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DISTRICT IV

May 9, 2024

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You are hereby notified that the Court has entered the following opinion and order:

2023AP444 In re the estate of Norma L. Smith: Randall J. Smith v. Prairie Trust (L.C. # 2022PR110)

Before Kloppenburg, P.J., Nashold, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Randall Smith appeals a circuit court order denying his motion for declaratory judgment in which he sought a ruling that he and Norma Smith entered into a common law marriage under Alabama law while they were living in Alabama in the early to mid-1980s. Randall argues that the court erred by failing to apply the correct legal standard for common law marriage under Alabama law and by failing to properly apply summary judgment methodology. Based on our

review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[1] We affirm.

This case arises in the context of a probate proceeding for the administration of Norma's estate in Wisconsin. In support of his motion for a declaratory judgment, Randall submitted briefing, affidavits, and a transcript of his deposition testimony. The personal representative of Norma's estate, Prairie Trust, filed a brief opposing Randall's motion. Prairie Trust argued that Randall failed to show that he and Norma had entered into a common law marriage under Alabama law.[2] The circuit court agreed with Prairie Trust and therefore denied Randall's motion.[3]

Under Alabama law, "[c]laims of the existence of a common-law marriage are subjected to strict scrutiny and must be supported by clear and convincing evidence." ***Melton v. Jenkins***, 92 So. 3d 105, 110 (Ala. Civ. App. 2012); *see also* ***Walton v. Walton***, 409 So. 2d 858, 860-61 (Ala. Civ. App. 1982) ("[T]he courts will closely scrutinize claims of common-law marriage and require clear and convincing proof thereof.").

The party arguing that a common law marriage exists must satisfy each of the following three elements: "1) capacity [to enter a marriage]; 2) present, mutual agreement to permanently

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] There is no dispute that Wisconsin would recognize a common law marriage validly entered into in another state.

[3] In this appeal, Prairie Trust has filed a respondent's brief that omits record citations and legal citations in multiple instances when we think it should be apparent to a reasonable litigant that citations are necessary. We remind Prairie Trust's counsel that this court's briefing rules require "citations to the authorities, statutes and parts of the record relied on." *See* WIS. STAT. RULE 809.19(1)(d)-(e), (3)(a)2., and (4)(b).

enter the marriage relationship to the exclusion of all other relationships; and 3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation." ***Boswell v. Boswell***, 497 So. 2d 479, 480 (Ala. 1986).

Here, after holding a hearing and considering the evidence that Randall submitted, the circuit court concluded that Randall failed to satisfy the third element. The court acknowledged that there were some facts showing public recognition of Randall and Norma's relationship as a marriage. For example, the court found that Randall and Norma held themselves out to the general public as married and that they exchanged rings. Ultimately, however, the court found that they had not made a public assumption of marital duties. It found that they never held title to property together, always maintained separate finances, and never filed joint tax returns or otherwise represented that they were married to tax authorities. The court concluded that the evidence showed a "common thread of avoiding the financial liability that comes with being legally married" and that Randall and Norma never "assumed the financial liabilities that go[] along with a valid marriage."

On appeal, Randall first argues that the circuit court erred by failing to apply the correct legal standard for common law marriage under Alabama law. "Whether the circuit court has applied the correct legal standard is a question of law reviewed de novo." ***Landwehr v. Landwehr***, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180. However, the determination of whether the elements of a common law marriage exist is generally considered a factual question for the circuit court. *See* ***Watkins v. Watkins***, 190 So. 3d 925, 932 (Ala. Civ. App. 2015) ("Whether the essential elements of a common-law marriage exist is a question of fact."). We uphold a circuit court's factual findings unless they are shown to be clearly erroneous. ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615.

Randall argues that the circuit court applied an incorrect legal standard because it considered conduct that he and Norma engaged in many years after they moved from Alabama to Wisconsin. He argues that this conduct is not relevant because (1) the question of whether the parties formed a common law marriage while living in Alabama in the early to mid-1980s depends on their conduct during that time period; and (2) a common law marriage, once formed, may be dissolved only by death or formal legal action.

We agree with Randall that the question is whether the parties formed a common law marriage while living in Alabama and that such a marriage, once formed, may be dissolved only by death or formal legal action. *See* ***Adams v. Boan***, 559 So. 2d 1084, 1087 (Ala. 1990) ("'[T]he operative time is when the agreement is initially entered into, and once other conditions of public recognition and cohabitation are met the only ways to terminate a common-law marriage are by death or divorce.'" (quoting ***Skipworth v. Skipworth***, 360 So. 2d 975, 977 (Ala. 1978)).

Accordingly, we also agree with Randall that our focus should be on the parties' conduct while living in Alabama. However, even focusing only on that conduct, Randall does not persuade us that he carried his burden to show by clear and convincing evidence that he and Norma formed a common law marriage based on their conduct while living in Alabama. The evidence on this point was mixed and reasonably supported a finding that there was no common law marriage. Randall and Norma lived together in Alabama, began referring to each other as husband and wife in Alabama, and exchanged rings in Alabama. However, they never signed an affidavit of common law marriage, they did not have children together until moving to

Wisconsin, and Randall points to no evidence that they ever bought property together in Alabama or maintained joint accounts while living in Alabama.[4]

It is true that the circuit court considered the parties' subsequent conduct in Wisconsin, but Randall does not persuade us that this conduct is wholly irrelevant.[5] Rather, the conduct may support reasonable inferences, albeit weak ones, relating to the parties' marital intentions while previously living in Alabama.

One example that is especially remote in time is Norma's will that she executed in 2020 in which she referred to Randall as only a "friend." The circuit court found that Norma's will supported a reasonable inference that she had *never* fully committed to the relationship as a marriage. The court acknowledged that an alternative reasonable inference was that she changed her mind about having a martial relationship with Randall, but the court declined to draw that inference. Given the lengthy time gap between the year that Norma drafted her will and the years that the parties lived in Alabama in the 1980s, we conclude that the inference the court drew was a particularly weak one, but we also conclude that the inference was not unreasonable as a matter of law and therefore did not constitute clearly erroneous fact finding. *See* ***Landrey v. United Servs. Auto. Ass'n***, 49 Wis. 2d 150, 157, 181 N.W.2d 407 (1970) ("'[W]here more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the one reached by the fact finder.'" (quoted source omitted)).

[4] Although Randall and Norma shared the last name Smith, Norma had taken that name from her first husband and kept it after the divorce.

[5] In places in his briefing, even Randall relies on the parties' subsequent conduct. For example, he points out that the parties had four children after moving to Wisconsin and that Norma carried him on her health insurance up to the time of her death.

Randall next argues that the circuit court failed to apply the proper legal standard because the court focused on the parties' "private" financial information, such as tax returns and bank accounts. He argues that this "private" information does not answer the question of whether there was "public" recognition of their relationship. As previously noted, the third element of a common law marriage in Alabama requires "public recognition of the relationship as a marriage and public assumption of marital duties." *See* ***Boswell***, 497 So. 2d at 480.

We reject Randall's "private" information argument because it lacks support in the Alabama cases that he cites. On the contrary, these cases show that the parties' financial information is relevant, even if it would normally be considered "private" in other contexts. In ***Aaberg v. Aaberg***, 512 So. 2d 1375 (Ala. 1987), for example, the court considered evidence that "[t]he couple maintained separate checking and charge accounts, except for a joint business account." ***Id.*** at 1376. In ***Waller v. Waller***, 567 So. 2d 869 (Ala. Civ. App. 1990), the court similarly considered "the fact that the parties handled their finances separately, had no joint credit cards, and filed separate income tax returns." ***Id.*** at 870.

Randall points out that the courts in these and other Alabama cases upheld lower court findings that a common law marriage existed even when, as is true here, there was evidence that the parties filed separate tax returns or maintained separate financial accounts. Randall apparently means to argue based on these cases that the circuit court in this case was bound to find the existence of a common law marriage as a matter of law. We are not persuaded. "The determination of whether a relationship … was intended as a common-law marriage is made on the facts of a particular case, with regard to the situation and circumstances of the individuals involved," ***Boswell***, 497 So. 2d at 480, and, as noted above, whether the parties' relationship satisfied each element of a common law marriage is ultimately a question of fact for the circuit

court to decide, *see* ***Watkins***, 190 So. 3d at 932. Randall does not persuade us that the circumstances in this case required a finding of common law marriage as a matter of law.

We turn to Randall's argument that the circuit court erred by failing to properly apply summary judgment methodology. Randall argues that the court's decision denying his motion for declaratory judgment was based solely on written submissions and that the court effectively treated his motion as a motion for summary judgment. He argues that the court was therefore required to apply summary judgment methodology. According to Randall, the court failed to properly apply summary judgment methodology because it effectively granted summary judgment in favor of Prairie Trust while drawing inferences from the evidence that were not in his favor.

We are not persuaded that the circuit court was required to apply summary judgment methodology. During the hearing that the court held on Randall's motion for declaratory judgment, the court provided the parties with an opportunity to offer additional evidence, including live testimony. Although the parties chose not to present live testimony or other additional evidence, they were free to do so.[6] Further, neither Randall nor Prairie Trust argued in the circuit court that the court should proceed using summary judgment standards. In these circumstances, we disagree with Randall that the court erred by failing to apply summary judgment methodology, and we conclude instead that the court was free to draw reasonable inferences in favor of either party in its role as fact finder.

[6] Randall argues that the circuit court "refused" to hear his testimony at the hearing. We disagree that this is a reasonable characterization of the record. When Randall's counsel summarized for the court what some of Randall's testimony might be, the court stated that it had already accepted those facts as true, but it did not refuse to hear testimony.

Randall next argues that we should give no deference to the circuit court's factual findings because the findings are based on written submissions that we can review as well as the circuit court. However, Randall provides no authority to support this argument apart from summary judgment case law, which for the reasons already explained, we conclude is inapplicable here.

Randall next appears to argue in the alternative that, even if there was not summary judgment, and even if we apply our usual deferential standard of review to the circuit court's factual findings, one of the court's underlying findings must be overturned as clearly erroneous. Specifically, Randall argues that the court's finding that he and Norma never filed tax returns as married is inconsistent with his deposition testimony. We disagree. Randall's deposition testimony was equivocal on this point. He initially testified that he signed his tax returns as "married," but upon further examination he admitted that he could not "positively" say this was true and that he "couldn't remember that stuff."

Randall also argues that the circuit court's finding that Norma never filed tax returns as married "overstate[d]" the evidence because the only tax returns in the record were Norma's returns from 2006 and 2011. We are not persuaded by this argument because, as noted at the outset, the burden of proof was on Randall to show the existence of a common law marriage in Alabama by clear and convincing evidence. *See* ***Melton***, 92 So. 3d at 110; ***Walton***, 409 So. 2d at 860-61. Given Randall's burden, the court reasonably drew inferences against him based on the lack of more complete evidence.

In sum, for the reasons explained above, we conclude that the circuit court properly denied Randall's motion for declaratory judgment.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals