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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **IN THE MATTER OF THE ESTATE OF HAROLD LONGSHORE, Deceased;** | ) | |
| | ) | 135 |
| **CLISTA LONGSHORE,** Petitioner-Appellant, | ) | Filed February 26, 1986 |
| **vs.** | ) | 5-720 / 85-892 |
| **JOVENEY BALASKI,** | ) | |
| Respondent-Appellee. | ) | |

Appeal from the Iowa District Court for Polk County (No. 42-18082), Ray A Fenton, Judge.

Appellant, decedent's mother, appeals from a declaratory judgment that appellee is decedent's surviving spouse, by virtue of a common-law marriage. **AFFIRMED.**

Ann Marie Brick of Brick, Seckington, Bowers, Swartz & Gentry, Des Moines, for appellant.

Bruce Lundy Butler, Des Moines, for appellee.

Considered by Oxberger, C.J., Hayden, and Sackett, JJ.

The appellant is the decedent's mother. She objects to the court's decision that appellee is decedent's common-law wife, and therefore his surviving spouse. We affirm.

Decedent Harold Longshore died intestate after a car accident on November 12, 1983. He was forty-six years old. The appellee, Joveney Balaski, filed a petition for administration of his estate and for appointment as administrator. She alleged she was decedent's surviving spouse by virtue of a common-law marriage. Decedent's mother, Clista Longshore, filed a petition for removal of Joveney as administrator, asserting there was no common-law marriage and that it was inappropriate for Joveney to represent decedent's estate until the dispute regarding the existence of a common-law marriage had been resolved. The appellant further filed a petition for a declaratory judgment establishing her as the sole distributee of decedent's estate.

Trial was held with voluminous evidence presented on both sides. The trial court ruled that a common-law marriage existed between decedent and Joveney. It is this decision which Clista has appealed.

Both parties agree the sole issue in determining whether a motion to dismiss was properly overruled and whether the final decision was proper is whether a common-law marriage existed.

The scope of review is de novo. Iowa R. App. P. 4. Although we are not bound by the trial court findings of fact, we give weight to the holdings, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

When one party is dead it is the duty of the person asserting the elements to show that a common-law marriage existed by clear, consistent and convincing evidence. In re Estate of Malli, 260 Iowa 252, 256, 149 N.W.2d 155, 158 (1967).

The elements of a common-law marriage include: (1) intent and agreement in praesenti, as to marriage, 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 1979). It is this last element which is strongly disputed by appellant. It has been referred to as the "acid test" of a common-law marriage. In re Estate of Dallman, 228 N.W.2d 187, 190 (Iowa 1975).

Harold and Joveney met in May 1976 when she rented a home from him. In fall of 1976 the couple became intimate and they started living together permanently in May 1981. The appellant showed that in a worker's compensation hearing six months before his death, Harold gave as his address his mother's home, and not the one he shared with Joveney. The appellant testified that she did not know Harold and Joveney were living together and Harold knew his mother would not approve of such an arrangement. He collected rent checks from Joveney through July 1983, although she said this was rent paid on behalf of her sons and not herself. Harold's and Joveney's income tax returns reflected a single status. Separate checking accounts were kept, although there was a joint account in Harold's and Joveney's name at a hardware store. A form filled out by Harold at Iowa Lutheran Hospital also indicated he was single. Forms at work for medical coverage and indicating a beneficiary for death benefits listed his mother as beneficiary of the benefits, but the section naming spouse and dependents was not completed.

Joveney presented twenty-two witnesses, some who were friends or relatives, and others who appeared to be unbiased. A witness that had hired Harold to dig a basement for her testified she asked Harold if he was married, and he said, "yes." Both she and her husband discussed the common-law marriage

of Harold and Joveney with them. Another man who did construction for Harold testified Harold referred to Joveney on several occasions as his wife. The wife of another friend of Harold's said Harold introduced Joveney to her as his wife. The husband of a friend of Joveney's testified he asked Harold when he was going to "make it legal." He said Harold responded, "Well, as far as I'm concerned, we already are." One of the strongest pieces of evidence is the statement of the twenty-eight-year-old niece of appellant. This relative of decedent's mother testified she talked with Harold one month before he was killed. Harold indicated he was married.

The appellant compares this fact situation to that in In re Estate of Dallman, 228 N.W.2d 187 (Iowa 1975). The court there found there was no holding out, although the couple cohabited. Id. at 191. They indicated on their tax returns that their status was single. Id. at 188. The decedent also executed a mortgage and in so doing, indicated he was single. Id.

We find the Dallman case to be distinguishable. The only evidence of holding out was that the decedent at times referred to a woman he lived with as the "Mrs." or "Ma." Id. The facts here go well beyond such slim evidence. Numerous witnesses, including some unbiased witnesses, described statements by the decedent in which he specifically indicated he was married to Joveney.

We have highlighted some of the key evidence presented. Clearly, there is some support for either conclusion. Appellant emphasizes the fact she has documentation to support her belief there is no common-law marriage. However, Joveney testified that the income tax returns were filed separately so as to incur lower taxation. The court has indicated that filing of income tax returns with a single status is supportive that there is no common-law marriage, but is not conclusive. In re Marriage of Winegard, 278 N.W.2d at 511. In Winegard,

the court found other evidence sufficient to overcome the contrary inference. Id.

We find that there is considerable support for a finding that a common-law marriage existed and there was holding out. The overwhelming number of interested and disinterested witnesses who testified as to Harold's statements strongly indicates there was holding out. Much of the determination also involves a decision regarding the credibility of witnesses. This is a matter best left to the trial court which had the opportunity to observe the witnesses first-hand.

We agree with the trial court there is clear and convincing evidence that a common-law marriage existed. Accordingly, we affirm the rulings of the court.

**AFFIRMED.**

Hayden, J., concurs; Sackett, J., dissents.

Harold Longshore truly led two lives. There is evidence in some instances Harold indicated he was a married man. There is equally strong (or stronger) evidence he did not consider himself married.

The burden to prove a common law marriage is on Joveney. Such a claim will be regarded with suspicion there being no public policy in Iowa favoring common law marriage. See In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979).

I fail to find Joveney met that burden. I would find no common law marriage existed.