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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF )
BERYL P. CONLEY, )
deceased. )

Filed April 28, 1978

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2-60155

Appeal from Woodbury District Court - Donald M. Pendleton, Judge.

Applicant appeals adverse trial court ruling that she had not established a common-law remarriage to the deceased and thus is not entitled to the surviving spouse's share of his estate. Affirmed.

Yaneff and Cosgrove, of Sioux City, and McCullough and McCullough, P.C., of Sac City, for appellant.

John T. O'Brien, of O'Brien, Galvin & O'Brien, of Sioux City, for appellee.

Submitted to Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Beryl Conley died testate on December 27, 1974. His last will and testament was admitted to probate on January 2, 1975. On June 4, 1975, appellant, Delores Farley filed an election to take against the will of Beryl Conley the statutory share provided for a surviving spouse. Sections 633.236 - 633.246, The Code 1973. On July 19, 1976, Delores filed an application asking the court to determine her to be the surviving spouse of Beryl Conley. The application and election were resisted by appellees, the executors of the Conley estate, and the matter was tried to the court; from the adverse ruling of the court Delores appeals. The dispute was tried in probate as an equity matter, thus, on appeal our review is de novo. Section 633.33, The Code 1975; rule 4, Rules of Appellate Procedure. We give weight to the findings of the trial court, but are not bound by them. Rule 14(f)(7), R. App. P.

Delores was first ceremonially married in January of 1944 to Francis Leroy Jones. They were divorced in 1948. She remarried Jones in the summer of 1949 and they were again divorced in December, 1949. In a January 1950 ceremony, Delores married Beryl Conley, the deceased. They were divorced in November, 1953. On July 9, 1955, a son, Michael, was born to Delores. The child's father was Beryl Conley. In 1959 Delores married Francis Leroy Jones for the third time. They were divorced in 1964. Delores next married Thomas Farley in 1967. At the time of trial in the present action a proceeding had been commenced to terminate that marriage. Delores's claimed status as surviving spouse is based completely upon an alleged common-law remarriage to Beryl Conley during 1954-1955 and the absence of a formal divorce subsequent thereto. After having studied the record, we affirm the trial court.

Common-law marriage is recognized in Iowa. The elements and conditions necessary to establish the existence of a common-law marriage in this state are:

> 1. Intent and agreement in praesenti, as to marriage, on the part of both parties, together with continuous cohabitation and public declaration that they are husband and wife. 2. The burden of proof is on the one asserting the claim. 3. All elements of relationship as to marriage must be shown to exist. 4. A claim of such marriage is regarded with suspicion, and will be closely scrutinized. 5. When one party is dead, the essential elements must be shown by clear, consistent and convincing evidence.

In re Estate of Long, 251 Iowa 1042, 1047, 102 N.W.2d 76 (1960).

I. Initially, we consider several evidentiary objections made by Delores at trial and reurged on appeal. Over Delores's hearsay objection, the court allowed admission of hospital records concerning Beryl's medical treatment between 1962-1974 (Ex. 8); on each document Beryl listed his marital status as either single or divorced. The identical objection and ruling were made upon the introduction of other documents offered for the same "marital status" purpose; a real estate mortgage prepared in 1972 (Ex. 24), real estate sales contracts drawn in 1973 (Ex. 25, 26), copies of Beryl's income tax returns for years 1970-1973 (Ex. 18, 19, 20, 21), and copies of three of Beryl's wills (Ex. 27, 28, 23), drafted in 1971, 1972 and 1974 respectively. Delores contends that all of the above evidence, as well as any testimony of appellees' witnesses regarding Beryl's declarations, is improperly admitted hearsay and should not be considered upon our de novo review.

With the exception of the 1974 will (Ex. 23), the offered testimony and documents were properly admitted into evidence under the well-settled exception to the hearsay rule that matters of pedigree, including marriage, may be proved by family declarations. Sinkora v. Wlach, 239 Iowa 1392, 1403-4, 35 N.W.2d 40 (1948) (and cases cited therein). In each instance the declarant, Beryl, met the conditions essential for admission of pedigree testimony; he was dead, was a member of the family and thus presumed to have known the facts, and the declarations were made prior to the present matter of litigation being in controversy. In re Estate of Conner, 240 Iowa 479, 484, 36 N.W.2d 833 (1949); Sinkora, supra at 1404; 5 Wigmore, Evidence § 1602 (Chadbourn rev. 1974). Admission of written declarations, like those in this case, offered only to prove pedigree, are governed by the same rules as oral declarations. In re Estate of Conner, supra at 484-5; In re Estate of Frey, 207 Iowa 1229, 224 N.W. 597 (1929); 29 Am. Jur. 2d, Evidence §§ 508-517.

The admissibility of the 1974 Beryl Conley will requires a different view. The drafting attorney testified that Beryl requested the 1974 will be written to eliminate bequests to Delores present in the prior wills. Because these declarations were made within a few months of his death and were directly concerned with Delores's eventual share of his estate, the declaration in the 1974 will concerning marital status was not admissible. See Sinkora v. Wlach, 239 Iowa 1392, 1403-4, 35 N.W.2d 40 (1948). Thus, on our de novo review, we do not consider the 1974 will.

II. Reviewing the evidence properly before the court, we conclude that Delores has not established the existence of a common-law remarriage by clear, consistent and convincing evidence. Delores testified that Beryl moved in with her in 1954, and that they lived together for nearly two years thereafter "like we were never divorced or we were married." She said she intended marriage when Beryl moved in. Delores's witnesses, Della Keller and Jackquala Coats, both testified that Beryl referred to Delores as his wife and his "old lady" during the 1954-55 period. Each stated that they thought Beryl and Delores were married, that they did not know of the 1953 divorce or Delores's 1967 marriage to Thomas Farley. Mike Conley testified that Beryl told him Delores and he were "man and wife" when Mike was born in 1955. Sophia Larson, who lived in the same building as Delores in 1954-55 testified that Beryl lived with Delores, and called her his "old lady." However, she also testified that she never inquired if they were married and that she did not believe in common-law marriage.

Witnesses for appellees, Darrel and Merle Wilde, testified that Beryl and Delores did not live together after their 1953 divorce. The instruments considered in division I, supra, show Beryl's declaration of a "single" marital status. The record shows that Beryl and Delores visited each other periodically until his death. In 1967, while applying for a license to marry Farley, Delores swore under oath that she was unmarried. She testified that in 1967 she presumed herself divorced by Conley sometime between 1955-67. During 1954-55 and even at the time of trial Delores was known by some people as Jones, and by others as Conley. Since 1967 her public records, employment records and most people have addressed her as Farley.

The ultimate effect of this evidence is to show behavior inconsistent with the claim of common-law remarriage. That being the case, Delores has not met her burden. In re Estate of Malli, 260 Iowa 252, 257, 149 N.W.2d 155 (1967). See also Coleman v. Graves, 255 Iowa 396, 122 N.W.2d 853 (1963); In re Estate of Long, 251 Iowa 1042, 102 N.W.2d 76 (1960).

AFFIRMED.