimacy for children it's not quite the same as race, or immutable characteristics in that sense. But you are born and you're illegitimate and you had nothing do with that. Whereas a common law spouse marriage is a legal institution, and you can make a decision to enter into it by formal marriage, or you can make a decision to not do so and to have an informal marriage and follow the requirements for establishing one.

I would like to point out that there is not a direct conflict between these two statutes because they do govern two distinct issues and claims. Although they are both involved in this suit. Proof of a common law marriage and proof of negligence resulting in death involve wholly distinct sets of facts. And so I think it was one of the legislature's prerogative to determine two different time periods for proof of each of these sets of facts in order to protect a defendant against having to defend either of these claims when witnesses were not available or the evidence not fresh.

I think in this case, the wisdom of the legislature's determination of a one year statute of limitations is demonstrated since within a year of Julio Fuentes' death respondent issued a written statement at the behest of Julio's mother denying the existence of any marital relationship; and yet, two years later changed her mind well after Julio's parents had filed their own wrongful death and survival claims, and after they had applied for an administration of his estate. And arguably this is one of the very types of situations that the legislature was trying to get at when it said we want timely proof of common law marriage.

I also think that the statutes in this case serves similar goals. As this court sated in Moreno one of the purposes of §16.003b is the prompt resolution of a decedent's affairs. Section 1.91b effectuates the same state interest by requiring the prompt processing of the claims of a common law marriage to a decedent. But even assuming that they do conflict, I don't think there is anything in the language or history of §16.003b that suggests it must prevail. Section 16.003b neither creates the right to bring a wrongful death, nor reflects an intent to enlarge the time period for bringing such a claim, such that would preclude the application of any shorter statute of

limitations.

SPECTOR: If there is a declaratory judgment action who is served? A woman goes into court and pleads that she's the common law wife of the deceased; states under oath the elements that are required and is that then res judicata?

LAWYER: I think she could serve the estate since if the decedent had been living she would have served him. She could serve the estate, or in this case his parents since they claimed to be heirs and indeed the father was the administrator.

SPECTOR: Is that required? I am curious if it's going to then allow her to bring any number of actions as the widow?

LAWYER: I understand the seeming problem. Although she could file an application for heirship or to be an administrator, and then go forth and sue on the basis of the judgments in those cases.

SPECTOR: But is that her only option to file in the probate court?

LAWYER: To either file some type of probate proceeding or declaratory judgment in district court.

SPECTOR: That's my problem. If it's a declaratory action it sounds to me like it's an ex parte kind of proceeding. She can swear that she's the common law wife and that ends the matter.

LAWYER: Well as I said I think she...if I was she I would serve the estate and then once...

SPECTOR: Is there any requirement under proving up a common law marriage that all of those people would be necessary parties?

LAWYER: No, not that I know of. The only real declaratory judgment under 1.91 that I found was the Georgeotta's case, and that was where the alleged husband was still living. So I just haven't found any cases that address...

SPECTOR: So when one of the spouses is deceased it really is impractical isn't it to have one party go in and prove up a common law marriage that becomes res judicata?

LAWYER: Well I don't know if it's impractical. It's unusual in the sense that it would probably...it might be a case of first impression until she got to the wrongful death stage. I wanted to point out that unlike the statute involved in Shepherd v. Leopard, the first case this court heard today, §16.03b does not contain any language which even remotely indicates an intent to preclude the application of all of the other limitations period. There is not any language such as not

withstanding any other law that this court discussed in the Balla case, said reflected an intent to preclude any other limitations period that might conflict with that.

Rather, I think the conflict perceived by the CA results from the mere fact that §1.91b has a 1 year statute of limitations and §16.003 has a two year statute of limitations. But if such a conflict is sufficient to justify a complete disregard of §1.91b express terms, it is difficult to see how §1.91b can be applied to any type of proceeding. Common law marriage is usually not a stand alone claim, but necessarily is brought in some type of proceeding. And almost all proceedings have their own statute of limitations. And under the CA's reasoning, if the underlying statute of limitations is not also one year from death, §1.91b will conflict and couldn't be applied.

I think also the legislature has indicated its intent that if these two code provisions conflict, the latest date of enactment shall prevail. In §311.025a of the Gov't Code, known as the code construction act, the legislature states that: "if two statutes enacted at the same or different sessions 'of the legislature are irreconcilable, the statute latest in date of enactment prevails." And since §1.91b was amended in 1989 to provide this limitations period, then §16.003b was codified in 1985. I believe that §1.91b would survive any conflict.

To conclude, I know that the CA's discussion of a conflict was influenced by a perception that it would be unfair to apply the limitations period to "benefit a tort feasor". We've already discussed while I believe that the cases they rely upon for this provision Garza and Brown, the reasoning in those cases is an inapplicable, I also believe that preclusion of the legal remedy alone is an illegal remedy that does not constitute a fundamental right as this court has said in Rose v. Doctors Hospital would not justify an exception to the limitations period.

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RESPONDENT

RICHTER: May it please the court. Petitioner is erroneous in asserting that there is no conflict between §1.91b and §16.003 of the Wrongful Death Act. Specifically, let's take a look at the actual language of both of these statutes. And I am going to turn to §1.91a and 1.91b originally. As enacted in 1989, §a says: In any judicial, administrative or other proceeding. And proceeds on to say that you can prove common law marriage either by a declaration by both parties where they execute it and file it at the courthouse, or you have the 3 elements of: agreement; holding out; and cohabitation.

HECHT: That was passed in 1969?

RICHTER: Yes sir. But what I am looking at is the effect of the 1989 amendment as it works with the entire 1.91. And thereafter it changes the inference that was in §b to a completely different thing saying: A proceeding in which a marriage is to be proved must be commenced before or not later than 1 year from the date that the relationship ended.

What happened when they changed it in 1989 is §b applies to both a1 and a2. So even if you have consent by both of the parties in §(a)(1), you still have to file an action to establish the marriage within 1 year after a death or a separation.

In §6.003(b), we have the language: "A person must bring an action or a suit not later than 2 years after the date the cause of action accrues in an action for injury resulting in death." So we have a statement here where it says we have a conflict between §(b) under 1.91, which is a proceeding in which a marriage is to be proved under this section; and we have a statement where it says a person.

HECHT: You don't have a conflict if you can bring separate proceedings though. So why can't you do that?

LAWYER: But I don't believe that that's what the effect of §b is. The effect of §b is requiring an action in which a marriage has to be established, has to be brought within one year. And that's what ...

HECHT: You could bring that action, and then a year later you can bring the wrongful death action.

LAWYER: But there is a conflict. Because what's happening here is that as was in the Shepherd case ahead of us they're saying no, you have to bring the one action before you can bring the other.

HECHT: So why is that a conflict?

LAWYER: Because that's not the language of the statute. The statute says: Bring an action in which a marriage is to be proved must be commenced. This is an action. That means an action where you have the wrongful death case in this action or you have some other tort case. It doesn't say you have 1 year to establish your marriage and then you can file any other action thereafter.

HECHT: But if you prove it in the first case isn't that proved as to the second one or not?

LAWYER: Well yes I guess you would.

CORNYN: Couldn't a common law spouse seek to be appointed the personal representative of the estate of her deceased common law spouse, and thereby in the course of that probate proceeding establish the existence of a common law marriage within a year of the death? Would that be one alternative means by which their status as a common law husband or wife could be established within a year of the end of the relationship?

LAWYER: Are you saying that if a person brings...

CORNYN: If I died today, could my wife go to court tomorrow assuming we were common law husband and wife and ask the probate judge to appoint her as the personal administrator of my estate assuming that I was in testate, and seek to qualify as my common law wife, and thereby establishing the relationship under the terms of §1.91? Is that one alternative is all I am asking?

LAWYER: Yes. In the second argument brought forth, petitioner asserts that these laws don't serve similar goals, or that they do serve similar goals. But I assert that they don't, because if such were true, then section (a)(1) as it applies to §b they would also have to still bring an action to establish their marriage even though they already had a consensual statement which said that they were common law married on file.

CORNYN: You do agree that for purposes of the survival statute being the wrongful death statute, that only a surviving spouse under the wrongful death statute and a heir under the survival statute those are the only ways that a common law spouse could be entitled to assert those actions; do you agree with that?

LAWYER: Not necessarily. Because the actual statute that we have in front of us is this statement that says: A person. Arguably perhaps you might say that if the, say it's the wife, the surviving spouse can bring it as a surviving spouse or as an heir. If you are applying another section, yes. But the issue that has come and the way I understand it is is that 16.003 is what is conflicting with 1.91 in the terms they are trying to say that the common law spouse is not a person under 16.003, that she has to jump through the hoop to establish that she's common law married before she can even bring, that she has standing to bring it as a person.

HECHT: But if that's true, you are going to have to prove it some place that she's the common law spouse in either a wrongful death action or ahead of time, or somewhere?

LAWYER: True. But I think what's happened in this case and in the **Shepherd** case that you've just heard is that they are using it as a statute of limitations. And that's what it is. It's operating as a statute of limitations. If you don't bring a case in which you are seeking to establish your common law relationship in addition to your wrongful death action within the 1 year period, you've been precluded from doing so.

HECHT: What about as between two claimants to a common law marriage? What if there were two persons who claimed that they were the common law spouse of the decedent? Shouldn't the one that tries to comply with the family code be in a better position than the one who doesn't or not?

LAWYER: I don't know. You would have to have an evidentiary hearing I guess to establish who has better rights. I think maybe it would pertain to...I guess you have two people competing for the same and they both have claims...

HECHT: Well they can't both have claims.

LAWYER: Both assert a claim. You have an action to establish only the existence of a common law marriage. You wouldn't have an additional claim going forward from there. What essentially is happening with the operation of §b is say that you did have two people who were asserting claims of common law marriage. If they didn't bring it within the 1 year statute of limitations under (b), they wouldn't have any claim at all. And the effect of this statute is to divest people of property interest whether it's a cause of action, whether it's community property, and it also has a further effect of divesting a child of its legitimacy. Because it is precluding any type of proof that a marriage existed, or litigation of such a marriage.

GONZALEZ: How do you respond to Justice Richoff's concurring opinion and Mrs. Stoke's argument, to this argument, Nancy your client, shortly after Julio's death signed a statement that they were boyfriend and girlfriend, had no plans to be married, and she filed income tax returns that she was single, she had student aid forms that she was single, and then after Julio's parents filed a claim for compensation under the wrongful death act and survival act, she then two years later comes and says: I lied; I was married: and this is the very thing that the legislature had in mind when they put a one year limitation to prove an informal marriage. And why isn't Justice Richoff not correct in his statement as a matter of law your client is single?

LAWYER: In the case of Nancy Fuentes, there is some statement in appellant's brief in a footnote that says that Nancy had signed some kind of statement which indicated that she was single with regards to Transamerican; and I wish to bring forward that it is Nancy's position that she was duped into signing that statement, that they approached her without the benefit of her having any counseling of legal type of advice. She didn't even have an attorney hired at that time and approached her saying: You don't really want to sue us do you; and having her execute a statement that she wasn't going to assert any type of a claim.

I think that if you were to read the entire deposition testimony of Mrs. Fuentes, I think you would realize that she's probably best described as naive. And she doesn't understand some of the things and she sought to accommodate the requests of her mother-in-law, Mrs. Fuentes.

GONZALEZ: How can she be a mother-in-law when she told that person: I was never married to your son; we had no plans to be married; we were not husband and wife?

LAWYER: The affidavit that Mrs. Torres filed in her proceeding as the administrator, was that they had to state those things and that Nancy Fuentes actually did it as merely an accommodation. She does state that in her testimony. I believe you will find that she did this as merely an accommodation and that perhaps she didn't understand what was going on in the effect of her rights and how it would affect her common law marriage.

I think also within the testimony you will find that there is some kind of an

argument made by Transamerican and the other defendants that they claimed that she actually admitted in her testimony that she wasn't common law married. And then she comes back and later on says: Well yes I am, at least we thought we were married; but perhaps she doesn't understand the legal elements of what a common law marriage was. But she and her husband both thought that they were common law married; held themselves out that way, and that the only real reason that she tried to do this or hold herself out not as married is perhaps to protect her I guess it's her educational right to have financial aid for her education.

GONZALEZ: Well she can't have it both ways. She is either single or married.

LAWYER: Admittedly so, but isn't this an issue for the TC to decide whether there was or there wasn't a common law marriage?

GONZALEZ: Why isn't this a law question when you have the statements that I have stated? What's there to dispute? She made the statement that we're not married; we are boyfriend and girlfriend, she filed aid as a single person; she filed income tax as a single person. Where's the fact issue?

LAWYER: Well the fact issue comes from statements that she says: Well we thought we were common law married. And she goes forward with the other things. Perhaps I am not understanding your question. But the way I have understood the testimony and the evidence in front of us was that there were issues of fact and that was recognized by the CA, that there were issues of fact and that those things should be allowed to be reviewed by the TC.

GONZALEZ: I was asking you to respond to the concurring opinion that says there are no fact issues.

LAWYER: Oh, to Judge Richoffs. I am sorry. It's our position that there are. I think that he's taking a restrictive view of it and that once again that it should be allowed to go down, that there are fact issues, and that this is an evidentiary question. And what's happening here is that Transamerican and the other petitioners are using 1.91b to preclude any type of a ruling on the issue of whether there existed a common law marriage. And as part of the wrongful death action you will have to establish that there was a common law marriage before you can proceed with the rest of it. So obviously we're only asking for the day in court to establish that and then go forward if in fact she does have it.

In petitioner's brief, the petitioner has tried to have the cake and eat it too by coming around with an additional interpretation of 1.91b by saying that 1.91b is only just to require a filing to establish the relationship and then you have your additional 2 year statute of limitations in which to bring any other action. And she cites the Dannelly v. Almond in which to support this claim. I respectfully submit that the Dannelly reasoning is misapplied, that it doesn't actually look at the situation at hand because in this particular case Dannelly only looked at the application of

1.91b to §(a)(2). It didn't look at the effect of it on §(a)(1); and when it was saying that the purpose of the 1-year statute of limitations would be to allow the bringing of a claim while you have witnesses present, and to avoid any type of staleness and things like that.

What would be the effect of actually having a file statement or file declaration where the parties both admitted that there was one. And the effect of 1.91(b) is to preclude any proof of that statement or any admission of that declaration of informal marriage after a 1 year period has gone by from the time that the relationship ended either through death or through separation for agreement. And by doing this, by arguing that §1.91(b) only requires just an action to establish the marriage it actually is creating an ambiguity. And so what's happening is that they are arguing for both sides. Petitioner is arguing for both sides by saying that well on the one hand you have one year to bring any action, and in the converse you have one year in which to establish your marriage. And then you have 2 years to go on and go further with your statement.

And furthermore, when we look at the...I think the real issue here, what we're looking at in this particular case in the light of this court's rulings in Brown and in Gassa(?) we have a situation here where we have a wrongful death act, and we are looking at the wrongful death act having an exception to it. And there is no basis for creating an exception to the wrongful death act for common law marriages.

HECHT: The statute's been changed? Right? 191(b) has been changed?

LAWYER: Yes sir it has.

HECHT: It now reads: Two years on the date on which the parties separated and ceased living together?

LAWYER: Yes sir.

HECHT: Would that mean when one of them dies or does that contemplate something that happened while both were alive?

LAWYER: Actually that's a good question. I have pondered it myself. I don't understand whether they contemplated or not. But what I find interesting in the entire statement of the statute if you will stop and think about the new section (b). It only applies to (a)(2). It doesn't apply to (a)(1). If you read the language of (b) now, it doesn't necessarily negate the inference of the declaration of marriage.

Another thing that happens with it is that it's now a rebuttable presumption. It creates a rebuttal. It's not a statute of limitations like the operation that it was previously. Perhaps there's an opportunity in the future for that language that you were asking about to be interpreted in light of all of these things.

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REBUTTAL

LAWYER: Justice Cornyn, to address the question you had asked earlier: Could a common law spouse seek to be appointed an administrator if the decedent died in testate within a year? It's true they could. Actually in this case respondent originally filed her suit not only individually but as administrator of the estate. And then dropped that claim when the defendants filed a motion to dismiss saying she wasn't the administrator, that the father had already been appointed. But she could have sought to attain that status.

HECHT: If the spouse had filed a declaratory judgment action and won it, got a judgment that she was the common law spouse, could the wrongful death defendants contest that in the wrongful death case?

LAWYER: I don't think so. I think the family code and the probate codes are already countenance actions where family members and survivors can establish their status and then use that in other proceedings as evidence of their status without those defendants having been part of those proceedings.

HECHT: So even though they weren't parties, and would otherwise have a chance to litigate that issue in a wrongful death action, they would be bound by the declaratory judgment you think?

LAWYER: Well I think that there's a good argument they would be bound. I can't say definitively. Justice Gonzalez in response to your question. I do believe that this is a situation where as a matter of law there isn't a common law marriage. I want to respond to respondent's point that she was duped. There's no evidence in the record that she was duped or mislead. She testified that she did give the statement, that she was doing it to help out Julio's mother, but that she knew that she was giving a false statement and that it was false. And I think the intimation that she's naive isn't supported by the record since she did know enough to deny her marital status on her student loan applications and she said that's why they didn't get married formally any earlier.

I would like to conclude that I think the CA was concerned that applying §1.91(b) to wrongful death claims would be unfair. I think that arguably it's not unfair considering the legislative interest. There is no concern in these cases that within a year of death the allegedly common law spouse will not have notice of the injury that provides the basis of her wrongful death claim. As this court recognized in Moreno "Survivors are put on immediate notice by the event of death and investigation into the cause of action must occur to preserve the claim" and that they have definitive notice of the injury making up their cause of action. Indeed in this case, respondent not only knew immediately of Julio's Fuente's death, but she also knew that the parents had filed their own wrongful death and survival claims. I believe the day after he died. And she admitted that she knew about this action. So she knew that there was a possible cause of action.

Also there's not a concern at the time of death common law spouses will not know that they have a potential common law marriage claim. At the very nature of the claim, includes facts clearly within the common law spouse's knowledge: an agreement to be married and holding themselves out as to the public as married. Respondent admitted that at the time she and Julio Fuentes lived together, that she thought they had a common law marriage and that she knew what a common law marriage was at that time.

Finally, the TC is wanting this case to not even to deprive prior respondent of the right to bring her wrongful death claims against 3 of the 5 defendants in this case. Since it is undisputed that she did not file suit against Continental _____ within even 2 years, the CA is incorrect when it says that she filed suit within 2 years against everyone.

For all of these reasons, the CA erred in refusing to give effect to the explicit statutorily language of §1.91(b) with little analysis and a total disregard of the legitimate state policies served by the statute.