

FILED

OCT 19 1978

90

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PATRICIA A. WARREN and ESTLE E. WARREN

Upon the Petition of	)	
PATRICIA A. WARREN,	)	Filed October 19, 1978
Appellee,	)	
And Concerning	)	651
ESTLE L. WARREN,	)	2-61130
Appellant.	)	

Appeal from the Cerro Gordo District Court - J. W. Frye, Judge.

Respondent appeals from property division provision of dissolution decree and the finding of common law marriage. Affirmed.

R. L. Stephenson, of Beck, Pappajohn, Shriver & Stephenson, of Mason City, for appellant.

James P. McGuire, of Mason City, for appellee.

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

PER CURIAM

Respondent, Estle Warren's appeal from the trial court's decree concerns dissolution of a common law marriage. On November 12, 1976, Patricia Warren filed a petition for dissolution of her alleged common law marriage to Estle Warren. She also filed an application for temporary alimony and attorney fees. The application for temporary aid was granted by order of February 17, 1977. On March 10, 1977, Estle filed in the supreme court an application for an order granting interlocutory appeal of the temporary award, challenging the trial court ruling that a common law marriage existed. Respondent's application was denied by that court on March 18, 1977, without prejudice to respondent's right to challenge the common law marriage ruling in the event of appeal from the subsequent dissolution decree. The dissolution decree was filed September 9, 1977, adjudicating that a common law marriage had been established, dissolving the marriage, and ordering respondent to pay petitioner a \$17,000 cash property settlement and \$1000 toward her attorney's fees.

On appeal Estle raises three issues: (1) whether the award of temporary alimony and attorney fees was not justified because petitioner failed to establish the existence of a common law marriage; (2) whether the September 1977 final decree was not justified for the same reason; and (3) assuming a common law marriage was established, whether the property division provision of the September 1977 decree was inequitable. Our review is de novo. Rule 4, Rules of Appellate Procedure.

I. Temporary Alimony and Attorney Fees. We hold the temporary alimony and attorney fee allowances are not reviewable on this appeal. The order for temporary alimony and attorney fees was a final judgment in the sense that a direct appeal therefrom may have been taken as a matter of right. Respondent did not exercise that right and therefore we decline to review the issue now. *In re Marriage of Winegard*, 257 N.W.2d 609, 613-14 (Iowa 1977); *In re Marriage of Prybil*, 230 N.W.2d 487, 488 (Iowa 1975).

II. Common Law Marriage. Respondent next challenges the September 1977 dissolution decree by arguing that the evidence presented did not establish the existence of a common law marriage between the parties. We disagree.

Common law marriage is recognized in Iowa. When such a relationship is alleged the following principles, recently summarized in *In re Marriage of Grother*, 242 N.W.2d 1 (Iowa 1976), apply. The burden is on the proponent of the marriage to prove it by a preponderance of evidence. A claim of common law marriage is closely scrutinized. It is necessary for the proponent to prove (1) intent and agreement in praesenti to be married, (2) continuous cohabitation and (3) public declaration by both that they were husband and wife.

The record shows that parties first met in 1958 when both were employed by Reserve Life Insurance Company. Each had previously been married and divorced. At that time Pat lived in a house in Mason City. Estle was apparently living with his ex-wife in her Waterloo home. His sales position required him to travel extensively through northern Iowa; for days at a time he would be away from Waterloo. In 1959 Estle purchased a home on Clear Lake. Pat claims that Estle lived with her, as husband, in Mason City beginning in 1958, whenever he wasn't working on the road. She testified they would spend summers at the Clear Lake home. Estle claims he has lived in the non-winterized Clear Lake home since 1959, except for the period 1974-75 when he was an inmate in the Ft. Madison penitentiary. Betty Warren, Estle's ex-wife, testified that she and Estle lived as common law husband and wife in her Waterloo home until 1964. It is undisputed that Pat sold her Mason City home in 1970 and moved, with her three children, into the Clear Lake home with Estle. We find that continuous cohabitation has been established.

Of course continuous cohabitation is not in itself sufficient to establish a common law marriage. Estle denies that the parties held themselves out to the public as man and wife. Estle's brother Floyd testified that Estle never told him Pat was his wife. Pat, however, testified that she and Estle declared themselves to be husband and wife in numerous social settings, including her children's school. She further testified that she held a charge account at a local store from 1971-77 under the name Pat Warren, that the letters Estle wrote her while an inmate in the penitentiary were addressed to Pat Warren, and her paychecks for employment at a nursing home named Pat Warren payee. Lorraine Dotson testified she worked with Pat in 1973 and that Estle, when calling for Pat, would ask for his wife. Dotson testified also that Pat told other employees that Estle was her husband. One exhibit received at trial was a 1972

promissory note in favor of Walter Johnson signed by Estle Warren and Pat Warren. Another exhibit was a 1974 federal joint income tax return for Estle and Pat Warren.

Also admitted into evidence was a portion of the transcript from Estle's 1972 criminal trial for obtaining money under false pretenses. At that time Estle testified he had been married to Pat Warren since 1969, that he had given her a ring, and that she sometimes used the name Pat Lennan for business purposes because she was his employee. At trial in this case Estle testified he had committed perjury in his criminal trial testimony. On our de novo review of the dispute we find Pat has established by a preponderance of the evidence that the parties publicly declared themselves to be husband and wife.

Estle also challenges the trial court's finding that the parties intended and agreed in praesenti to be married. He argues that he never intended marriage. We agree with the trial court's contrary finding in this regard. Relevant to our conclusion on the intent issue is the principle commented on in *In Re Marriage of Winegard*, 257 N.W.2d 609, 616 (Iowa 1977);

[I]t is immaterial how the intention is evidenced. The woman, indeed, may be entitled to marital rights if she intends present marriage, and the man does not, provided they cohabit and provided his conduct is such as to justify her in believing that he intends present marriage.

Applying the quoted principle, we find the evidence previously referred to adequately established the required matrimonial intent. It is well established that circumstantial as well as direct evidence may be relied upon to demonstrate a common law marriage. *State v. Lawson*, 165 N.W.2d 838, 839 (Iowa 1969). We affirm the trial court ruling that a common law marriage existed.

III. Property Division. Estle claims the \$17,000 he was ordered to pay Pat as property settlement is excessive. In our review of this issue we are guided by the criteria stated in *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). We do not consider fault. *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972).

The trial court found the net worth of the parties to be approximately \$50,000, the value of Estle's Clear Lake home less debts to two financial institutions. Pat's assets were estimated to comprise only \$500 of the total. Estle claims the net worth figure should be only \$4000. At the time of the temporary alimony hearing Estle listed debts of \$6900 in addition to \$5600 owed to financial institutions; a \$6000 debt to his

ex-wife Betty and a \$900 debt to his brother Floyd. After that hearing, in which the trial court determined there was sufficient evidence of a common law marriage to justify a temporary award, and before the dissolution hearing, Estle executed instruments evidencing obligations of \$46,513.54 to Betty Warren and Floyd Warren. More than half of the \$46,000 total consists of promissory notes and contingent mortgages given Betty and Floyd for loans made Estle at times which, if not revived by admission in writing would have been barred by the statutory limitation period for enforcement of oral contracts, §§ 614.1(4), 614.11, The Code. A \$19,003 confession of judgment to Betty Warren was prepared and filed in the district court during the same interim period. It represents unpaid child support and interest thereon which Estle apparently voluntarily promised to pay at the rate of \$100 per month for Todd Warren in 1959. Both Betty Warren and Floyd Warren testified that they were owed the money by Estle, but that they had never attempted to enforce the oral obligations.

At the time of trial Pat was 48 years old and suffered from a nervous condition. She was earning \$100 per month from babysitting and dog trimming. Estle was 54 years old, had high blood pressure, and was employed as a salesman by a boat marina. His income therefrom has fluctuated between \$7800 and \$12,000 annually. Pat was previously employed for approximately 15 years in Estle's businesses, and was paid infrequently. She is unskilled. On our de novo review of the entire record, including the evidence detailed in this opinion, we conclude that the property division contained in the trial court's decree was equitable and should be affirmed. Costs are assessed to Estle and, in addition, he shall pay the sum of \$900 to apply upon Pat's attorney fees on this appeal.

AFFIRMED.