

Affirmed and Memorandum Opinion filed March 15, 2022.



In The

Fourteenth Court of Appeals

NO. 14-19-00624-CV

EDWARD A. LANE, Appellant

V.

JAMES S. MCCORMICK, Appellee

**On Appeal from the County Court at Law
Washington County, Texas
Trial Court Cause No. CCL-8499**

MEMORANDUM OPINION

Appellant Edward A. Lane filed this lawsuit seeking a divorce from appellee James S. McCormick. After a jury trial, the jury found there was no marriage between the two, and the trial court signed a final decree holding that no marriage existed. In two issues, Lane argues (1) the evidence was factually insufficient to support the jury's finding of no marriage and (2) the evidence conclusively proved there was a marriage. We affirm.

I. BACKGROUND

Lane and McCormick met in 1996 and began dating in 1997. They shared a residence in Houston from June 1998 to January 2017. It is undisputed the two were never formally married, and there is no indication in the record that they filed a declaration of informal marriage.¹ At trial, Lane alleged that he and McCormick were informally married under Texas law.

II. ANALYSIS

A. Factual sufficiency

In issue 1, Lane argues the evidence is factually insufficient to support the trial court's decree that he and McCormick were not married. When conducting a factual-sufficiency review, we consider all the evidence in the record, both supporting and conflicting. *Plas-Tex Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We set aside the verdict only if it is so contrary to the overwhelming weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The jury answered question 1 concerning marriage as follows:

QUESTION NO. 1

Are EDWARD A. LANE and JAMES S. McCORMICK married?

Two people are married if they agreed to be married and after the agreement they lived together in Texas as spouses and there represented to others that they were married. All three elements must

¹ No argument was made in the trial court or this court that Texas law precludes same-sex marriage. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) ("The Court enjoins Defendants from enforcing Article 1, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage."), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (following June 26, 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

exist at the same time.

Answer “Yes” or “No.”

Answer: NO

Based on the instruction included in this question, in conducting our review we consider whether the evidence is factually sufficient to support the jury’s finding that Lane did not prove he and McCormick (1) agreed to be married, (2) lived together in Texas as spouses, and (3) there represented to others that they were married.² See *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (“[I]t is the court’s charge, not some other unidentified law that measures the sufficiency of the evidence when the opposing party fails to object to the charge.”).³

We begin with the element of agreement to be married. To establish an agreement to be married, the evidence must show the parties intended to have a “present, immediate, and permanent marital relationship” and specifically agreed to be married. *Small v. McMaster*, 352 S.W.3d 280, 283 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Lane argues the following evidence shows the jury’s conclusion was against the great weight and preponderance of the evidence:

- The evidence at trial included two notarized domestic-partnership affidavits stating Lane and McCormick lived together in a “spouse-like relationship” as “domestic partners.”
- The evidence also included handwritten cards and letters from McCormick expressing his love for Lane and his hopes for the couple’s future, including referring to the couple as “Husbears.”
- The couple lived together for approximately 19 years.

² The elements stated in jury question 1 substantially track the elements listed in Family Code section 2.401(a)(2). Tex. Fam. Code Ann. § 2.401(a)(2) (proof of informal marriage).

³ Lane did not object to the trial court’s charge or the jury questions.

- McCormick purchased and gave Lane a ring similar to McCormick’s wedding band from a previous marriage, which Lane wore for a time.
- McCormick gave Lane 750 shares in a company McCormick started.
- McCormick created a trust naming Lane as a trustee and beneficiary.
- McCormick named Lane as the executor of his will.
- McCormick appointed Lane his agent for medical power of attorney and durable power of attorney.
- McCormick designated Lane to be both the guardian of his person and guardian of his estate should the need arise.

While some of the evidence cited by Lane constitutes evidence of an agreement to be married, the proof is not conclusive. *See, e.g., Russell v. Russell*, 865 S.W.2d 929, 933–34 (Tex. 1993) (while proof of cohabitation may be circumstantial evidence of agreement to be married, agreement may not be inferred solely from this fact, and each case must be decided on its own particular facts). Moreover, the evidence cited by Lane conflicts with evidence in the record that McCormick and Lane did not agree to be married, including:

- McCormick testified that he “never considered [Lane his] husband” and they were “never married.”
- McCormick testified that, around the time of the Supreme Court’s decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Lane “suggested repeatedly” that the couple marry, but McCormick declined each time. According to McCormick, “I was emphatic that I would never marry him, multiple, multiple times.”
- Both McCormick and Lane listed themselves as “single” on tax

returns, including those filed post-*Obergefell*. See *Small*, 352 S.W.3d at 286 (considering listing of “single” on tax returns in informal-marriage analysis).

Ultimately, the evidence is conflicting as to whether Lane and McCormick agreed to be married. Typically, when the evidence of informal marriage is conflicting, it is the role of the factfinder to resolve the inconsistencies. See *id.* at 282 (“The existence of an informal marriage is a fact question[.]”); *Matter of Smith*, No. 01-19-00014-CV, 2020 WL 5269417, at *10 (Tex. App.—Houston [1st Dist.] Sept. 3, 2020, no pet.) (mem. op.) (“Where the evidence is conflicting about the existence of an informal marriage, the conflict must be resolved by the factfinder.”) (quotation omitted). In this case, the jury’s finding is not so against the great weight and preponderance of the evidence summarized above for this court to disturb the jury’s determination, particularly given McCormick’s testimony that he did not consider the couple to be married and repeatedly declined to marry Lane when asked. See *Small*, 352 S.W.3d at 283 (to prove informal marriage, plaintiff must show agreement to “present, immediate, and permanent marital relationship”) (emphasis added); see also *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex. 1993) (it is jury’s role to resolve disputed issues of fact and jurors are “the sole judges of the credibility of the witnesses and the weight to be given their testimony”) (quotation omitted).

Having determined the evidence is factually sufficient to support the jury’s finding there was no informal marriage because Lane and McCormick did not agree to be married, we do not address the evidentiary sufficiency of the remaining elements of informal marriage. Tex. R. App. P. 47.1. We overrule issue 1.

B. Conclusive evidence

In issue 2, Lane argues there is conclusive evidence of all three elements of

an informal marriage and less than a scintilla of evidence supporting the jury's finding there was no marriage. Lane argues that, under these circumstances, this court should reverse and render in his favor. However, the evidence discussed above in issue 1 reveals more than a scintilla of evidence supporting the jury's finding there was no marriage.

We overrule issue 2.

III. CONCLUSION

We affirm the trial court's decree as challenged on appeal.

/s/ Charles A. Spain
Justice

Panel consists of Justices Jewell, Spain, and Wilson.