

[Cite as *In re Estate of Thompson*, 2009-Ohio-6139.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

IN THE MATTER OF	:	Appellate Case No. 23230
THE ESTATE OF	:	
	:	Trial Court Case No. 2007-EST-2567
ANTHONY THOMPSON, Decedent :	:	(Civil Appeal from Common Pleas
	:	Court, Probate)
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OPINION

Rendered on the 20<sup>th</sup> day of November, 2009.

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BROGAN, J.

{¶ 1} Linda Combs appeals from the judgment of the Montgomery County Probate Court that she is not the surviving spouse of Anthony Thompson, deceased.

{¶ 2} Anthony Thompson died intestate on November 21, 2007. Linda Combs applied on December 7, 2007 to administer the estate, asserting she was

Thompson's surviving spouse. On the same date, the probate court approved her application. On January 17, 2008, William Thompson, the deceased's brother, filed a petition to remove Combs as fiduciary. On August 22, 2008, Combs filed a motion to have the court find that she is the surviving spouse of Anthony Thompson by virtue of a marriage of common law. The matter was heard by a magistrate who found that Combs and Anthony Thompson were not common-law married at the time of Thompson's death and thus Combs was not his surviving spouse. The trial court adopted the magistrate's findings and recommendations. It is from that decision this appeal lies.

{¶ 3} Linda Combs testified at the magistrate's hearing that she met Anthony Thompson on April 16, 1976, and shortly thereafter began living together. Anthony was married to Loretta Thompson at the time but was living separate and apart at the time. She testified that she and Anthony had a joint bank account at Liberty Savings Bank and shared expenses such as groceries, clothing and living expenses.

{¶ 4} In 1983, despite being married, Linda testified that Anthony gave her a diamond engagement ring. On December 15, 1987, Anthony was divorced from his former wife, Loretta. At Christmas 1987, Linda testified that Anthony gave her a wedding band and told her "we will get married as soon as we get time." Linda said Anthony said we needed a certificate, and we never had time to get one. Linda said she felt they were married since she and Anthony lived together.

{¶ 5} Linda testified Anthony inherited real estate from his parents and gave it to his brother and sister. She could not explain why Anthony signed the deed as an unmarried person and why the deed did not contain a release of dower for Linda.

Linda testified that Anthony's sisters, Delores Stone and Phyllis Lewis, considered her as their sister-in-law. She identified birthday cards sent to her by Delores and Phyllis. She identified one of the cards as sent to her by Delores Stone in 2003. Linda introduced evidence that Anthony completed a benefits enrollment application with Humana health plan in December 2005 and listed Linda as his spouse.

{¶ 6} Co-workers of Anthony also testified that they thought Anthony and Linda were married. David Cornett specifically testified he knew Anthony for over 26 years, and Linda and Anthony were always together. He testified Tony referred to Linda as his wife. He was not specific, however, as to when he heard Anthony make this reference to Linda. Lloyd Crump testified he worked with Tony at the Centerville schools for some thirty years. He testified that Anthony and Linda lived together during all those years.

{¶ 7} Brian Thompson testified he was the younger brother of Anthony Thompson and he never heard his brother refer to Linda Combs as his wife.

{¶ 8} Delores Stone, Anthony's sister, testified she considered Linda as her sister-in-law. She testified her parents treated Linda as a member of the family. She identified two birthday cards she sent to Linda which referred to her as her sister-in-law.

{¶ 9} Anthony Fuentes testified his family lived next door to Anthony Thompson. He stated he had known Anthony since he was a young man going back at least to 1976. He testified he assumed Tony was married because Linda lived with Anthony and he heard Anthony refer to her as his wife. He was not specific as to the date of any such references.

{¶ 10} At the conclusion of the hearing, the magistrate made the following findings of fact and conclusions of law:

{¶ 11} “I find that Anthony Thompson died on November 21, 2007 and that he was a resident of Montgomery County, Ohio.

{¶ 12} “I find that in 1976 Linda Combs moved in with the decedent, Anthony Thompson who was at that time was [sic] married but separated from his then wife Loretta.

{¶ 13} “I find that Anthony Thompson was divorced from his wife Loretta in 1987.

{¶ 14} “I find that Anthony Lewis [sic] gave Linda Combs an engagement ring in 1983.

{¶ 15} “I find that Anthony Lewis [sic] purchased a wedding ring for Linda Combs in 1988, one year after his divorce from his wife Loretta, and placed the ring in the family Christmas tree for Linda to find.

{¶ 16} “I find that Linda Combs testified that from Christmas of 1988 she considered herself married to the decedent.

{¶ 17} “I find that at some point in their relationship Linda Combs and Anthony Lewis [sic] separated and live [sic] apart for a few weeks and then reconciled and continued to live together.

{¶ 18} “I find that Linda Combs acknowledged that she and Anthony Lewis [sic] were not ceremonially married.

{¶ 19} “I find that several witnesses called by Linda Combs testified that she and the decedent always held themselves out as married and that the witnesses

always considered them as married.

{¶ 20} **CONCLUSIONS OF LAW**

{¶ 21} “In Ohio, common-law marriages were prohibited by statutory amendment after October 10, 1991. However, common-law marriages that occurred prior to that date continue to be recognized.

{¶ 22} “Common-law marriages are established when the following elements are present:

{¶ 23} “1. an agreement of marriage *in praesenti*;

{¶ 24} “2. co-habitation as husband and wife;

{¶ 25} “3. a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community.

{¶ 26} “The party seeking to establish the existence of a common-law marriage must prove each element by clear and convincing evidence.

{¶ 27} “Even if a party proves cohabitation and reputation, the lack of an agreement of marriage *in praesenti* will be fatal to any claim that there is a common-law marriage.

{¶ 28} “I find that Linda Combs has established by clear and convincing evidence that she and the decedent, Anthony Thompson, lived together for a period of over 30 years, including a period of over 18 years after the decedent received his divorce from his wife, Loretta, in 1987.

{¶ 29} “I find that over the period of many years Linda Combs and to a much lesser degree Anthony E. Thompson held themselves out to their friends and family members as married to each other.

{¶ 30} “What I cannot find from the testimony is the actual present intention of the decedent to be married to Linda Combs.

{¶ 31} “Linda Combs admitted that there were no witnesses to the parties’ alleged agreement to marry *in praesenti*.

{¶ 32} “Linda Combs testified that the decedent purchased a wedding ring for her after they had been shopping for wedding rings earlier in the year.

{¶ 33} “She further testified that the decedent placed the ring in a box and hung the box in the Christmas tree for her to find.

{¶ 34} “Linda Combs testified that to her the ring *indicated* to her that she and the decedent were married. She testified at that time the decedent referred to her as his wife and she referred to him as her husband.

{¶ 35} “However, Linda Combs also testified that the decedent told her that same Christmas day that, ‘We are going to get married’ and ‘we will need to get a certificate.’

{¶ 36} “Linda Combs testified that the decedent told her they would be married ‘as soon as we get time.’

{¶ 37} “When questioned why she and the decedent did not get ceremonially married Linda Combs answered that ‘we never had time \* \* \* we were living our lives.’

{¶ 38} “There is other evidence which conflicts with Linda Combs’ claim that the parties agreed to marry *in praesenti*.

{¶ 39} “There was no indication that Linda Combs ever purchased a wedding ring for Anthony E. Thompson or that he ever wore a wedding ring.

{¶ 40} “It appears that the parties did not have joint bank accounts.

{¶ 41} “Although there is some conflict in the testimony by the parties, it appears that Linda Combs rarely used the decedent’s last name as her own until after the decedent’s death.

{¶ 42} “More to the point, the Court is troubled by what may be best described as ‘the dog that did not bark’ nature of this case.

{¶ 43} “Linda Combs, after living with the decedent, her alleged spouse, for a period of in excess of thirty years, is, for all practical purposes, unable to produce any written documentation of any kind whatsoever—no deed, letter, bank savings account book, bank statement, tax return, tax bill, automobile title, homeowner’s insurance policy, household bill, credit card bill, house or car repair bill—that shows the parties considered themselves married.

{¶ 44} “The total record of the written documents admitted by Linda Combs in this case consists of the following items: A copy of a printout of an Open Enrollment statement with Humana dated 1/1/2006 (wherein Linda Combs is listed as the decedent’s spouse); three preprinted greeting cards (undated) sent to Linda Combs by Phyllis Lewis and Delores Stone, the decedent’s sisters and a ‘thank you’ card dated June 30, 2003 with the envelope addressed to ‘Mr. And Mrs. Anthony Thompson.’

{¶ 45} “The Court cannot find that this documentation indicates by clear and convincing evidence that both of the parties ever considered themselves married.

{¶ 46} “Indeed, the one legal document put forward as evidence, which was introduced by the opposing party, is a Survivorship Deed signed by the decedent

dated May 14, 2003 that in two places lists the decedent, Anthony E. Thompson, as 'unmarried.' In her testimony to the Court, Linda Combs could offer no explanation why the decedent would represent himself as unmarried.

{¶ 47} “Unfortunately, the Court is compelled to answer that question for her. The Decedent, Anthony Thompson, did not consider himself married to Linda Combs.”

{¶ 48} After objections were filed by Linda to the magistrate’s report, the trial court overruled the objections and adopted the magistrate’s findings and recommendations.

{¶ 49} In two related assignments of error, Linda argues that the trial court erred in finding there was insufficient evidence to conclude that Anthony considered himself married to Linda. Although Appellant has not provided the court with a transcript of the proceedings below as required by App.R. 9(A), we have nonetheless reviewed carefully the videotape of the proceedings filed with the court.

{¶ 50} The necessary elements to establish a common-law marriage were set forth long ago by the Ohio Supreme Court in *Umbenhowe v. Labus* (1912), 85 Ohio St.238. The syllabus provides as follows:

{¶ 51} “An agreement of marriage *in praesenti* when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move establishes a valid marriage at common law \* \* \*.”

{¶ 52} “The fundamental requirement to establish the existence of a common law marriage is a meeting of the minds between the parties who enter into a mutual



contract to presently take each other as man and wife. The agreement to marry *in praesenti* is the essential element of a common law marriage. Its absence precludes the establishment of such a relationship even though the parties live together and openly engage in cohabitation. Although cohabitation and reputation are necessary elements of a common law marriage, this court has previously held that standing alone they do not constitute a common law marriage. *In re Redman* (1939), 135 Ohio St. 554 [29 O.O. 143].

{¶ 53} “The contract of marriage *in praesenti* may be proven either by way of direct evidence which establishes the agreement, or by way of proof of cohabitation, acts, declarations, and the conduct of the parties and their recognized status in the community in which they reside. However, all of the essential elements to a common law marriage must be established by clear and convincing evidence. *Markley v. Hudson* (1944), 143 Ohio St. 163.” *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, 146.

{¶ 54} In *Nestor v. Nestor*, the Ohio Supreme Court in a per curiam opinion noted the following:

{¶ 55} “Where there is no direct proof in reference to the formation of the contract of marriage *in praesenti*, testimony regarding cohabitation and community reputation tends to raise an inference of the marriage. This inference is given more or less strength according to the circumstances of the particular case. The inference is generally strengthened with the lapse of time during which the parties are living together and cohabitating as man and wife.

{¶ 56} “Where there is direct evidence concerning the formation of the

contract of marriage *in praesenti* and a finding by the court, as here, that such a contract exists, the evidence of long-time cohabitation and reputation of living together as man and wife should be given even greater weight to further strengthen the inference of marriage.” *Id.*

{¶ 57} There is no dispute in this record that Linda Combs and Anthony Thompson cohabited for many years and that several persons in their community thought they were married. Certainly there was evidence to support Linda’s claim that she considered herself as Anthony’s spouse. There was, however, conflicting evidence as to whether Anthony agreed to be married to Linda. While there was no evidence to dispute Linda’s claim that Anthony gave her a wedding ring at Christmas in 1987, Anthony signed a survivorship deed as “unmarried” in 2003. Although Linda testified she had a joint bank account with Anthony at Liberty Savings Bank, she produced no documentary proof to support that claim. Linda testified that after Anthony gave her a wedding ring in 1987, Anthony told her “we are going to get married.” There was also evidence that Linda rarely used Thompson as her last name.

{¶ 58} Linda essentially argues that the trial court’s judgment is against the manifest weight of the evidence. She acknowledges that she bore the burden of proving her common-law marriage status by clear and convincing evidence. The trial court’s determination that she failed to meet that burden is not against the manifest weight of the evidence. There is some substantial and probative evidence to support the trial court’s finding. *C.E. Morris v. Foley Construction Co.*, 54 Ohio St.2d 279 (1978). Appellant’s assignments of error are Overruled.

{¶ 59} The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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