

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2298

TONYA R. EXCHO OLIVIER

VERSUS

JAMES CHAD OLIVIER

Judgment Rendered: September 10, 2010

Appealed from the
The Family Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 165,519

Honorable Lisa Woodruff-White, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Handwritten signatures and initials in the left margin, including what appears to be 'TLW', 'JCF', and a signature that looks like 'JCF'.

WELCH, J.

Tonya R. Excho Olivier appeals a judgment in favor of James Chad Olivier sustaining a peremptory exception raising the objection of no right of action with regard to her claim for spousal support and dismissing that claim. Finding no error in the judgment of the trial court, we affirm in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

On June 22, 2007, Tonya and James participated in a marriage ceremony in Baton Rouge, Louisiana. Shortly thereafter, on September 10, 2007, Tonya filed a petition for divorce against Peter Excho in suit number 162,324 in the Family Court for the Parish of East Baton Rouge. In that petition, she made the following allegations:

4.

[Tonya] and [Peter] formerly lived together as husband and wife in Washington[,] D.C.

5.

While residing in Washington[,] D.C., the parties lived together for the requisite time as husband and wife, held themselves out to the public as husband and wife, used the same last name, adopted a minor child together as husband and wife and intended to live together as husband and wife.

6.

Under the laws of common law marriage of Washington[,] D.C., the parties are considered to be common law husband and wife. As, such, the United States Constitution requires every state to accord “Full Faith and Credit” to the laws of its sister states. Thus, a common-law marriage that is validly contracted in Washington[,] D.C. where such marriages are legal will be valid even in Louisiana where such marriages cannot be contracted and may be contrary to public policy.

* * *

9.

[Tonya] seeks a divorce from [Peter] under the provisions of La. Civil Code art. 102 and intends to live separate and apart from [Peter], and without reconciling, for a period of 365 days prior to filing a rule to show cause why a divorce should not be granted.

Attached to Tonya’s petition for divorce against Peter was a notarized

verification (affidavit) that provided, in part, as follows: "I have read the foregoing petition and all the facts contained therein are true and correct to the best of my knowledge, information and belief. I fully understand that if I am not telling the truth in this affidavit, I may be charged with perjury and tried in a criminal [proceeding]." In response, Peter filed an answer and reconventional demand admitting the petition's allegations.

On April 17, 2008, Tonya filed a petition for divorce against James, requesting among other things, spousal support. In response, James filed an answer and reconventional demand. In his reconventional demand, James asserted that although the parties participated in a marriage ceremony, at the time of that ceremony, Tonya was still married to Peter pursuant to the common law of Washington, D.C. Therefore, an impediment to their marriage existed, *i.e.*, the prior undissolved marriage of Tonya, and the marriage between him and Tonya was absolutely null pursuant to La. C.C. art. 94. James further asserted that although he attempted to contract the marriage in good faith, Tonya had not, and thus, both he and the child born of the parties were entitled to the civil effects of marriage.

Thereafter in the proceedings, when Tonya pursued her claim for spousal support, James filed a peremptory exception raising the objection of no right of action. After a hearing, the trial court sustained the exception with regard to Tonya's claim for spousal support and dismissed the claim. In written reasons for judgment, the trial court found that the evidence established that under the law of Washington, D.C., a common law marriage existed between Tonya and Peter. Giving full faith and credit to that common law marriage contracted in Washington, D.C., along with the lack of evidence establishing that the marriage between Tonya and Peter had been terminated, the trial court concluded that

there was a legal impediment to Tonya's marriage to James, rendering it absolutely null under La. C.C. arts. 88 and 94. Furthermore, the trial court found that because Tonya knew or should have known that she was still married to Peter when she contracted to marry James, she was in bad faith and consequently not entitled to any civil effects from her marriage to James, *i.e.*, spousal support.

A written judgment in conformity with the trial court's ruling was signed on March 4, 2010, and it is this judgment that Tonya has appealed.¹ On appeal, Tonya asserts that the trial court erred in denying her the right to seek spousal support because the evidence was insufficient to prove that she was still married at the time of her marriage to James.

In this case, the trial court's judgment determining that Tonya had no right to claim spousal support was based solely on its factual finding that she was married to Peter at the time of her marriage to James. The correct standard of review by the appellate court for factual findings is manifest error. The two-part test for the appellate review of a trial court's factual finding is: (1) whether there is a reasonable factual basis in the record for the finding of the trier of fact; and (2) whether the record further establishes that the finding is not manifestly erroneous. **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude that there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding

¹ The March 4, 2010 judgment on appeal is a supplemental judgment. The original judgment was issued and signed by the trial court on July 8, 2009. However, that judgment, although appearing to sustain the peremptory exception raising the objection of no right of action, lacked the appropriate decretal language disposing of or dismissing the claims of Tonya. After this court issued a rule to show cause why the appeal should not be dismissed, the trial court signed a supplemental judgment, which was added into the record of this matter. Therefore, on April 26, 2010, we maintained the appeal.

only if, after reviewing the record in its entirety, it determines that the factual finding was clearly wrong. See Stobart v. State, DOTD, 617 So.2d 880, 882 (La. 1993); Moss v. State, 2007-1686, p. 3 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 2008-2166 (La. 11/14/08), 996 So.2d 1092.

At the outset, we note that the jurisprudence of Louisiana is replete with decisions recognizing that if a common law marriage is contracted in a state whose law sanctions such a marriage, the marriage will be recognized as a valid marriage in Louisiana, even though a common law marriage cannot be contracted in this state. See Ghassemi v. Ghassemi, 2007-1927, pp. 16-17 (La. App. 1st Cir. 10/15/08), 998 So.2d 731, 743, and cases cited therein.

Washington, D.C. has long recognized common law marriages. Coates v. Watts, 622 A.2d 25, 27 (D.C. 1993). The elements of common law marriage in the jurisdiction of Washington, D.C. are: cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense. *Id.*

According to the record, shortly after the marriage ceremony between Tonya and James, Tonya filed a petition for divorce against Peter asserting that under the law of common law marriage of Washington, D.C., she and Peter were married. Specifically, she asserted that while residing in Washington, D.C., the parties lived together for the requisite time as husband and wife, held themselves out to the public as husband and wife, used the same last name,² and adopted a child together as husband and wife. Peter admitted these allegations in his answer. Thus, both Tonya and Peter have admitted that they had a common law

² Pursuant to a judgment rendered in the 19th Judicial District Court, Parish of East Baton Rouge, both Peter and Tonya changed their last name to "Excho" according to the provisions set forth in La. R.S. 13:4751.

marriage.³

Tonya's testimony at the hearing confirmed that she and Peter lived together, used the same last name, and adopted a child together. However, at the hearing, she claimed that the allegations that she made in her petition for divorce from Peter were not true. Tonya stated that she filed that petition for divorce from Peter because of poor advice from an attorney. However, regardless of the advice—poor or not—the fact remains that she still swore under oath that the allegations contained in that petition were true to the best of her knowledge, information, and belief.

Tonya also argues that her contention that she was not married to Peter is supported by the fact that she filed a motion to dismiss that petition on the grounds that the parties were not married under the laws of either Washington, D.C. or Louisiana and that the trial court granted that motion dismissing her petition for divorce. However, according to the judgment of dismissal, the trial court specifically stated that the dismissal was granted “without determining whether or not the parties entered into a common law marriage” and “based solely on the joint motion requesting dismissal.”

After a thorough review of the record and given the conflict between the testimony of Tonya at the hearing (where her right to claim spousal support was at issue) and her previous admission contained in her petition for divorce against Peter, and thus, the obvious credibility determination facing the trial court, we

³ Generally, an admission by a party in a pleading constitutes a judicial confession, is full proof against the party making it, and has the effect of waiving evidence as to the subject of the admission. **C.T. Traina, Inc. v. Sunshine Plaza, Inc.**, 2003-1003, p. 5 (La. 12/3/03), 861 So.2d 156, 159; see also La. C.C. art. 1853. However, Tonya's assertion in her petition for divorce from Peter is not a judicial admission, with its conclusive effect, in this proceeding against James, as Louisiana jurisprudence is clear that such an “extra-judicial” confession does not bind the declarant in subsequent litigation. See La. C.C. art. 1853, comment (c). A party who has made such an admission in a previous suit is not barred from denying the facts contained in that admission in a subsequent suit, unless the adverse party has been prejudiced by his reliance upon that admission. **Alexis v. Metropolitan Life Ins. Co.**, 604 So.2d 581, 581-82 (La. 1992) (per curiam). Rather, the admission is to be given the probative value it deserves as an admission of the party who made it. *Id.*; see also La. C.E. art. 801(D)(3).

find a reasonable factual basis exists for the trial court's factual finding that Tonya was still married to Peter at the time she attempted to contract a marriage with James, and the record does not demonstrate that this finding is clearly wrong.

Louisiana Civil Code article 87 provides that the requirements for the contract of marriage are: (1) the absence of a legal impediment; (2) a marriage ceremony; and (3) the free consent of the parties to take each other as husband and wife, expressed at the ceremony. An existing marriage is a legal impediment to a contract of marriage. See La. C.C. art. 88. "A marriage is absolutely null when contracted ... in violation of an impediment." La. C.C. art. 94. Therefore, having found no manifest error in the trial court's determination that Tonya was married to Peter at the time she contracted a marriage with James, we find no error in the trial court's conclusion that the marriage between James and Tonya was absolutely null.

Furthermore, since Tonya filed the petition for divorce against Peter shortly after her marriage ceremony with James, we also find a reasonable factual basis exists for the trial court's determination that, at the time Tonya attempted to contract the marriage to James, that she knew or should have known she was still married to Peter, and therefore, was not in good faith, and the record does not demonstrate that this factual findings is clearly wrong. Accordingly, Tonya was not entitled to any of the civil effects of a marriage, and the trial court correctly dismissed her claim.

For all of the above and foregoing reasons, the March 4, 2010 judgment of the trial court is hereby affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Tonya R. Excho Olivier.

AFFIRMED.