[Cite as *Sulfridge v. Kindle*, 2005-Ohio-3929.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

CALEB D. SULFRIDGE,	:	
Plaintiff-Appellant,	:	Case No. 04CA795
vs.	:	
MARY L. KINDLE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Stephen C. Rodeheffer, 630 Sixth Street, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: John F. Berry, 707 Sixth Street, P.O. Box 950, Portsmouth, Ohio 45662

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 7-28-05

ABELE, P.J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment finding that Caleb D. Sulfridge, plaintiff below and appellant herein, failed to prove the existence of a common law marriage between himself and Mary L. Kindle, defendant below and appellee herein.

{¶ 2} The following error is assigned for our review:

> "THE DECISION OF THE TRIAL COURT FINDING THAT THE APPELLANT FAILED TO ESTABLISH A COMMON LAW MARRIAGE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 3} The parties met approximately twenty years ago when they were employed by General Electric. Although appellant was married at that time, the two began dating and eventually engaged in a romantic relationship.[1]

{¶ 4} In 1988, appellee purchased a farm on Buck Run Road in Adams County. She lived at the farm for the next few years. Appellant lived there periodically until 1991 when they borrowed money to build a home on the property. Between 1991 and 1997, both resided at the premises sometimes representing themselves as husband and wife, and sometimes as single people who simply lived together. The couple eventually separated in 1997 under less than amicable circumstances.[2]

{¶ 5} Appellant commenced this action on November 14, 1997 and alleged that he and appellee established a "common law" marriage in 1991. He further alleged that his "wife" was guilty of gross neglect and extreme cruelty. Appellant requested a divorce and an equitable division of real and personal property. Appellee denied that she and appellant established a common law marriage and asked that his complaint be dismissed and that she be awarded attorney fees.

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[1] Appellant separated from his first wife in 1986 and the marriage was formally terminated five years later.

[2] Although no specific document to that effect is included in the record before us, there are various references to domestic violence charges and civil protection orders.

{¶ 6} In 1999, appellee requested a summary judgment. Specifically, she argued that appellant could not prove the elements necessary to establish a common law marriage. In support of her argument, she cited 1991 tax returns (showing both her and appellant as filing single), various other documents denoting either her or appellant as "single" over the course of the 1990s, and numerous affidavits from people in the community attesting that they had always known appellee as a single person.

{¶ 7} Appellant's memorandum contra argued that genuine issues of material fact existed as to whether he and appellee had a common law marriage. In support of that argument, he attached a 1993 federal tax return showing that the two of them filed jointly as husband and wife. He also submitted other documents to show that the two shared accounts and that appellee sometimes used "Sulfridge" as her last name.

{¶ 8} On May 26, 1999, the trial court granted summary judgment in appellee's favor, but deferred action on her attorney fee request. An appeal was taken from that judgment and we dismissed it for lack of jurisdiction. See Sulfridge v. Kindle (Feb. 15, 2000), Adams App. No. 99CA767 ("Sulfridge I").[3] Subsequently, the trial court conducted a hearing to consider

[3] Judgments that determine aspects of a claim, but defer the issue of attorney fees for further adjudication, are neither final nor appealable. See Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn. (1993), 87 Ohio App.3d 840, 843, 623 N.E.2d 232; Cole v. Cole (Nov. 8, 1993), Scioto App. No. 94CA2146; Pickens v. Pickens (Aug. 27, 1992), Meigs App. No. 459.

evidence regarding appellee's attorney fees. Appellant and his counsel did not appear at the hearing and, thus, offered no rebuttal evidence. The court then awarded appellee approximately $11,000 in attorney fees.

{¶ 9} On September 6, 2000, appellant filed a Civ.R. 60(B) motion to vacate the judgment for attorney fees. Appellant claimed that neither he nor his counsel were provided notice of the hearing. The trial court overruled his motion. Appellant appealed that judgment and, on September 25, 2001, we reversed the trial court's denial of the motion to vacate and remanded the case for further proceedings. See Sulfridge v. Kindle (Sep. 25, 2001), Adams App. No. 00CA700 ("Sulfridge II"). On remand, rather than schedule a hearing to consider the attorney fee issue, the trial court vacated the summary judgment entered two years earlier (regarding the existence of a common law marriage) and ordered that the matter be set for a "full contested hearing."[4]

{¶ 10} Later, appellant retained new counsel who filed an amended complaint and asserted additional claims in "joint enterprise" and "quasi contract."[5] Appellee denied any liability under the new claims.

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[4] The trial court's December 27, 2001, judgment entry indicates that this action was taken upon appellant's oral motion and without objection.

[5] The gist of these claims was that appellant and appellee had acquired and developed a farm which they worked as a "joint enterprise" and that, in the course of operating that farm,

{¶ 11} On July 15, 2002, the matter came on for hearing solely as to the issue of common law marriage. After two days of testimony, the trial court found that appellant had not proven the existence of a common law marriage.

{¶ 12} Appellant's remaining claims subsequently came on for trial. After its review of the evidence, the trial court found that appellant did not establish his case for "joint enterprise" or quasi contract and granted judgment in appellee's favor. The matter was then deferred for further proceedings on appellee's request for attorney fees. However, appellee later withdrew her attorney fee demand. This appeal followed.

{¶ 13} Appellant asserts in his sole assignment of error that the trial court erred in determining that he had not established a common law marriage. We disagree.

{¶ 14} Our analysis begins from the premise that Ohio law prohibits the creation of common law marriages after October 10, 1991. R.C. 3105.12(B)(1). Prior to that time, common law marriages could be formed if the following elements were present: (1) an agreement of marriage in praesenti; (2) cohabitation as husband and wife; and (3) a holding out by the parties to those with whom they normally come into contact, resulting in a

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appellant conferred certain benefits (contributions of money, use of his credit, etc) to appellee under such circumstances that it would be unjust for her to retain those benefits without compensating him. Appellant asked for a dissolution of their joint enterprise, the imposition of a constructive trust and compensatory damages in excess of $25,000.

reputation as a married couple in the community. Nestor v. Nestor (1984), 15 Ohio St.3d 143, 145, 472 N.E.2d 1091; Umbenhower v. Labus (1912), 85 Ohio St. 238, 97 N.E. 832, at the syllabus; also see State v. DePew (1988), 38 Ohio St.3d 275, 279, 528 N.E.2d 542.

{¶ 15} Because common law marriages have always been disfavored in Ohio, the party asserting the marriage's existence had the burden to prove those elements by clear and convincing evidence. See In re Estate of Shepherd (1994), 97 Ohio App.3d 280, 284, 646 N.E.2d 561; Harris v. Harris, Medina App. No. 04CA0020-M, 2004-Ohio-6741, at ¶5; Kvinta v. Kvinta, Franklin App. No. 02AP-836, 2003-Ohio-2884, at¶25.[6] In addition, because of the particular facts and circumstances at issue in this case, those elements had to be shown to exist during a six month window between April and October of 1991.[7]

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[6] We note that the trial court's October 22, 2004 judgment entry finds that appellant failed to prove common law marriage by "a preponderance of the evidence." This statement as to the burden of proof is incorrect. Because this issue has not been raised on appeal, and because the trial court was unlikely to have found in appellant's favor under the more rigorous standard if it did not find for him under the less rigorous one, we need not address this issue.

[7] The uncontroverted evidence revealed that appellant's divorce from his first wife was final on April 16, 1991. Because polygamy is prohibited in Ohio, a person cannot establish a common law marriage while that person is still lawfully married to another spouse. See generally Nyhuis v. Pierce (1952), 65 Ohio Law Abs. 73, 114 N.E. 75; State v. Heredia (Sep. 24, 1987), Cuyahoga App. No. 52705; Swain v. Watts (Oct. 30, 1984), Montgomery App. No. 8729. Consequently, appellant's opportunity to enter into a common law marriage occurred after his April, 1991 divorce, but before October 1991 when common law marriages were banned altogether.

{¶ 16} This case involves a substantial quantity of conflicting evidence and we do not dispute that sufficient evidence was adduced at trial which, if given the proper weight and credibility, could have permitted the trial court to conclude that a common law marriage was formed during the six month window. Appellant testified that he and appellee agreed to enter a "common law relationship" two days after his divorce and after that he introduced her as his wife until they separated. In September of 1991, both parties executed a note and mortgage to secure financing for construction of a log cabin home on the Buck Run Road property.[8] Appellant also related that he would not have obligated himself on such a debt had he and appellee only been "living together."

{¶ 17} Appellee admitted during her testimony that during the fall of 1991, appellant listed her name on the title to one of his vehicles. Other evidence revealed that the parties opened joint bank accounts, but it is not clear whether this action was taken in 1991 or subsequently. Several witnesses also testified that appellee was introduced to them as appellant's wife and that joint federal income tax returns for tax years 1992, 1993 and 1994 showed the two using the "married" filing status. All this

[8] Neither instrument specified a marital status for these parties. The mortgage did, however, list the parties as "joint tenants." We find this somewhat perplexing, as the uncontroverted evidence reveals that appellee is the sole owner of the Buck Run Road farm.

suggests that the parties had indeed entered into a common law marriage in 1991.

{¶ 18} By the same token, however, considerable evidence was adduced to the contrary. Appellee emphatically denied she and appellant entered into a "common law relationship." Neighbors and acquaintances testified that they had always regarded the parties as single. Gregory Pfeffer, the parties' insurance agent, stated that he met with both of them in 1995 to issue liability insurance and that both represented themselves as single. John Rickey, Winchester councilman and former mayor, testified that appellant was hired in 1995 to be the police chief and that he listed his tax filing status as "single" on the federal W-4 form. More importantly, appellee introduced copies of tax returns for the pivotal 1991 tax year that showed both she and appellant filed as single individuals for that tax year.

{¶ 19} Other evidence also contradicted appellant's assertion that the parties entered into a common law marriage agreement and held themselves out as husband and wife. A "Personal Data Change" card appellant completed in 1991 for his employer listed him as "single" and a pay stub for another employer in 1994 likewise listed appellant's status as "single."[9] In 1994,

[9] We note that as to the "Personal Data Change" card, this document was dated April 8, 1991. This occurred before the date when appellant testified he and appellee entered a common law relationship. At the same time, however, appellant was also still married to his first wife on that date and, thus, the card was incorrectly completed in any event.

appellee executed a "settlement agreement" and released "Camp Joy Education Center" from all liability for a personal injury that she sustained while staying there. That agreement listed her as a single woman and appellant signed the document as a witness. Finally, appellee introduced a copy of a 1997 deed whereby appellant sold property he owned in Kentucky. That document also listed his marital status as single.

{¶ 20} In sum, the evidence as to the existence of a common law marriage was conflicting and highly contradictory. It is generally up to the trial court, sitting as the trier of fact, to sift through the evidence, perform an evaluation and determine which side is the more credible. See Cole v. Complete Auto Transit, Inc. (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289; GTE Telephone Operations v. J & H Reinforcing & Structural Erectors, Inc., Scioto App. No. 01CA2808, 2002-Ohio-2553, at ¶10; Reed v. Smith (Mar. 14, 2001), Pike App. No. 00CA650. Moreover, appellate courts typically defer to trial courts on issues of evidence weight and credibility because, as the trier of fact, trial courts are better positioned than appellate courts to view the witnesses and to observe their demeanor, gestures, and voice inflections and to use those observations in weighing credibility. See Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. It is also important to note that a trier of fact is free to believe all, part or none of the

testimony of any witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591; also see State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Harriston (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144.

{¶ 21} In the case sub judice, the trial court obviously afforded more weight to appellee's evidence and that is within its province as the trier of fact. We note that a substantial amount of evidence tended to discredit appellant's common law marriage claim, including appellant's admission that in 1993 he and his alleged common law wife held an engagement party to announce their engagement to be married. Although he attempted to explain the engagement as merely to "reinforce [their] vows and [their] relationship," the trial court may well have found this an improbable answer. Some married couples choose to renew their marriage vows, but an engagement typically suggests a first time marriage.[10]

{¶ 22} Moreover, assuming arguendo that an *in praesenti* agreement to be married existed, appellant still tended to contradict his claim that he and appellee held themselves out in the community as husband and wife. Appellant testified that both

[10] The parties did not follow through with a formal wedding ceremony and appellee explained that this was because she got "cold feet" after appellant pressured her too much to get married and wanted to take an expensive honeymoon without having the means to pay for it.

were "very private in [their] lives." Appellant admitted that he did not inform his own brother they were married because it was their "secret." He explained that he did not conceal the marriage, but also "didn't announce" it "to the general people in [their] lives." Appellant further conceded that he listed his status as single with every employer he had during his relationship with appellee. We agree with the trial court's conclusion that these actions are hardly the kind of actions taken by a someone holding himself out to be married.

{¶ 23} In the end, we may not reverse a judgment as against the manifest weight of the evidence so long as it is supported by some competent, credible evidence. Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; Vogel v. Wells (1991), 57 Ohio St.3d 91, 96, 566 N.E.2d 154; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus. This standard is highly deferential and even "some" evidence is sufficient to sustain the judgment and prevent a reversal. Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989; Willman v. Cole, Adams App. No. 01CA25, 2002-Ohio-3596, at ¶24; Simms v. Heskett (Sep. 18, 2000), Athens App. No. 00CA20.

{¶ 24} Therefore, we conclude that in the case at bar sufficient evidence exists in the record to support the trial court's conclusion that appellant did not prove the existence of a common law marriage. Accordingly, we hereby overrule

appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only

For the Court

BY:_____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.