FILED
MAR 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

159

MARY B. (SIMPSON) HART,	)	
Plaintiff-Appellant,	)	Filed March 26, 1985
vs.	)	
SUSAN LYNN DOOLITTLE, Executor of the Estate of **WALTER E. HART,** Deceased,	)	5-36 84-702
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Story County - Carl E. Peterson, Judge.

Plaintiff Mary Simpson appeals from an adverse ruling on her petition for a declaratory judgment that she is the surviving spouse of decedent Walter Hart by virtue of a common law marriage. AFFIRMED.

Rick L. Olson, Des Moines, for plaintiff-appellant.

David W. Benson of Smith, Nutty, Sharp, Benson & Jahn, Ames, for defendant-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

DONIELSON, P.J.

Plaintiff Mary Simpson appeals from an adverse ruling on her petition for a declaratory judgment that she is the surviving spouse of decedent Walter Hart by virtue of a common law marriage. On appeal, plaintiff asserts (1) that she has established the existence of a common law marriage, and (2) that the trial court should have treated the letter decedent wrote to her the day before his death as presumptive evidence of the common law marriage. We affirm.

Decedent Walter (Bud) Hart died in 1983. The will he had executed in 1979 was admitted to probate. Under the provisions of the will, all of decedent's property was to be given to his three children, Debra, Barbara and Susan; Susan was to serve as executor. Plaintiff, Mary (Molly) Simpson, filed a surviving spouse's election to take against the will. She also filed the present petition for a declaratory judgment that she was the surviving spouse of decedent by virtue of a common law marriage; Susan was named as defendant. Susan answered, and trial was held.

The evidence at trial indicated that plaintiff and decedent had each been divorced, that they lived together from July 1980 until decedent's death in November 1983, and that they had planned to be formally married in December 1983. There was testimony about their household finances, the manner in which they held their investments and bank accounts and filed their income tax returns, and the persons named as beneficiaries of their life insurance policies and wills. There was also testimony about which last name plaintiff used, and how she and decedent described their marital status to others.

The district court ruled that plaintiff had failed to establish the existence of a common law marriage between herself and decedent. Specifically, the district court found that plaintiff had failed to show the element of open declaration to the public of the marital relationship by both partners; the district court stated:

"At best, the evidence supports a conclusion . . . that the relationship was ambiguous to the public." Plaintiff has appealed from this determination.

In order to establish a common law marriage, three elements must be shown: 1) intent and agreement in praesenti to be married by both parties; 2) continuous cohabitation; and 3) public declaration that the parties are husband and wife. In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa), cert. denied, 444 U.S. 951, 100 S. Ct. 425, 62 L. Ed. 2d 321 (1979). When one party to the alleged marriage is dead, the essential elements must be shown by clear and convincing evidence. In re Estate of Fisher, 176 N.W.2d 801, 805 (Iowa 1970). We view such claims with suspicion since there is no public policy in Iowa favoring common law marriage. In re Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975).

Upon review of the record, we conclude that the trial court was correct in determining that a common law marriage did not exist. As the trial court indicated, at best, the relationship was ambiguous to the public. Mary and Walter retained investments in their separate names. Additionally, the parties did not change their wills or any legal documents to reflect the relationship as husband and wife. Mary filed tax returns as a single person and in 1981 Walter executed a deed identifying himself as a single person. Mary also continued to receive alimony from her former husband in spite of the provision in the divorce decree that alimony was to cease after remarriage.

We also note that Mary's actions after Walter's death are inconsistent with the claim that they were married. The information she provided to hospital personnel at the time of Walter's last illness identified her as a friend. Furthermore, some testimony indicated that the information she provided to funeral home officials identified the decedent as not having a surviving spouse. As Mary points out, testimony in this regard is in conflict. However, in such a situation we avoid making independent determinations of credibility and defer to the trial court's judgment.

The culmination of these facts would seem to indicate that Mary and Walter did not hold themselves out to the public as married; nor would the facts indicate that they considered themselves to be married.

We recognize that some facts would indicate to the contrary. The parties purchased airline tickets using the names Mary and Walter Hart. They also corresponded with real estate brokers in Colorado using the last name Hart. Walter's sister-in-law indicated that she corresponded with the parties as Dr. and Mrs. Walter Earl Hart. Additionally, evidence indicates that Walter referred to Mary as his "frau." However, it is evident that different inferences can be drawn from these facts. For instance, as the trial court indicated, the parties planned to be married before they moved to Colorado and may have used a common last name when corresponding with real estate brokers to avoid future explanation. Regardless of whether this is the case, we simply cannot say that the record establishes by clear and convincing evidence the existence of a common law marriage.

Plaintiff also relies heavily on a letter written by the decedent to the plaintiff one day before his death. The letter states in part:

> When I moved in with you, I made a commitment to you and myself that if we lived together we would do so as man and wife; and as soon as we had our kids settled we would get married. To this day I have never considered you anything but my wife. I hope you understood that. If I hadn't felt that way I never would have moved in. We are accepted as such by our friends and my colleagues, to say nothing of my brothers . . . .

(emphasis in original). Mary argues that pursuant to section 622.27 of the Iowa Code, the letter should be considered presumptive evidence of marriage.

Section 622.27 provides in part:

> The entries and other writings of a person deceased who was in a position to know the facts therein stated, made at or near the time of the transaction are presumptive evidence of such facts, when the entry was made against the interest of the person so making it . . . .

(emphasis added). Pursuant to this provision, the statutory presumption is only triggered when the writing is against the interest of the person who made it. Mary claims that the presumption should be applied since Walter's letter is against his pecuniary interests in two respects. First, she asserts that in making the previously-quoted statement, Walter assumed support obligations under the Uniform Support of Dependents Law. See Iowa Code ch. 252A (1983). Mary also asserts that Walter's statement is against his interest since it would allow her to elect against his will.

We are unpersuaded by the plaintiff's arguments and are unwilling to characterize Walter's letter as a statement against interest on such tenuous grounds. Upon reading the letter, it is clear that it was not intended to acknowledge any form of indebtedness. It is sentimental in nature and, as defendant indicates, it is more of an expression of emotion rather than facts. Furthermore, we agree with the trial court that the benefits of marriage can hardly be considered less persuasive than any detriments incurred. In other words, the letter can just as easily be characterized as a statement made in Walter's interests rather than against them.

We conclude that the letter in question should not be given any more weight than other evidence in the record. In viewing these facts as a whole, we further conclude that the existence of a common law marriage has not been established by clear and convincing evidence.

AFFIRMED.