

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003000-MR

PATRICIA BATES

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE DAVID L. KNOX, JUDGE
ACTION NO. 96-CI-000043 & 96-CI-000087

MICHELLE N. BATES; JAMES L.
BATES; AND JOHN HANES

APPELLEES

OPINION AND ORDER
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING WITH DIRECTIONS

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, and KNOPE, JUDGES.

JOHNSON, JUDGE: Patricia Bates (Patricia) has appealed from the judgment of the Woodford Circuit Court entered on September 25, 1997, which determined that a valid common-law marriage existed between her husband, the appellee, James L. Bates (James), and the appellee, Michelle N. Bates (Michelle). Patricia has also appealed various interlocutory rulings entered prior to the trial court's final order on the issue of the existence of the James/Michelle marriage. We affirm in part, reverse in part and remand with directions.

The facts and procedural history of this case are both vexatious and bizarre. James and Michelle entered into a statutory ceremonial marriage in Kentucky on November 21, 1980. Kentucky Revised Statutes (KRS)402.050. This was James' second marriage and Michelle's first marriage. James and Michelle moved to Georgia and, in 1982, their son, James Landon Bates, Jr. (Landon), was born. James and Michelle had marital problems and, in 1984, Michelle sought a dissolution of the marriage. On June 25, 1985, their marriage was dissolved by decree.¹ Although their marriage had been dissolved, James and Michelle continued to cohabit. Nevertheless, the parties carried out the provisions for distributing property contained in their settlement agreement. While the parties dispute that James paid Michelle all the amounts required as maintenance under the agreement, James' income tax returns after the divorce contain deductions for alimony. Further, James and Michelle no longer filed joint returns: James filed as head-of-household; the only return in the record filed by Michelle after the dissolution, her 1985 return, listed her as a single person.

¹Under the terms of their property settlement agreement, incorporated into the decree, Michelle was awarded custody of Landon, James was required to pay child support in the amount of \$400 per month (to increase to \$500 per month in 1990). Additionally, James was required to maintain health insurance on Landon, pay half of his medical bills not covered by insurance, maintain a life insurance policy with Landon as the beneficiary, and pay one-half of Landon's college expenses. Michelle was ordered to convey her interest in the real property in exchange for \$8,000, her share of its equity, and she was awarded \$18,000 in lump-sum maintenance to be paid over four years. Michelle was also allowed to remain in the marital residence until September 1, 1985.

In 1987, James' job required that he relocate to Minnesota. Michelle and Landon moved with James and they continued to live together in that state until 1988. In that year, after a trip to Europe, Michelle and Landon moved to Kentucky and established a residence in Lexington. James visited on weekends. At some point, Michelle learned that James was dating Patricia and the intimate relationship of James and Michelle ended.

In September 1989, Michelle filed a petition in the Franklin Circuit Court seeking modification of the Georgia divorce decree. She alleged in that petition that notwithstanding the proceedings in Georgia, she and James did not separate until August 1988. In a memorandum submitted in that case, she argued as follows:

The Court should view this arrangement as a common law marriage which is recognized under Georgia law. Under the law of that jurisdiction [] the parties [met the] threefold marriage test; they were able to contract, held themselves out to the world as married, and were reputed by all who knew them to be married. The divorce was a sham engineered by [James] when he sold his valuable company.

In his response to her memorandum, James argued that in order for a valid common-law marriage to exist under Georgia law, there must have been a contract predicated on a "meeting of the minds."

The response further provided:

Finally, Petitioner [Michelle] alleges a common law marriage between the parties. . . . Unfortunately, the three part test she cites is not the test as recognized by the State of Georgia. OCGA § 19-3-1 gives the three prerequisites to a valid marriage:
(1) Parties able to contract;

- (2) An actual contract; and
- (3) Consummation according to law.

. . . To have a contract there must be a meeting of the minds. The Respondent [James] most emphatically maintains there was never a meeting of the minds between the parties in contemplation of a common law marriage. Thus, according to Georgia law, the action for a modification for spousal support should be dismissed."

The Franklin Circuit Court declined to modify the maintenance provisions of the Georgia decree finding that "a sum certain has been paid to [Michelle] and maintenance is not now modifiable." Although that court did not specifically address Michelle's claim of entitlement to maintenance based on her claim that she and James had entered a common-law marriage after the dissolution, that claim was clearly rejected by implication. Michelle did not appeal that ruling.

On October 11, 1990, James married Patricia in a statutory ceremony in Minnesota. Although she testified that she believed herself to be still married to James, Michelle testified that she did not alert Patricia to that fact.² James continued

²In a pretrial deposition, Michelle testified as follows:

Q. Michelle, you indicated that when you purchased your home in 1990 that Jim had already gotten married and you knew by the time that you purchased that home that they were married? . . . Did you present yourself on Jim's doorstep to let Patty know that you were already married to him?

A. I wouldn't come to her doorstep to talk to her about anything. I had nothing to discuss with her.

Q. So you did not let her know that you were married to him?

(continued...)

to support Landon per the Georgia divorce decree. A few days after James and Patricia married, Michelle purchased a house in Lexington. The deed, which as a grantee she was required to execute, described Michelle as a single person. KRS 382.135. She testified that the reason she represented herself as a single person was because to do otherwise "would have opened up a can of worms and I couldn't have got the house." Michelle herself re-married in January 1992. That marriage, to John Hanes, was dissolved by the Franklin Circuit Court in May 1993. In 1992, James and Patricia moved to Kentucky and built their marital residence on a 65-acre farm in Woodford County purchased by James prior to their marriage.

James and Patricia, who had no children together, separated in January 1996. Patricia commenced this action on

²(...continued)

A. We don't have anything to discuss.

Q. That's not my question. Did you let her know that you were married to Jim Bates?

A. Patty and I do not talk.

Q. Okay. Can you be responsive to the question I ask you?

A. I can't answer it.

[Q.] I mean, it's a simple yes or no question.

A. We did not talk.

Q. Yeah. But did you communicate with her some other way?

A. No, I did not communicate. We do not have any communications. We never have.

February 7, 1996. By agreement, Patricia was allowed to reside in a trailer located on the farm during the pendency of the dissolution action and received \$1,200 per month for her living expenses. James moved to Florida soon after the dissolution proceedings were commenced. With two minor exceptions not relevant to the issues in this appeal, James admitted the allegations contained in Patricia's petition for dissolution. He also asked the court for a decree dissolving his marriage and for the restoration of each party's non-marital property and a equitable division of the marital estate.

The complexion of the dissolution action changed on March 21, 1996, when Michelle filed a petition for dissolution against James in the Woodford Circuit Court, naming Patricia and John Hanes³ as additional respondents. Michelle claimed that "from and after June 25, 1985, [she and James] entered into a common law marriage, valid and recognized by law in the state of Georgia." Because that marriage had never been dissolved, she alleged that the marriage between James and Patricia, and her own marriage to John, were "void and must be disregarded and declared void" by the trial court. Michelle asked for a jury trial on the issue of the validity of her common-law marriage to James, that the trial court enter a judgment annulling the marriage of James and Patricia, that her marriage to James be dissolved, and that the court make a "fair, reasonable and equitable division of the marital property and marital debts which accumulated during the

³Mr. Hanes has never responded to the petition or participated in this litigation in any manner.

marriage." Patricia raised several defenses in her answer including estoppel⁴, laches, standing and statute of limitations. On May 31, 1996, Patricia moved the trial court to dismiss Michelle's case, or in the alternative, to consolidate Michelle's's case with her own action for dissolution.

James' response to Michelle's complaint and petition for dissolution was quite different from the one he had made to the same allegations raised by Michelle in the 1989 Franklin Circuit Court modification action. This time, James alleged that he was

without sufficient knowledge to determine whether his cohabitation with [Michelle] subsequent to their dissolution of marriage in June, 1985, in Georgia, constitute[d] a common law marriage as recognized in the state of Georgia.

James acknowledged that he and Michelle continued to cohabit after their divorce, but he alleged that he was "unable to affirm or deny the allegation" in Michelle's complaint as it pertained to the validity of the common-law marriage between himself and Michelle, and thus, denied the allegation "reserving the right to amend his answer upon obtaining additional information." In his

⁴The allegations underpinning this argument are that Michelle knew that Patricia married James in 1990, and that Michelle took "no step[s] to dissuade [Patricia] from the belief that she had entered into a valid marriage", that Michelle had never notified Patricia of Michelle's claim, that by failing to seek a dissolution of her alleged common-law marriage after learning of James' and Patricia's 1990 statutory ceremonial marriage and by herself entering into a statutory ceremonial marriage with John in 1992, Michelle "create[d] the impression" that she was not married to James. Patricia alleged that Michelle's actions were "inconsistent" with those of a person who believes she is married and those actions encouraged Patricia to "change her position to her detriment" and should estop Michelle from claiming that she was married to James.

answers to interrogatories executed the same day as his response, James stated, "[I] can not speculate as [to] why Michelle N. Bates believes that a contract to marry was made, nor when or where such belief occurred." He asked the court to enter a dissolution of marriage to whichever of the petitioners it determined was his legal spouse, and if that were Michelle, to declare his marriage to Patricia void. James, however, did not join Patricia's motion to dismiss Michelle's complaint/petition, and in fact, took the position that any financial obligations to Patricia arising from their marriage would be avoided if Michelle prevailed in establishing the validity of the common-law marriage.

In its order of October 1, 1996, the trial court determined that Michelle had no standing to challenge the validity of the marriage of James and Patricia, however, it held that she could seek a determination of the validity of her own marriage with James. The order provided as follows:

In her Complaint, Michelle requests this Court to declare that she had a valid common-law marriage with James; she then petitions the Court to dissolve that marriage. This Court concludes that KRS 402.250 authorizes Michelle to petition the Court to affirm her marriage with James.

With respect to the existence of any common-law marriage between Michelle and James, 52 AmJur2d Marriage, Section 166 (1970) provides that the existence of a valid marriage is a question of fact to be decided by the jury, whether a ceremonial or common-law marriage is alleged, except where the facts are not in dispute. From the record, this Court cannot conclude with certainty whether or not a valid common-law marriage existed between Michelle and James. Therefore, it appears to this Court that the

issue as to the existence of the marriage must be decided by a jury.

If Michelle's common-law marriage with James is affirmed, then it would appear to render James's marriage with Patricia prohibited and void pursuant to KRS 402.020(2). If Patricia's marriage is void, it would seem to this Court that it is without authority to grant her petition for dissolution of her marriage, since a Court can only make such Orders in favor of a lawful wife, see Rose v. Rose, Ky., 118 S.W.2d 529, 532 (1938) (Court without power to award alimony since marriage was void). From that, it seems to this Court that the issue as to the existence of the common-law marriage must be resolved before this Court can proceed with the other matters before it relating to the dissolution of the marriage of Patricia and James.

The trial court denied Patricia's motion to dismiss. It rejected her defenses of equitable estoppel, laches, and statute of limitations for the reason that to bar Michelle from asserting the existence of a valid common-law marriage regardless of the time that had passed or any actions inconsistent with her status as James' wife "would be sanctioning a void and bigamous marriage." Finally, the trial court consolidated the two actions pursuant to Kentucky Rules of Civil Procedure (CR) 18.02.

On May 1, 1997, after further discovery, Patricia moved the trial court for permission to amend her pleadings to assert a counterclaim against Michelle and a cross claim against James for fraud, and alternatively, a claim against James for dissolution of the partnership between herself and James, the principal asset of which was the corporation known as First Technology Capital, Inc. of Minnesota, allegedly worth \$0 at the commencement of

their relationship and \$14 million at the time of the dissolution.⁵

In his response to the motion to amend, James argued that the trial court lacked jurisdiction to entertain the counterclaim and/or cross claim as "any inducement to marry, fraudulently or not, occurred in Minnesota." On May 9, 1997, Patricia again moved the trial court to dismiss Michelle's complaint on the grounds that the suit was collusive and barred by the doctrine of collateral estoppel. Patricia made these allegations based on James' failure to raise the 1989 Franklin Circuit Court judgment as a bar to Michelle's 1996 action to validate her alleged common-law marriage, and on James' actions in reaching a property settlement agreement with Michelle in the action filed by her in Woodford Circuit Court in 1996. Patricia argued that although James had, in 1989, vehemently denied that he and Michelle had contracted to marry after their divorce and was successful in avoiding paying further alimony to Michelle, James became equivocal on the issue and did not attempt to use

⁵Relevant portions of the amended complaint read as follows:

5. James Bates did knowingly, intentionally and with reckless disregard for Patricia Bates, fraudulently represent his status to Patricia K. Bates, in an effort to obtain the benefits of marriage from Patricia Bates, including financial support, sexual contact, services both familial and professional;

. . .
2. Mrs. Michelle Bates concealed [the act of her common-law marriage] with the express knowledge that Patricia Bates was providing substantial monies, services and sexual contacts to Mr. James L. Bates as an incident of her belief that she was lawfully married to Mr. James L. Bates.

collateral estoppel as a bar to Michelle's suit in this action. Further, she alleged that James and Michelle had entered into a property settlement agreement on August 31, 1996, which provided that James would pay Michelle \$8,000, upon the execution of the agreement and \$48,000 (\$800 per month for 60 months), if the trial court found that they were validly married. Patricia alleged that James and Michelle "and their respective attorneys" were "acting collusively" to deprive her of her equitable share of the estate amassed during her marriage to James. Patricia also moved the trial court for summary judgment on the issue of the existence of a common-law marriage between Michelle and James.⁶ In the meantime, James and Michelle agreed to waive their right to a jury trial on the issue of whether they had a valid marriage.

On May 23, 1997, the trial court entered an order holding Patricia's motion to amend her pleadings and her motion for summary judgment in abeyance pending a hearing concerning the common-law marriage between James and Michelle. The trial court also made the following ruling which is challenged in this appeal:

In addition, the Defendant, Patricia Bates, shall not be permitted to put on evidence or cross-examine any witnesses concerning the alleged common law marriage of James Bates and Michelle Bates at the hearing on common

⁶In making this motion, Patricia relied on the deposition testimony of the Hon. Judge Thomas Cauthorn, formerly a Superior Court Judge in Cobb County, Georgia, who, after familiarizing himself with the evidence of record, opined that Michelle's claim that she and James had a common-law marriage would not survive a motion for summary judgment in Georgia. This deposition is not included in the record on appeal.

law marriage on May 26, 1997. Nor shall the Court consider any in limine or pretrial Motions of Patricia Bates concerning the issue of James['] and Michelle's alleged common law marriage.

On May 26, 1997, an evidentiary hearing was conducted before the trial court. Patricia's counsel was permitted to attend; however, his participation was severely restricted as provided by the pre-trial order. At the conclusion of the hearing, post-trial memoranda were submitted by all three parties. Both James and Michelle argued that they had established a valid common-law marriage under Georgia law and both asked the trial court to enter a judgment declaring their marriage valid and declaring the marriage between James and Patricia void ab initio.

In its order of September 25, 1997, the trial court held as follows:

In this case, this Court believes that the proof is beyond dispute but that Jim and Michelle cohabited and held themselves out to the world as husband and wife. While Jim and Michelle give somewhat varying testimony as to the method of agreement or the words of agreement used to establish a common law marriage, it appears that Michelle believed in good faith during the time that the parties cohabited together that they were married. It further appears that, based upon Jim's testimony, he furthered and encouraged that belief by re-establishing the same family relationship as existed before the divorce decree. This Court believes that the fact that the parties had an existing previous ceremonial marriage and the fact that they do not appear to have altered the marital lifestyle and arrangement they enjoyed prior to the entry of the 1985 divorce decree confirms that Jim and Michelle did enter into an agreement to continue their marital relationship until their 1989 separation.

Since this Court believes that the evidence heard by the Court, not only from the parties, but from their friends and family, is sufficient direct evidence that the parties established a common law marriage, then, considering the Evans [v. Marbut], Ga.Ct.App., 231 N.E.2d 94 (1976)] case, this Court believes the issue is whether the circumstances subsequent to their 1989 separation cited by Patricia are sufficient to overcome the direct proof of the existence of the common law marriage.

First, with respect to the fact that Michelle filed a 1985 tax return in a single capacity, this Court notes that the Georgia Courts have held that, while such evidence should be considered, it does not necessarily overcome direct proof of the existence of a common law marriage, Beals v. Beals, Ga. App., 416 S[.]E[.]2d 301 (1982).

Second, the record confirms that, subsequent to their final separation, and in the Franklin Circuit Court action, both parties engaged in acts and made allegations inconsistent with their position that a common law marriage was established. Further, in the context of this action, Jim has either denied the existence of a common law marriage, or has taken a somewhat equivocal position as to whether one was established. And finally, both parties entered into ceremonial marriages with other parties prior to Michelle's filing of this dissolution action.

However, this Court again expresses the belief that, based upon the Evans case, since clear and persuasive evidence exists that the parties, subsequent to their 1985 divorce, re-established their marriage as a common law marriage, those subsequent events are not sufficient to overcome that direct evidence.

On October 6, 1997, Patricia moved the trial court to alter, amend or vacate the judgment. Patricia again argued that Michelle's claim was barred by the doctrine of collateral estoppel, that the trial on the issue of the alleged common-law marriage was "collusive and not truly adverse," that she did not

lack standing to participate in the trial and should have been allowed to fully participate, particularly as the trial was not adversarial. She also argued that Michelle failed to present evidence sufficient to fulfill her burden of proof in light of the "presumption of the validity of the last-in-time marriage." Again, she asked to be allowed to amend her pleadings to allege fraud.

On October 15, 1997, the trial court entered a decree dissolving the common-law marriage of James and Michelle which incorporated the property settlement agreement entered into by those parties the previous August. See p.12, supra. It denied Patricia's CR 59 motion on November 13, 1997, without elucidation. In a separate order entered the same day, the trial court held Patricia's motion to amend her pleadings in abeyance indefinitely. Patricia filed her notice of appeal on November 14, 1997.

Before addressing the issues raised in this appeal, it is necessary to dispose of the motions made by James and Michelle to dismiss the appeal for lack of finality. We find no merit to these motions. Both appellees insist that the judgment entered on September 27, 1995, is not final as it does not contain the recitals pursuant to CR 54.02 that are necessary to confer jurisdiction on this Court to entertain an appeal of a judgment resolving less than all the claims in a case involving multiple parties and/or claims. The appellees are correct that the judgment does not state that it is final and appealable, or that there is no cause for delay. However, there is no necessity for

the recitals if the judgment of the trial court resolves directly, or by implication, all the issues pending before it. CR 54.01.

It is abundantly clear that the trial court's order of October 1, 1996, in which it concluded that the void marriage doctrine would govern Patricia's dissolution proceeding if her marriage were a bigamous marriage, combined with its judgment of September 27, 1995, in which it found a valid common-law marriage to exist between James and Michelle, and finally, its order of November 13, 1997, denying Patricia's motion for a new trial, or in the alternative, to alter, amend or vacate the judgment, adjudicated all the claims of all the parties pending before it. The trial court had, as noted above, previously determined that if James and Michelle had a valid common-law marriage, Patricia's marriage was void ab initio, leaving it without the authority to further adjudicate the claims raised in her petition for dissolution. There is not doubt, as we glean from the record, that both James and Michelle interpreted the judgment as final in all aspects and argued as such in to the Woodford Circuit Court in response to various post-judgment motions.⁷ Having argued to

⁷ For example, in his response to Patricia's renewed motion to amend her pleadings, James stated:

On September 25, 1997, this Court entered its order recognizing the valid common law marriage between Jim and Michelle, and thereby, necessarily determining that Jim and Patty were not and never have been married. Realizing her petition for dissolution of marriage is no longer viable, Patty now seeks to amend her petition to allege new causes as action....[T]his Court's September 25, 1997 Order serves to effectively dismiss Patty's

(continued...)

⁷(...continued)

petition for dissolution of marriage filed in
Civil Action 96-CI-000043.`

In a similar vein, James made the following response to Patricia's motion for a temporary injunction on October 8, 1997, seeking an order requiring James to continue to pay her support and maintain medical insurance until the matter was concluded:

[Patricia] is not entitled to a temporary injunction on the basis that this is no longer a pending action, but rather an action wherein a final opinion has been rendered....After memoranda were filed by counsel for all parties, this Court rendered an Opinion, Conclusions of Law and Judgment on September 25, 1997, determining that there was a valid common law marriage between James L. Bates and Michelle N. Bates, and in effect rendering the marriage between James L. Bates and Patricia K. Bates void abinitio [sic]. It is therefore the position of [James] that this matter is no longer a pending action, a final judgment having been entered, and therefore pursuant to CR 65.04 [Patricia] is not entitled to a temporary injunction.

Likewise, Michelle argued that there were no pending matters, and that the September 25, 1997, judgment adjudicated all the claims raised in Patricia's petition for dissolution, as follows:

This Court has ruled that a common-law marriage existed between James and Michelle bates, therefore Patricia Bates had no marriage relationship with James and cannot suffer from any such loss by any actions on the part of James Bates. On the contrary, Patricia Bates has financially benefitted [sic] from the marital estate of James and Michelle Bates during the five years that she co-habited with James Bates. In [an] effort to bring this matter to a conclusion and avoid further embarrassment for all concerned, Michelle Bates had elected not to attempt to recover from James her share of the marital funds expended on behalf of

(continued...)

the trial court that Patricia should be denied any further relief pendente lite, and that she should not be allowed to amend her pleadings to assert other claims after a "final" order was entered, we find James' and Michelle's contentions in this Court that the appeal should be dismissed for lack of finality to be somewhat disingenuous. See Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976) (a party to an appeal may not "be permitted to feed one can of worms to the trial judge and another to the appellate court"). In any event, it is this Court's duty to "determined for itself whether it is authorized to review the order appealed from." Hook v. Hook, Ky., 563 S.W.2d 716, 717 (1978). Having reviewed the entire record, it is apparent that the September 27, 1995, judgment is a final judgment, that all the claims pending before the trial court were disposed of, and that the issues resulting from the judgment are now ripe for our review.

The other ground asserted for lack of finality is that the trial court's order of November 13, 1997, abating indefinitely Patricia's motion to amend her pleadings, left matters pending before the Woodford Circuit Court so as to

⁷(...continued)

Patricia Bates during that period.

Michelle asked that the trial court overrule the motion for temporary injunction and terminate any maintenance to Patricia as "Patricia Bates ... is not nor has she ever been a legal spouse of James Bates."

preclude our review. Obviously, since the trial court did not allow Patricia to amend her pleadings to assert various tort and/or contract claims against James and Michelle, those claims were not pending so as to affect the finality of the judgment. Accordingly, the motion to dismiss is denied.

In her appeal, Patricia makes the following arguments: (1) the trial court erred in its determination that she had no standing to participate in the trial on the issue of whether James and Michelle had a valid common-law marriage; (2) the trial court erred in declining to dismiss Michelle's claim on the basis of collateral estoppel; and, (3) the trial court erred in refusing her demand for a jury trial on the issue of the existence of a common-law marriage.

Patricia first argues that the trial court erred to her prejudice by restricting her participation at the trial on the issue of whether James and Michelle had a valid common-law marriage by prohibiting her from introducing evidence or cross-examining witnesses. Both James and Michelle contend that there was no error as the trial court had "severed" the issue of the existence of the common-law marriage from the issues contained in Patricia's dissolution petition. They further argue that since Patricia was not present from 1985 to 1988, the years the common-law relationship occurred, Patricia would not have any "information concerning the relationship or transactions between James and Michelle during that time period."

If we agreed with the trial court's ruling of October 1, 1996, that the validity of Patricia's marriage to James,

and/or her rights upon dissolution, were dependent upon or affected by its resolution of the issue of the existence of the James/Michelle common-law marriage, we would not hesitate to reverse and remand the matter for a new trial with Patricia's full participation. Patricia was, after all, named as a party in Michelle's petition. More importantly, if, as the trial court determined, a finding in favor of Michelle required the determination that Patricia's marriage was void ab initio, there would be no question that Patricia had "a real, direct, present and substantial right in the subject matter of the controversy." Williams v. Phelps, Ky.App., 961 S.W.2d 40, 41 (1998).

However, we find no error in the trial court's ruling that Patricia lacked standing to participate in the common-law marriage issue, but for reasons different than those proffered by the trial court. First, KRS 402.250, the statute under which Michelle was proceeding provides as follows:

Where doubt is felt as to the validity of a marriage, either party may, by petition in Circuit Court, demand its avoidance or affirmance; but where one (1) of the parties was within the age of consent at the time of marriage, the party who is of proper age may not bring such a proceeding for that cause against the party under age.

Clearly, the only persons with standing to seek "avoidance or affirmance" of a doubtful marriage are the parties themselves. Second, while Michelle had standing to seek a determination of the validity of her own marriage, she cannot use that determination to collaterally attack Patricia's marriage to James. In other words, the legal conclusion of the trial court that James and Michelle had a valid common-law marriage has no

preclusive effect on the issues involved in Patricia's dissolution action, negating any standing on Patricia's part to contest the action between James and Michelle.

The trial court erred as a matter of law early in this litigation by its determination that a finding that James and Michelle had a valid common-law marriage would deprive it of "authority to grant [Patricia's] petition for dissolution of her marriage," or divide the marital estate, or award maintenance. The trial court's reliance on the void marriage doctrine and the 1938, Rose case was misplaced. The law concerning void marriages was dramatically changed in 1972 by the passage of KRS 403.120, which, in pertinent part, provides:

(1) The Circuit Court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

. . .

(C) The marriage is prohibited.⁸

(2) A declaration of invalidity under paragraph (a), (b) or (c) of subsection (1) may be sought by any of the following persons and must be commenced within the times specified, but only for the causes set out in paragraph (a) may a declaration of invalidity be sought after the death of either party to the marriage:

. . .

(b) For the reason set forth in paragraph (c) of subsection (1), by either party, no later than one (1) year after the petitioner obtained knowledge of the described condition.

⁸Prohibited marriages are defined in KRS 402.020 to include one "[w]here there is a husband or wife living, from whom the person marrying has not been divorced[.]"

It is clear from the plain words of the statute that the only persons who can seek to declare a bigamous marriage void or invalid, are the parties themselves. Patricia, of course, does not want such a declaration-- she wants a dissolution and an equitable distribution of the marital estate. James, the only other person with standing to seek such a determination, is prevented by the one-year time limitation from seeking a declaration of invalidity.⁹ Had the trial court not failed to recognize that these statutory provisions altered the common-law concerning void marriages, the litigation between James and Michelle and Patricia would have taken a much different course.

There have been very few cases since 1972 requiring the application of KRS 403.120. However, this Court's holding in Ferguson v. Ferguson, Ky.App., 610 S.W.2d 925 (1980), makes it clear that Michelle cannot directly attack the James/Patricia marriage, or collaterally attack the marriage by virtue of her KRS 402.250 proceeding. In that case, the only child of the decedent attempted to challenge the appointment of his father's second wife as the administratrix of his father's estate. There was no question that the marriage between the father and his second wife was a bigamous marriage as the father had married his second wife prior to a divorce from his former wife, the mother of the appellant. In affirming the circuit court's determination

⁹If he did not know of the existence of his common law marriage to Michelle before 1989, James was certainly made aware of the "described condition" in 1989, before his marriage to Patricia, by the pleadings filed in the Franklin Circuit Court.

that the son/appellant lacked standing to contest the appointment of the second wife, this Court held as follows:

Clearly, it is within the power of the legislature to enact statutes governing both marriage and the invalidation of certain marriages. Enacted in 1972, KRS 403.120 was in effect seven years before the decedent's death. Furthermore, the enactment of KRS 403.120 represented a conscious recognition on the part of the legislature that a previous policy of allowing a collateral attack on marriages created unfair, economic penalties for the surviving spouse. See Petrilli, Family Law, §§ 10.2-10.7 (1977 Supplement). In effect, the legislature determined that the only effect of invalidating marriages such as that between the decedent and the appellee would be to create unexpected hardship for the appellee by denying her her dower rights, as well as her expectations of social security and other benefits. See Uniform Marriage and Divorce Act, (U.L.A.), Commissioners Prefatory Note, p.92 in s 208, p. 113.

Id. at 927. This Court soundly rejected the son's argument that a bigamous marriage is void ab initio and "subject to collateral attack at any time by any person."

The fact, in the instant case, that both parties remain alive does not alter the policy considerations underlying the statute, thus the result should be no different. The trial court's pre-trial ruling, that a decision in favor of Michelle would automatically result in Patricia's marriage being void, created "unfair, economic penalties" for Patricia, who the record reveals, had no idea that there was any impediment to her marriage. The trial court's concern that any other result "would be sanctioning a void and bigamous marriage," should have given way to the Legislature's policy, expressed in KRS 403.120, to

prevent the harsh penalties that would otherwise befall an innocent spouse under the void marriage doctrine.

Thus, it is our holding that the trial court erred in consolidating these cases and in allowing Michelle to do indirectly what she is statutorily precluded from doing directly, that is, to have Patricia's marriage to James declared invalid and void. The trial court should proceed with Patricia's petition to dissolve her marriage without reference to the proceedings commenced by Michelle. All issues raised in Patricia's petition and in James' response to that petition, including entitlement to maintenance, amount of maintenance and division of marital property, should be resolved by the trial court without consideration of those sums paid by James to his common-law wife, Michelle. The determination of the value of the marital estate to which Patricia has a claim should not be diminished by those sums paid by James to Michelle under the terms of their property settlement agreement. Rather, such sums should be deemed to have been paid from James' nonmarital assets.

Finally, we note that Patricia had made a compelling argument that the trial court erred in failing to dismiss Michelle's complaint based on the doctrine of collateral estoppel, a "subdivision of res judicata." Napier v. Jones, Ky.App., 925 S.W.2d 193, 195 (1996). There is no question that although the Franklin Circuit Court did not specifically determine there to be no common-law marriage in the 1989 action, that ruling was made by implication. Michelle testified that she did not pursue the matter any further because her attorneys were

not familiar with Georgia law. When asked why she did not file for dissolution in 1989, instead of a modification of her Georgia divorce decree, she responded: "I don't know why the lawyer did it that way." Nevertheless, the issue was raised and responded to and, by implication, disposed of in the Franklin Circuit Court. Michelle failed to appeal that adverse judgment. Thus, the doctrine of collateral estoppel should have prevented her attempt from litigating the issue again in 1996. See Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997), and Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970). James' motive for failing to raise the doctrine of res judicata in light of the trial court's October 1, 1996 order, is obvious. Unfortunately, the Woodford Circuit Court conducted an evidentiary hearing on an issue that had already been litigated between two persons, who apparently only considered themselves married when it was convenient or advantageous for them to do so. In any event, because the judgment from which Patricia has appealed can have no preclusive effect on her own petition for dissolution, that issue, and others raised in her brief are moot.

Accordingly, that portion of the judgment of the Woodford Circuit Court which validated the common-law marriage of James and Michelle is affirmed. However, the trial court's order declaring the marriage of Patricia to James void ab initio, is reversed. The matter is remanded and the trial court is instructed to proceed with Patricia's dissolution action in a manner consistent with this Opinion.

ALL CONCUR.

ENTERED: September 10, 1999

/s/ Rick A. Johnson
Judge, Court of Appeals

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