

IN THE COURT OF APPEALS OF IOWA

FILED

SEP - 6 1984

CLERK SUPREME COURT

IN RE MARRIAGE OF JOYCE ELAINE EDWARDS AND GARY JON EDWARDS

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Upon the Petition of	)	
JOYCE ELAINE EDWARDS,	)	Filed September 6, 1984
Petitioner-Appellee,	)	
And Concerning	)	
GARY JON EDWARDS,	)	<u>4-269</u>
Respondent-Appellant.	)	<u>84-35</u>

Appeal from the Iowa District Court for Des Moines County - John C. Miller, Judge.

Respondent appeals from the decree dissolving the parties' marriage asserting that: (1) the trial court erred in finding that a common law marriage existed, and (2) the trial court erred in awarding petitioner custody of the parties' two children. **AFFIRMED.**

Alfredo G. Parrish, Des Moines, Iowa, for respondent-appellant.

David Adams, Burlington, Iowa, for petitioner-appellee.

Considered by Snell, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Respondent appeals from the decree dissolving the parties' marriage asserting that: (1) the trial court erred in finding that a common law marriage existed, and (2) the trial court erred in awarding petitioner custody of the parties' two children. We affirm.

Our review of this proceeding in equity is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I. Common Law Marriage. The party asserting the existence of a common law marriage has the burden of proving three elements: (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).

The evidence in this case showed that petitioner, Joyce Edwards, and respondent, Gary Edwards, lived together continuously from June of 1970 until April of 1983 except for several separations of a few months. There was also evidence that Joyce publicly referred to Gary as her husband and that Gary publicly referred to Joyce as his wife. Apparently neither party objected to the other's characterization of a marriage relationship.

Gary contends that the trial court erred in finding that he had the requisite intent to enter into a marital relationship. He presented evidence that on several occasions he had told Joyce that he did not want to marry her. The trial court interpreted these statements to mean that Gary did not want to go through a marriage ceremony, rather than that he did not want to enter into a marriage relationship. After reviewing the entire record we cannot say the trial court erred in finding an intent by both parties to be married.

In the context of a common law marriage intent may be shown by circumstantial evidence. In re Marriage of Winegard, 278 N.W.2d at 511. Although

introduction of one party by the other as the wife or husband is not in itself proof of a present agreement and intent to be married, it is an acknowledgement of the marital relationship and may be considered on the question of intent. In re Estate of Fisher, 176 N.W.2d 801, 807 (Iowa 1970). In addition to the public declarations in this case, Joyce used Gary's last name with his agreement and permission for many years. In 1974 the parties bought a house and took title in the names of Gary and Joyce Edwards, husband and wife. For several years the parties filed income tax returns as Gary and Joyce Edwards, married filing jointly.

Although Gary may have on occasion stated that he did not intend to marry Joyce, his actions in filing joint income tax returns, buying a house as husband and wife, permitting Joyce and the children to use his name, coupled with his references to Joyce as his wife, outweigh his denials of intent. The trial court did not err in finding that the existence of a common law marriage had been established.

II. Child Custody. The factors to be considered by a court in determining the custody of children are found in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Of course, the primary consideration is the best interest of the children. Iowa R. App. P. 14(f)(15).

In this case the parties have two daughters: Margaret, born in 1971, and Diane, born in 1981. In addition Joyce has two children from previous marriages who lived with the parties, Mike Mitchell and Pam Laird. Only the custody of Margaret and Diane is at issue in this appeal.

The evidence showed that both parties have close interpersonal relationships with the children and both parties appear to be capable of providing for the needs of the children. However, we cannot say the trial court erred in concluding that it is in the best interest of the children to remain with Joyce. During the marriage Joyce was the principal homemaker. Furthermore, the children have good relationships with their half-siblings, Mike and Pam, which would be disrupted by

separation. Finally, we cannot ignore the fact that Pam has charged Gary with sexually abusing her. These charges were still being investigated at the time of the dissolution hearing. Although there was evidence that Pam may have fabricated the story in retaliation for Gary's strict disciplining of her, a social services investigator testified that in her opinion there was probable cause to believe that the abuse had occurred and that placing Margaret and Diane in Gary's custody would be a mistake.

AFFIRMED.