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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BENFORD WALKER, Plaintiff-Appellant,	)	Filed June 24, 1980
vs.	)	
NORMA METCALF WALKER, Defendant-Appellee.	)	0-136 2-64078

Appeal from Polk District Court - A. V. Hass, Judge.

Plaintiff appeals dismissal of his petition seeking a declaratory judgment he and defendant had a common law marriage; defendant seeks an award for attorney fees incurred in this appeal. AFFIRMED.

Benford Walker, pro se, Ankeny.

Robert E. Conley of Conley, Conley & Crawford, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Benford Walker, appeals dismissal of his petition seeking a declaratory judgment he and defendant, Norma Metcalf Welch, had a common-law marriage. Defendant seeks an award for attorney fees incurred in this appeal. We affirm the trial court.

Our review of this law action is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1); see In re Estate of Dallman, 228 N.W.2d 187, 188-89 (Iowa 1975) (quoting Davis v. Hansen, 224 N.W.2d 4, 5 (Iowa 1974)).

I.

Benford filed a petition seeking a declaratory judgment he and Norma had a valid common-law marriage. He also sought a judgment declaring as void Norma's purported ceremonial marriage to another man, Roy Welch, and an injunction restraining Norma from entering into marriage with Roy. At the close of trial, the court dismissed orally Benford's petition. Ten days after trial, Benford filed on July 12, 1979, a pro se "application to reopen and continue hearing," alleging his attorney refused to present all the evidence Benford wished to put before the court. On August 6, 1979, trial court overruled Benford's application because Benford had not identified the allegedly favorable evidence his attorney refused to present. Benford filed on September 4, 1979, a pro se notice of appeal from this ruling. On September 21, 1979, trial court filed its judgment entry formally dismissing Benford's petition. Benford filed a second notice of appeal on September 28, 1979.

II.

The burden was on Benford as proponent of the common-law marriage to prove its existence by a preponderance of the evidence. In re Marriage of Winegard, 257 N.W.2d 609, 615 (Iowa 1977) (quoting In re Marriage of Grother, 242 N.W.2d 1, 1 (Iowa 1976)). We regard a claim of common-law marriage with suspicion and scrutinize closely the arguments and facts put forth as support. Id. To prevail on his claim, Benford needed to prove an intent and agreement in praesenti by both parties to be married, along with continuous cohabitation and public declaration he and Norma were husband and wife. Id. We find substantial evidence in the record supporting the trial court's findings and judgment that a common-law marriage did not exist between Benford and Norma.

Benford and Norma both testified they had associated with each other since the mid-1960's. Benford testified that in January 1975 they had professed their mutual love and declared their intent to consider themselves married. Norma denies they ever agreed to consider themselves married. She testified they had discussed the possibility of a ceremonial marriage, but Benford had not been willing to participate in such a marriage. Norma stated she had never considered herself married to Benford and would never be a party to a common-law marriage. Although Benford and his brother lived in Norma's basement for about three months in 1978, Norma testified she continued to sleep upstairs alone and had not shared her bedroom with Benford during this period.

Benford contends Norma's testimony should be discredited completely because of circumstances in her life that placed her under a great deal of stress and caused her to lie under oath. The trial court, however, considered Norma's testimony credible and we find no reason to disagree with its assessment. Benford's selective citations to and quotations from Norma's testimony are self-serving and do not justify a reversal of the fact-finder's conclusions.

The other evidence asserted by Benford to be supportive of his claim is not conclusive nor does it reach the required level of preponderance. Norma's letter to Benford where she mentions the words "home" and "our house" is at best ambiguous and most likely was used to describe the house shared by herself and her children, not with Benford. Benford asserts they had mutual financial dealings. Even if we assume these existed, there is equally persuasive evidence of a lack of financial commingling. Furthermore, a financial relationship does not constitute sufficient grounds for finding a common-law marriage. After reviewing carefully the record, we conclude the trial court properly found Benford had failed to carry his burden of proof to establish any element of a common-law marriage between himself and Norma. See Grother, 242 N.W.2d at 1-2.

III.

Benford also challenges the trial court's overruling of his application to reopen and continue the hearing, which he based primarily on the ground his attorney refused to present certain evidence at trial. He also alleged his attorney failed to represent him

properly by failing to seek a different judge to hear the case, by extending a confidential note to Norma's attorney, and by withdrawing exhibits without consulting Benford. Benford characterizes his attorney's handling of the case as fraudulent and a denial of a fair trial. We find Benford's arguments to be without merit.

A lawyer has a duty to exercise ordinary care in handling a client's work. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). Benford's attorney thus was obligated to use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances. Mere errors in judgment, however, are not grounds for a finding of incompetence, at least where the lawyer acts in good faith and exercises a reasonable degree of skill, care, and diligence. See generally Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975). Further, the lawyer's duty to represent and protect a client does not extend beyond reasonable bounds. Kurtenbach, 260 N.W.2d at 57.

We find the conduct of Benford's lawyer in this case to have been competent and fair representation. While the lawyer did not call certain witnesses Benford wished to have examined, his judgment in not doing so has not been shown to have been either negligent or prejudicial to Benford's interests. The lawyer apparently believed certain witnesses Benford wished to call would testify against him. Benford has not established this judgment was unreasonable or a different outcome would have resulted had these persons testified. Under these facts, we hold Benford received competent, fair representation and trial court correctly overruled his application to reopen and continue the hearing.

IV.

We hold Benford shall pay the costs of this appeal. Attorney fees are not awarded as part of the costs unless clearly authorized by statute. Keeney v. Iowa Power and Light Co., 250 Iowa 887, 889, 96 N.W.2d 918, 921 (1959). Finding no statutory authorization for an award of attorney fees in a case like this, Norma's request for an award for attorney fees is denied.

Trial court is affirmed.

AFFIRMED.