In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00080-CV

DONALD GERARD VAN HOOFF, APPELLANT

V.

MANDY KRISTINE ANDERSON, APPELLEE

On Appeal from the 393rd District Court
Denton County, Texas[1]
Trial Court No. 2011-61188-393; Honorable Douglas Robison, Presiding

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January 14, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

By this appeal we are asked to resolve a quagmire between Appellant, Donald Gerard Van Hooff, and Appellee, Mandy Kristine Anderson, concerning whether they ever entered into a valid informal or common law marriage from which Mandy sought

[1] Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this court on any relevant issue. TEX. R. APP. P. 41.3.

and was granted a divorce.[2] For the reasons expressed herein, we reverse and remand.

BACKGROUND

In 1999, Mandy and Donald began living together in an apartment. At the time, they were both nurses. During the early stages of their relationship, Mandy's part-time employment did not provide her with benefits. Therefore, in order to obtain benefits and establish Mandy's eligibility for insurance coverage, Mandy and Donald provided Donald's employer with an *Affidavit of Common Law Marriage* that was executed on November 1, 2000. The affidavit recites as follows:

> [w]e have lived together for a period of time and continue to do so, publicly holding ourselves out to be husband and wife. We intend that our relationship be permanent, and we consider ourselves to be husband and wife, under law, for all purposes.

In addition to medical insurance, Donald also obtained life insurance on Mandy and designated her as his spouse on the insurance paperwork. According to the testimony presented, at the time the affidavit was executed, Mandy desired to be married to Donald but Donald was adamant that he did not intend his execution of the affidavit to create a marriage relationship.

[2] While the term "informal marriage" is the statutory term used to describe what is colloquially known as a "common law marriage," legal writers often use the phrases interchangeably. *See Blair v. McClinton,* No. 01-11-00701-CV, 2013 Tex. App. LEXIS 8048, at *3 (Tex. App.—Houston 1st Dist.] July 2, 2013, pet. denied). Technically, however, there is a distinction. In addition to what has traditionally been described as a judicially pronounced common law marriage (now statutorily defined by section 2.401(a)(2) of the Texas Family Code), the term "informal marriage" also encompasses the idea of a marriage relationship established by proof of the execution of a declaration of marriage under section 2.401(a)(1) of the Texas Family Code. *See* TEX. FAM. CODE ANN. §§ 2.401(a)(1), (a)(2) (West 2006). Here, the parties did not attempt to establish a marriage relationship through the execution of a declaration of marriage; therefore, as used herein, the terms informal marriage and common law marriage refer to a marriage relationship established by meeting the requirements of section 2.401(a)(2) of the Texas Family Code.

Later, in 2002, Donald purchased a home "as a single man." He, Mandy, and his daughter from a previous marriage resided there.[3] Mandy made monthly payments to Donald, from her separate bank account, for a portion of the mortgage. She also paid Donald $1,000 per month toward household bills and expenses and a few hundred dollars toward groceries.

In March 2003, Donald executed a *Declaration of Appointment of Guardian for My Children in the Event of My Death* where he designated Mandy as his daughter's primary guardian. Mandy treated Donald's daughter as her own and was involved with her education and welfare. During the relationship, Mandy even provided one of her vehicles for the daughter to drive.

At some point during their relationship, Donald enrolled in graduate school to become a psychiatric nurse practitioner. He worked a full-time night shift while in school. However, after becoming a psychiatric nurse practitioner, he became an independent contractor which left him without insurance benefits. At that time, Mandy returned to work full time in order to obtain those same benefits. Beginning in 2007, Mandy secured insurance coverage for Donald and his daughter through her employer. Donald was designated as her husband on the insurance paperwork and he was also listed as the primary beneficiary of her employer-provided life insurance policy.[4]

[3] Mandy testified the house was purchased by Donald as a "single man" because he could qualify for the loan and get a better interest rate. She also testified the house was purchased with the intent that she, Donald, and his daughter would live there.

[4] Numerous exhibits regarding insurance coverage were introduced by Mandy to support her claim that she and Donald were married.

At all times during their relationship Mandy and Donald maintained separate bank accounts at different banks. One of Donald's accounts was payable on death to Mandy to be used for his daughter but Mandy's account was not payable on death to Donald. They always maintained separate credit card accounts and filed separate income tax returns as single individuals.

In 2011, Mandy and Donald ceased living together and in September of that year, she filed for divorce. On November 3rd, the trial court signed a default *Final Decree of Divorce* against Donald for failing to appear. By *Motion for New Trial and to Set Aside Default Judgment*, Donald asserted his failure to appear was based on Mandy's representation that she had nonsuited the divorce proceedings. The trial court granted his motion and ordered a new trial.

Following two days of trial, the jury was asked to determine whether Mandy and Donald were ever married, and if so, to determine when the marriage commenced. The verdict was not unanimous. Ten jurors found the parties had a common law marriage as of November 1, 2000, the date they signed the *Affidavit of Common Law Marriage*. Several months later, the trial court held a final hearing to hear testimony on the division of property. On October 31, 2013, based on the jury's findings and evidence presented, the trial court signed a *Final Decree of Divorce* which ordered a disproportionate division of property. Donald requested and the trial court filed *Findings of Fact and Conclusions of Law.*

By two issues, Donald appeals the trial court's *Final Decree of Divorce* asserting (1) the evidence is legally and factually insufficient to support the jury's verdict that he

and Mandy were informally married, and (2) the trial court abused its discretion by failing to divide the community estate in a just and right manner. Based upon a review of the record, we find the evidence to be factually insufficient to establish a common law marriage. Based upon our disposition of issue one, we pretermit consideration of Donald's second issue relating to the division of property and we reverse and remand this case to the trial court for further proceedings.

APPLICABLE LAW

An informal or common law marriage is not a trifle matter, easily or casually established. Texas courts have customarily held proponents of such a relationship to a high standard of proof. Accordingly, an informal or common law marriage exists in Texas only if the parties have either: (1) executed a declaration of informal marriage as provided by Title I, subchapter E of the Texas Family Code (TEX. FAM. CODE ANN. § 2.402 (West 2006)); or, (2) they (a) *agreed* to be married, (b) *lived together* in Texas as husband and wife after the agreement, and (c) there *represented to others* that they were married. TEX. FAM. CODE ANN. §§ 2.401(a)(1), (a)(2) (West 2006); *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993).

Other than the terminology used, the common law requirements and the statutory requirements for an informal marriage are the same. The statutory requirement of "represented to others that they were married" is synonymous with the judicially stated common law requirement of "holding out to the public." *Small v. McMaster*, 352 S.W.3d 280, 284-85 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). A common law marriage does not exist until the concurrence of all three elements. *Ex parte Threet,* 160 Tex. 482, 333 S.W.2d 361, 364-65 (Tex. 1960); *Eris v. Phares*, 39 S.W.3d 708, 713

(Tex. App.—Houston [1st Dist.] 2001, pet. denied). To establish that parties agree to be husband and wife, the proponent must show that *both* parties intended to create an immediate and permanent marriage relationship, not merely a temporary self-serving association that may be ended by either party. *Id.*

The burden of proof that an informal or common law marriage exists falls on the party seeking to establish the existence of such a marriage by a preponderance of the evidence. *Farrell v. Farrell*, 459 S.W.3d 114, 117 (Tex. App.—El Paso 2015, no pet.) (citing *Small*, 352 S.W.3d at 282-83). Each element of a common law marriage may be proven by direct or circumstantial evidence, including the conduct of the parties. *Russell*, 865 S.W.2d at 933. Actual cohabitation and representations to others notwithstanding, a finding of common law marriage must be based upon the facts and circumstances of each case. *Id.*; *Estate of Claveria v. Claveria,* 615 S.W.2d 164, 166 (Tex. 1981). Therefore, as applied to the facts of this case, Mandy had the burden of establishing all three elements of a common law marriage by a preponderance of the evidence.

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

Most appealable issues in family law cases are reviewed for abuse of discretion. *Slicker v. Slicker*, 464 S.W.3d 850, 857 (Tex. App.—Dallas 2015, no pet.); *In re Marriage of C.A.S.*, 405 S.W.3d 373, 382 (Tex. App.—Dallas 2013, no pet.). This standard applies to the granting of a divorce. *In Marriage of C.A.S.*, 405 S.W.3d at 382. Therefore, when reviewing a family law case under an abuse of discretion standard, challenges to the sufficiency of the evidence do not constitute independent grounds of error but are relevant factors in determining whether the trial court abused its discretion.

Boyd v. Boyd, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.). Where the sufficiency standards overlap with the abuse of discretion standard, "we engage in a two-pronged inquiry: (1) Did the trial court have sufficient evidence upon which to exercise its discretion and (2) Did the trial court err in its application of that discretion?" *Id.*; *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 206 (Tex. App.—El Paso 2003, no pet.). A trial court abuses its discretion, and therefore errs, when it acts arbitrarily and unreasonably, or without reference to guiding rules and principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

In conducting a legal sufficiency review, we must consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that supports the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). Evidence will be found to be legally sufficient if it would enable reasonable and fair-minded people to reach the verdict under review. *Id.* at 827. In conducting a legal sufficiency analysis, this court must credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id.* The trier of fact is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. *Id.* at 819. The reviewing court may not substitute its judgment for that of the jury, so long as the evidence falls within the zone of reasonable disagreement. *Id.* at 822. But if the evidence allows only one inference, neither the jurors nor the reviewing court may disregard it. *Id.* A legal sufficiency challenge may only be sustained when the record discloses (a) a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla of

evidence, or (d) the evidence conclusively establishes the opposite of the vital fact in question. *Id.* at 810.

We apply a somewhat different standard of review in a factual sufficiency evaluation. A factual sufficiency challenge requires a reviewing court to consider, examine, and weigh all the evidence in the record. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998), *cert. denied*, 525 U.S. 1017, 119 S. Ct. 541, 142 L. Ed. 2d 450 (1998). In doing so, the court no longer considers the evidence in the light most favorable to the disputed finding; instead, the court considers and weighs all the evidence and sets aside that finding only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Id*. at 407. When reversing a judgment for factual insufficiency, an appellate court must detail all evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *Gonzalez v. McAllen Med. Ctr.*, *Inc.*, 195 S.W.3d 680, 681 (Tex. 2006).

ANALYSIS

(1) AGREEMENT TO BE MARRIED

The first and most essential element of a common law marriage is an agreement by both parties to be married. § 2.401(a)(2). Here, Mandy introduced the *Affidavit of Common Law Marriage* signed on November 1, 2000, to support her argument that she and Donald agreed to be married. Although Donald initially denied that he signed the agreement, he later admitted that he did. Donald's explanation of the agreement (and perhaps his reluctance to admit execution of it) was that it was executed for purposes of obtaining insurance through his employment. At trial, the affidavit was introduced into

evidence without objection and it does provide that Mandy and Donald intended their relationship to be permanent and considered themselves to be husband and wife.[5] *Eris*, 39 S.W.3d at 713.

In addition to the affidavit, Mandy also testified that she and Donald agreed to be married as of November 1, 2000. The testimony of one of the purported spouses constitutes some direct evidence that they agreed to be married. *Small*, 352 S.W.3d at 283. Mandy further testified that Donald gave her a three-stone ring that represented their "past, present, and future." Donald testified the ring was a gift and he never intended it to be a wedding ring.

In support of his position that there was no agreement to be married, Donald introduced into evidence a notarized *Agreement of Joint Interest Not to Have a Common Law Marriage.* That agreement was signed by both parties after Mandy filed her *Original Petition for Divorce.* It provided as follows:

> We have been and plan to continue living together as two, free, independent beings and neither of us has ever intended to enter into any form of marriage, common law or otherwise.

Mandy testified she was pressured into signing the agreement due to a threatening email from Donald.[6] Although this agreement does not conclusively establish the absence of a common law marriage, it does go to the weight and sufficiency of the evidence.

[5] While it is a subtle distinction, considering oneself to be married is not strictly the same thing as *agreeing* to be married.

[6] The agreement was signed in February 2012, however, the email which was introduced into evidence to support Mandy's accusation is dated March 30, 2012. The tone of the email threats was financial in nature and critical of both of their attorneys.

Considering the evidence under the appropriate standards of review, while we find that the original affidavit and Mandy's testimony provide legally sufficient evidence of an agreement to be married; as more fully detailed below, we find the overall evidence to be factually insufficient to support that conclusion.

(2) LIVED TOGETHER IN TEXAS AS HUSBAND AND WIFE

Mandy and Donald began cohabitating in 1999. They continued to live together until 2011 when Mandy and Donald separated. Neither party disputes the element of cohabitation. Consequently, we find the evidence to be legally and factually sufficient to support the second element of a common law marriage.

(3) REPRESENTED (HOLDING OUT) TO OTHERS THEY WERE MARRIED

An agreement to be married and cohabitation notwithstanding, "the public and open holding out that [the parties] are man and wife are as essential to a valid common law marriage as the agreement itself." *Ex parte Threet*, 333 S.W.2d at 364. Under well-established Texas law, there can be no secret common law marriage. *Id.* at 364-65 (stating that "secrecy is inconsistent and irreconcilable with the requirement of a public holding out that the couple are (sic) living together as husband and wife"). Accordingly, Mandy also bore the burden to establish that a marriage relationship with Donald was public and that their conduct towards each other created a "status" in the community that they were husband and wife. *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1130 (Tex. 1913).

The element of holding out to others that two people are married "requires more than occasional references to each other as 'wife' and 'husband.'" *Smith v. Deneve*,

285 S.W.3d 904, 910 (Tex. App.—Dallas 2009, no pet.). A couple's reputation in the community as being married is a significant factor in determining the holding out element. *Id.* (citing *Danna v. Danna*, No. 05-05-00472-CV, 2006 Tex. App. LEXIS 2368, at *1 (Tex. App.—Dallas March 29, 2006, no pet.). Establishing a reputation for being married requires the couple to "consistently [conduct] themselves as husband and wife in the public eye or that the community [view] them as married." *See Danna*, 2006 Tex. App. LEXIS 2368, at *2. *See also Winfield v. Renfro*, 821 S.W.2d 640, 648 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Here, Mandy asserts that documents provided to her and Donald's respective employers for purposes of obtaining insurance is evidence that they were holding themselves out to the public as husband and wife.[7] She also contends that providing benefits to Donald and his daughter through her employer, acting as primary caregiver to his daughter, providing housekeeping services, vacationing together, and being in a monogamous relationship is evidence of holding themselves out as husband and wife.

However, by her own testimony, she affirmed that in normal conversations she did not tell people that she and Donald were husband and wife. No family members, friends, co-workers, neighbors, or acquaintances testified on Mandy's behalf that she and Donald ever had a reputation in the community for being married or that they conducted themselves in public as husband and wife. The only other witness to testify on Mandy's behalf was a psychologist who conducted a mental evaluation of Donald and he did not offer any testimony to support the existence of a common law marriage.

[7] Insurance coverage paperwork designating each other as spouses was introduced into evidence.

Mandy does not cite authority and we have found none that supports a finding that mere representation of marital status to an employer, for the purpose of obtaining insurance, is sufficient to satisfy the statutory requirement of establishing a reputation in the community that the parties are husband and wife. Neither does she provide any cases in which the conduct she described as evidence of the holding out element—caregiver for Donald's daughter, vacationing together, housekeeping duties—was found sufficient to establish a reputation in the community of being husband and wife.

To the contrary, the jurisprudence of Texas strictly construes the holding out element and has held that marriage is more than a contract; it is a "status" in the community, a general reputation, a public and open holding out that the parties are man and wife. *See Threet*, 333 S.W.2d at 364-365 (citing *Grigsby*, 153 S.W. at 1130) (holding that to have a common law marriage, "cohabitation must be professedly as husband and wife, and public, so that by their conduct towards each other they may be known as husband and wife"). *See also Castillon v. Morgan*, No. 07-05-13-00872-CV, 2015 Tex. App. LEXIS 3640, at *7-9 (Tex. App.—Dallas April 14, 2015, no pet.) (mem. op.) (finding evidence insufficient to support the holding out element even though parties were listed as husband and wife in life and auto insurance policies); *Small*, 352 S.W.3d at 285-87; *Smith*, 285 S.W.3d at 910; *Lee v. Lee*, 981 S.W.2d 903, 906-07 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (sustaining a legal sufficiency challenge to holding out element where proponent of common law marriage only provided evidence that she told a few friends that she was married); *Flores v. Flores*, 847 S.W.2d 648, 653-54 (Tex. App.—Waco 1993, writ denied); *Winfield*, 821 S.W.2d at 648-51 (among other factors, purported wife's bank records and tax returns showed her as single); *Cf.*

Quinn v. Milanizadeh, No. 01-07-00489-CV, 2008 Tex. App. LEXIS 3022, at *15-17 (Tex. App.—Houston [1st Dist.] April 24, 2008, no pet.) (mem. op.) (finding evidence sufficient to support holding out element where parties referred to themselves as husband and wife to friends and families and parties signed a VA loan to purchase their home as husband and wife).

We now examine the contrary evidence tending to negate the "holding out" element of a common law marriage. Despite admitting to signing the *Affidavit of Common Law Marriage*, Donald testified he "never, ever, ever" intended to be married to Mandy. They never celebrated anniversaries or exchanged any anniversary greeting cards as spouses. He further testified he never told any of his friends or family that he and Mandy were married. He acknowledged that Mandy periodically expressed a desire to be married but he clearly and unequivocally did not share her sentiment. He never introduced Mandy as his wife and had no knowledge that she ever referred to him as her husband. After a difficult divorce from his first wife, Donald resigned himself to remain unmarried and he made that intention well known to Mandy as well as his friends and family.

At all times during their relationship, Mandy and Donald each filed tax returns as single individuals.[8] Mandy further testified that despite having filed suit claiming a common law marriage and seeking a divorce, she filed her tax returns as a single individual. Even after separating from Donald, she represented to the Internal Revenue Service that she was single in her 2011 and 2012 tax returns. Although a party's denial

[8] Donald offered and the trial court admitted copies of Mandy's 2009 and 2010 Form 1040EZ tax returns and copies of his 2008 and 2010 Form 1040 tax returns. Donald's Form 1040 returns show his filing status as Head of Household but the Turbo Tax Online form shows his status as single.

of the existence of a common law marriage on tax returns does not conclusively negate a common law marriage as a matter of law, it does go to the weight and sufficiency of the evidence. *Estate of Giessel*, 734 S.W.2d 27, 31 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

Additionally, the *Warranty Deed with Vendor's Lien* to Donald's house dated June 28, 2002, received while the parties were cohabiting together, shows "DONALD G. VAN HOOFF, a single man" as the grantee. The *Deed of Trust* likewise provides "Donald G. Van Hooff, AN UNMARRIED MAN" and is signed by only Donald. The record further establishes that Mandy was well aware of this representation and arrangement.

By their conduct and actions, Mandy and Donald did not represent to the public at large that they were husband and wife. Donald also presented overwhelming evidence that he and Mandy did not have a reputation in their community as being married. Two of Donald's co-workers testified he never introduced Mandy as his wife and the co-workers did not believe them to be married. One of the co-workers testified that Donald consistently referred to Mandy as his girlfriend.

A couple from their neighborhood testified they once attended a get-together at Donald's house and that neither Mandy nor Donald represented themselves as being married. Although the neighbors were not particularly friendly with Mandy or Donald, one of them recalled a conversation with Donald that he would never get married again because of the dissolution of his first marriage.

Additionally, Donald's friend of thirty-five years testified that he had the opportunity to spend time with Mandy and Donald and he never heard either one refer to the other as his or her spouse. He and Donald conversed about marriage, and given Donald's first marriage and divorce, Donald assured him he was not interested in marrying Mandy. He also recalled conversations in which Donald told him that Mandy wished to get married but Donald was not interested. He testified that Donald consistently referred to Mandy as his girlfriend. Finally, he testified that he and Donald were "that good of friends. I know Don would have told me if he decided to get married."

During deliberations, the jury sent a note to the trial judge asking, "What constitutes 'represented to others?'" The trial judge responded with a note to refer to the "Court's charge and continue your deliberations." Given the note and the non-unanimous verdict, we can see that the jury struggled with whether Donald had ever agreed to be married and whether Mandy and Donald had represented to others that they were husband and wife.

In our opinion, the jury's finding of a common law marriage is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Although Mandy presented enough evidence to defeat a legal sufficiency challenge concerning whether both parties agreed to be married and held themselves out to the public as husband and wife, she did not present sufficient evidence to defeat a factual sufficiency challenge as to each of those elements. Accordingly, we conclude the evidence is factually insufficient to support a finding that a marriage relationship existed between Mandy and Donald. Because the evidence is factually insufficient to establish

an informal or common law marriage relationship, the trial court abused its discretion in granting a divorce. Issue one is sustained.

Our disposition of issue one pretermits consideration of issue two concerning the trial court's property division. TEX. R. APP. P. 47.1.

CONCLUSION

The *Final Decree of Divorce* signed on October 31, 2013, is reversed and the cause is remanded to the trial court for further proceedings to allow Mandy the opportunity to satisfy her burden to establish a common law marriage under section 2.401(a)(2) of the Texas Family Code. Should Mandy fail to satisfy her burden, the trial court is ordered to make a division of any jointly-claimed or jointly-owned property held by Mandy and Donald.

Patrick A. Pirtle
Justice