IN THE COURT OF APPEALS OF IOWA

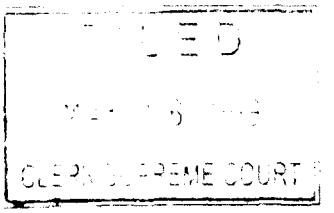
No. 1999-106 (9-293) / 98-1962
Filed May 26, 1999

IN THE MATTER OF THE ESTATE OF MARK R. HENSCH, Deceased,

REBECCA A. WILLIAMS, Individually and as Administrator of the Estate of **MARK R. HENSCH,** Deceased,
Appellee,

vs.

DEBORAH M. HENSCH,
Appellant.



Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Deborah Hensch appeals a district court's declaratory judgment finding that Rebecca Williams was the lawful surviving spouse of Mark Hensch and entitled to distribution from his estate. **AFFIRMED.**

Gary G. Mattson and Gregory W. Landry of LaMarca & Landry, P.C., West Des Moines, for appellant.

Roxanne Barton Conlin and Tiffany B. Klosener of Roxanne Conlin & Associates, P.C., Des Moines, for appellee.

Heard by Sackett, C.J.,and Vogel and Zimmer, JJ.

VOGEL, J.

Deborah Hensch appeals a district court's declaratory judgment finding that Rebecca Williams was the lawful surviving spouse of Mark Hensch and entitled to distribution from his estate. We affirm.

Background facts. Rebecca Williams began dating Mark Hensch in the fall of 1978, while she was separated from her husband, Rodney Backous. Rebecca and Rodney's marriage was dissolved in February of 1979, and Rebecca and Mark made plans to be married in September of 1979. The couple applied for a marriage license, reserved the church, sent invitations, and planned a reception. However, prior to the rehearsal dinner, Mark told Rebecca he did not want to go through with the ceremony. Rebecca testified that he asked her to be his wife, stating they did not need a piece of paper to prove their marriage. From that point on, she considered them to be common-law husband and wife.

The couple went through with the wedding reception and for the next several years lived together on and off with Rebecca's children from her first marriage in Iowa, Colorado and Alaska. The couple's daughter, Nova, was born to them in 1981. The couple permanently separated in 1985, but did not seek a dissolution of marriage. Both parties eventually remarried; Mark to Deborah Johnston in July of 1987, and Rebecca to Robin Williams in September of 1988. Mark and Deborah's final separation was in June of 1994.

On October 24, 1996, Mark died intestate from injuries he sustained in a work-related accident. Prior to his death, Rebecca signed documents at the hospital,

affirming her status as Mark's common-law wife and later authorizing the discontinuation of life support. Rebecca was appointed administrator of his estate and filed a wrongful death action on behalf of the estate in April of 1997. Deborah intervened and petitioned to remove Rebecca as administrator. Rebecca subsequently filed a declaratory judgment action asking that the court determine Mark Hensch's lawful surviving spouse and distributees. After a hearing, the district court ruled that Rebecca was Mark's surviving spouse and a distributee of his estate. Deborah now appeals.

Scope of review. This action was tried in equity in the district court, therefore our review is de novo. *See* Iowa R. App. P. 4; *Davis-Eisenhart Marketing Co., Inc. v. Baysden*, 539 N.W.2d 140, 142 (Iowa 1995) (stating that cases are ordinarily heard on appeal in the manner in which they were treated in district court); *In re Estate of Custer*, 229 Iowa 1061, 1063-64, 295 N.W. 848, 851 (1941) (holding that even in probate proceedings which are ordinarily tried at law, the parties may stipulate to a trial in equity which will be reviewed de novo on appeal). On our de novo review, we give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. *See* Iowa R. App. P. 14(f)(7).

I. Common-law marriage. The State of Iowa recognizes a common-law marriage to be equally as valid as a ceremonial marriage. *See In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970); *In re Estate of Stodola*, 519 N.W.2d 97, 98 (Iowa App. 1994). For a party to successfully assert the existence of a common-law marriage, they must prove the following elements: 1) the present intent and

agreement to be married; 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 1979). When one party is deceased, these elements must be proven by a preponderance of clear, consistent, and convincing evidence. *See Conklin by Johnson-Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102, 105 (Iowa App. 1996); *Fisher*, 176 N.W.2d at 805. Circumstantial evidence may be relied upon to demonstrate a common-law marriage. *Conklin*, 557 N.W.2d at 105 (citations omitted).

A person may be entitled to marital rights if his or her intention is to be married, even though the other person's intention is not the same, provided they cohabit and provided the conduct of one person justifies the other to believe he or she intended to be married. *See In re Marriage of Winegard*, 257 N.W.2d 609, 616 (Iowa 1977) (citation omitted).

The district court made extensive and detailed findings, and we adopt those findings. Rebecca testified that when Mark told her he didn't want to go through with the planned ceremony, he asked her if she would be his wife without a piece of paper. She stated that, in their minds, they considered themselves married at that point. This belief was further evidenced by their going through with the planned wedding reception and their immediate cohabitation thereafter. Rebecca and Mark lived together in Iowa, Colorado, and Alaska, portraying themselves as a married couple. Rebecca and her children also began using Mark's last name for nearly all purposes, including a driver's license, social security cards, school, and medical records. There

is no evidence in the record that Mark protested their use of his name. Mark even petitioned for custody of Rebecca's children after they separated and she was living in Seattle.[1] These and many other facts outlined in the district court ruling establish by clear and convincing evidence that Mark and Rebecca had a present intent and agreement to be married in September of 1979, continuously cohabitated with the exception of a few separations until 1984, and publicly declared that they were husband and wife in numerous ways. Although both Mark and Rebecca clearly thought they could informally dissolve their common-law marriage, as demonstrated by their later remarriages, the law is clear that a common-law marriage must end in a formal dissolution. *See Stodola*, 519 N.W.2d at 100; *Fisher*, 176 N.W.2d at 807. Their misconception of this legal principle, based in part by poor legal advice at the time of their separation, does not undermine the validity of their previously established common-law marriage.

As we find that a common-law marriage existed between Rebecca Williams and Mark Hensch which was never formally dissolved, we hereby affirm the ruling of the district court.

AFFIRMED.

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[1] We note that in his petition for custody, Mark referred to Justin and Jennifer using the surname Backous.

No. 98-1962. [1999-106 (9-293)] IN RE ESTATE OF HENSCH

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (5 pages $2.00)

Deborah Hensch appeals a district court's declaratory judgment finding that Rebecca Williams was the lawful surviving common-law spouse of Mark Hensch and therefore entitled to distribution from his estate. **OPINION HOLDS:** ***Common-law marriage.*** The district court made extensive and detailed findings which we adopt. Rebecca testified that when Mark told her he didn't want to go through with their planned wedding ceremony in 1979, he asked her if she would be his wife without a piece of paper. She stated that, in their minds, they considered themselves married at that point. This belief was further evidenced by their going through with the planned wedding reception and their immediate cohabitation thereafter. Rebecca and Mark lived together in Iowa, Colorado, and Alaska, portraying themselves as a married couple, and had a daughter together in 1981. Rebecca and her children from her previous marriage also began using Mark's last name for nearly all purposes, including a driver's license, social security cards, school, and medical records. Mark even petitioned for custody of Rebecca's children after they separated and she was living in Seattle. These and many other facts outlined in the district court ruling establish by clear and convincing evidence that Mark and Rebecca had a present intent and agreement to be married in September of 1979, continuously cohabitated with the exception of a few separations until 1984, and publicly declared that they were husband and wife in numerous ways. Although both Mark and Rebecca clearly thought they could informally dissolve their common-law marriage, as demonstrated by their later remarriages, the law is clear that a common-law marriage must end in a formal dissolution. Their misconception of this legal principle, based in part by poor legal advice at the time of their separation, does not undermine the validity of their previously established common-law marriage. As we find that a common-law marriage existed between Rebecca Williams and Mark Hensch which was never formally dissolved, we hereby affirm the ruling of the district court.