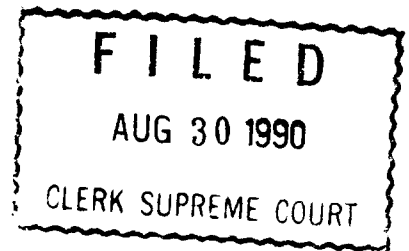


IN THE COURT OF APPEALS OF IOWA

No. 0-236 / 89-1098



LINDA SCHLATTER, Executor of the Estate of A. H. McCANN,
a/k/a DEWEY McCANN,

Appellant,

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vs.

EMMA BOVEE,

Appellee.

Appeal from the Iowa District Court for Clayton County,
John Bauercamper, Judge.

The plaintiff, executor, appeals from a jury verdict in a declaratory judgment action which determined the defendant, Emma Bovee, to be the common-law spouse of the deceased, Dewey McCann. The executor claims the district court erred in denying (1) a motion for new trial; and (2) a motion for judgment notwithstanding the verdict.
AFFIRMED.

Gary L. Robinson and Jeffrey P. Taylor of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellant.

Kathleen M. Neylan and Kevin C. Neylan of Neylan Law Office, Elkader, for appellee.

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

DONIELSON, P.J.

In 1972, Emma Bovee and Dewey McCann began to cohabit following the deaths of their respective spouses. This cohabitation continued through 1986 when Dewey entered a nursing home. Following Dewey's death in 1987, Emma filed an election to take against the will and occupy the homestead as the spouse of the deceased.

In September 1988, the executor for the estate of Dewey McCann filed a petition for declaratory judgment seeking a determination of whether Emma was the common-law wife of the decedent. During Emma and Dewey's cohabitation, the two never formally married. However, after extensive evidence was presented during the trial, the jury reached the conclusion that Emma was in fact the common-law spouse of Dewey. The executor claims the trial court erred in failing to grant the motions for a new trial and judgment notwithstanding the verdict. We affirm.

I. New Trial. With regard to motions for a new trial, the trial court has wide discretion. Such decisions will not be disturbed on appeal unless clear abuse of discretion is shown. Rice v. McDonald, 258 Iowa 372, 381, 138 N.W.2d 889, 894 (1965).

The executor contends in accordance with Iowa Rule of Civil Procedure 244 a new trial should be granted because the jury verdict: 1) was contrary to the weight of the evidence; 2) was prejudiced by erroneous jury instructions and/or interrogatories; and 3) overall failed to effectuate

substantial justice. After reviewing the record of the trial, we find no abuse of discretion in denying the executor's request for a new trial.

Sufficiency of Evidence. The three elements necessary to find a common-law marriage are: (1) present intent and agreement of the parties they are married, (2) continuous cohabitation, and (3) a "holding out" by the parties to the public they are husband and wife. In re Marriage of Gebhart, 426 N.W.2d 651, 652 (Iowa App. 1988) (citing In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979)). In addition, the burden of proof rests upon that person who asserts the common-law marriage. Id. Such proof must be by a preponderance of clear, consistent, and convincing evidence. In re Estate of Fisher, 176 N.W.2d 801 (Iowa 1970).

During the course of the trial, Emma presented a variety of evidence to support her assertion that she and Dewey had a common-law marriage. She accepted a wedding ring set from Dewey. The couple repeatedly referred to one another as the "Mr." and the "Mrs." The evidence also reflected a continuous cohabitation, as well as shared accommodations while traveling. Dewey and Emma also received mail at their residence as Mr. and Mrs. McCann. Several witnesses testified the couple acted as if they were married and presented themselves that way to the public. The trial court did not err in finding substantial evidence to support the jury's verdict.

Instructions and Interrogatories. Instructions to the jury must be considered in their entirety and not piecemeal. Robeson v. Dilts, 170 N.W.2d 408, 414 (Iowa 1969). After examining the jury instructions as a whole, they properly stated the law. The trial court did not err when instructing the jury.

The trial court has considerable discretion as to the submission of interrogatories. Iowa R. Civ. P. 206. The majority of the interrogatories involved issues of evidence rather than facts which were necessary in deciding the case. See Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 237 (Iowa 1974). The remainder of the interrogatories posed questions which the jury had to decide when reaching the verdict. The district court did not err when refusing to submit the interrogatories.

Substantial Justice. The executor asserts the verdict rendered by the jury fails to effectuate substantial justice and is therefore entitled to a new trial. We disagree. There was no abuse of discretion by the trial court; the verdict is not contrary to the weight of the evidence; nor is it contrary to law set out in previous cases. Therefore, the motion for a new trial was properly denied.

II. Judgment Notwithstanding the Verdict. A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978);

Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

The district court properly refused to grant the motion for a judgment notwithstanding the verdict.

Costs of this appeal are assessed to the executor. For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.