

[Cite as *Faison v. Faison*, 2005-Ohio-2733.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84942

BETTY FAISON

Plaintiff-Appellant

vs.

WILLIE J. FAISON

Defendant-Appellee

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JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT  
OF DECISION:

June 2, 2005

CHARACTER OF PROCEEDING:

Civil appeal from  
Common Pleas Court,  
Domestic Relations Division,  
Case No. D-292462

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

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APPEARANCES:

For Plaintiff-Appellant:

WILLIAM D. MOORE  
620 Leader Building  
526 Superior Avenue, N.E.  
Cleveland, Ohio 44114-1900

For Defendant-Appellee:

VINCENT A. STAFFORD  
Stafford & Stafford Co., L.P.A.  
380 Lakeside Place  
323 Lakeside Avenue, West  
Cleveland, Ohio 44113

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Plaintiff-appellant Betty Faison ("appellant") appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

I.

{¶ 2} Appellant filed her complaint for divorce on May 1, 2003. In her complaint, appellant alleged that the parties were married on June 16, 1970, a Tuesday, in Cleveland, Ohio. However, the record indicates appellee was still married to his first wife in 1970. Appellant later filed an amended complaint on July 17, 2003, averring that the parties were married on June 15, 1975, a Sunday, in Detroit, Michigan. Appellee argues that he was never married to appellant. Appellant alleged that the parties were married at common law, no children were born of the marriage, and they were joint owners of the real property located at 1979 Torbenson Drive, Cleveland, Ohio. Appellee filed his answer generally denying the allegations of the amended complaint.

{¶ 3} Appellant offered exhibits 1 through 5. Appellee objected to appellant's exhibit 4 on the grounds that it was hearsay and not self-authenticating. The appellee objected to appellant's exhibit 5 on the basis that no foundation had been established for its admissibility. The appellee offered exhibits A through E; there was no objection to the appellee's exhibits.

Appellee's objection to appellant's exhibit 5 was overruled and all of the remaining exhibits were admitted into evidence.

{¶ 4} Appellant was asked on cross-examination if she ever applied to a governmental body for a marriage license, and she testified that she was waiting for appellee to get the license. Appellant acknowledged that her signature does not appear on appellee's exhibit 1, the deed to the Torbenson Drive property, and that the document was created by the title company when the house was purchased. No witnesses were called to establish the reputation of the parties in the community. Both parties testified that they never had any joint bank accounts or joint credit cards.

{¶ 5} Appellee testified that he was divorced from a prior wife in 1973 and married his current wife, Joan Faison, on December 10, 1998. He testified that he left the Torbenson Drive residence in 1993. Appellee denied exchanging vows with appellant and denied introducing her as his wife. He testified that he and appellant talked about getting a marriage license but never did. Appellant offered his federal income tax returns for 1993, 1994, 1995, and 1997; his status on each was listed as single.

{¶ 6} The case proceeded to trial before the magistrate. At the close of the appellant's case in chief, appellant moved to amend the pleadings to conform to the evidence and was overruled. The lower court upheld the decision of the magistrate, and appellant filed this timely appeal.

II.

{¶ 7} Appellant's first assignment of error states the following: "The decision by the court is against the manifest weight of the evidence."

{¶ 8} Appellant's second assignment of error states the following: "The court erred to the prejudice of the plaintiff by improperly excluding relevant evidence."

{¶ 9} Appellant's third assignment of error states the following:

{¶ 10} "The court erred to the prejudice of the plaintiff in its interpretation of the law of common law marriage."

{¶ 11} Appellant's fourth assignment of error states the following: "The court abused its discretion by denying her motion to amend the pleadings to conform to the evidence."

{¶ 12} Because of the substantial interrelation of appellant's assignments of error, we shall address them together. In *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, the Ohio Supreme Court set out the required elements necessary to establish the existence of a common law marriage: (1) an agreement to marry in praesenti by parties competent to contract; (2) cohabitation as husband and wife; (3) the parties must hold themselves out as husband and wife, and (4) the parties are treated and reputed as husband and wife by the community. The court in *Nestor* further concluded that each

element must be established by clear and convincing evidence. Id. at 146.

{¶ 13} However, after October 10, 1991, the establishment of common-law marriage became prohibited by statute. R.C. 3105.12(B)(1). Although common law marriages have been prohibited in Ohio since October 10, 1991, R.C. 3105.12(B) provides that a common law marriage which came into existence before October 10, 1991 remains valid after that date.

{¶ 14} "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. See, also, *Mullins v. Mullins* (1990), 69 Ohio App.3d 167.

{¶ 15} "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, at 169; *In re Redman*, supra, at 558. Clear and convincing evidence is that degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. *Cork v. Bray* (1990), 52 Ohio St.3d 35.

{¶ 16} The first element of the test, a meeting of the minds to marry in praesenti, is the essential element of the common law marriage. "Its absence precludes the establishment of such a relationship even though the parties live together and openly engage in cohabitation \*\*\*." *Nestor*, supra at 146. "An agreement to marry in praesenti may be proven either by direct evidence which establishes agreement, or by proof of cohabitation, acts, declarations, and conduct of the parties and their recognized status in the community in which they reside." *Id.* The inference raised from cohabitation and community reputation is given more or less strength according to the circumstances of the particular case at bar. The inference is also strengthened when taking into consideration the period of time the couple is living together and cohabiting as man and wife. *Id.*

{¶ 17} The trial court magistrate cited *Brooks v. Brooks* (Apr. 30, 2001), 12<sup>th</sup> Dist. No. CA2000-08-079, in his decision. The facts in *Brooks* are similar to the facts in the case sub judice. In

*Brooks*, the plaintiff presented deeds she signed as the defendant's wife which named the husband as a "married man," a life insurance beneficiary designation signed by the defendant indicating the plaintiff as his wife, and cards and letters addressed to "Mr. and Mrs. Brooks." In *Brooks*, supra, the parties maintained separate bank accounts, there were no witnesses to any agreement to marry in praesenti and the plaintiff's testimony about the circumstance of that agreement was inconsistent. Mr. Brooks offered several tax returns which showed that both parties filed as single individuals and two witnesses who testified that he corrected people who referred to the plaintiff as his wife.

{¶ 18} The magistrate who heard the *Brooks* case found that the plaintiff had proved, by clear and convincing evidence, that the parties had a common law marriage. The trial court granted the defendant's objections and found that the "evidence presented, while indicating a common law marriage, fell short of meeting the clear and convincing standard." The court of appeals affirmed the trial court's decision.

{¶ 19} Similar to *Brooks*, the parties in the case at bar maintained separate bank accounts and there were no witnesses to any agreement to marry in praesenti. Both parties in the case sub judice testified they never had joint bank accounts or joint credit cards. Furthermore, appellee offered his federal income tax

returns for several years in the 1990s, and his status on each was listed as single.

{¶ 20} As previously mentioned, appellee testified that he was not divorced from his first wife until 1973, well after appellant's alleged June 16, 1970 marriage date. The evidence established that appellee was still married to his first wife in 1970 and never signed a marriage certificate with appellee. Appellant acknowledged that her signature does not appear anywhere on the deed to the Torbenson Drive property. Witnesses were never called to establish the reputation of the parties in the community. Appellee denied exchanging vows with appellant and denied introducing her as his wife. Appellee testified that the parties may have talked about getting a marriage license, but never actually did. The evidence demonstrates that the parties failed to meet the first element of a common law marriage.

{¶ 21} Assuming arguendo that appellant had met all of the elements of a common law marriage, she would not overcome the defense of laches. Appellant did not file her complaint for divorce until May 1, 2003. However, appellant testified that she stopped living with appellee at the Torbenson Drive house in 1994 or early 1995. Appellant gave no reason for her delay of more than eight years from when she testified that the parties separated in bringing her claim for common law marriage.



{¶ 22} In conclusion, we do not find the decision of the trial court to be against the manifest weight of the evidence, nor do we find any evidence of prejudice to the plaintiff regarding the exclusion of evidence. Moreover, we find the lower court's interpretation of common law marriage to be proper, and do not find any abuse of discretion regarding appellant's motion to amend the pleadings.

{¶ 23} Accordingly, appellant's four assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his 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 Cuyahoga County Court of Common Pleas, Domestic Relations Division, to carry this judgment into execution.

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

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ANTHONY O. CALABRESE, JR.  
JUDGE

SEAN C. GALLAGHER, P.J., CONCURS;

MARY EILEEN KILBANE, J., DISSENTS (SEE SEPARATE  
DISSENTING OPINION).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT  
COUNTY OF CUYAHOGA  
NO. 84942

|                     |   |                     |
|---------------------|---|---------------------|
| BETTY FAISON,       | : |                     |
|                     | : |                     |
| Plaintiff-Appellant | : |                     |
|                     | : |                     |
| -vs-                | : | D I S S E N T I N G |
|                     | : |                     |
|                     | : | O P I N I O N       |
| WILLIE J. FAISON,   | : |                     |
|                     | : |                     |
| Defendant-Appellee  | : |                     |

DATE OF ANNOUNCEMENT  
OF DECISION: June 2, 2005

MARY EILEEN KILBANE, J., DISSENTS:

{¶ 24} In the decision reached by the majority, I respectfully dissent.

{¶ 25} Admittedly, the record reflects several different marriage dates including June 16, 1970 (Complaint filed May 1, 2003), June 16, 1972 (Petition in Domestic Violence dated July 19, 1990), and June 15, 1975 (Affidavit of Betty Faison as attached to the Motion to Amend Complaint filed June 25, 2003). However, all dates are prior to the abolition of common law marriage on October 10, 1991. Although testimony was also submitted that Mr. Faison was married to Dorothy Faison in 1955 and divorced on December 19, 1973, by virtue of case number DR043475, and that he then married Joan Faison in November 1998 in Las Vegas, Nevada, this alone does not negate the existence of a common law marriage to Betty Faison in the intervening years. In between the time period of his first divorce and at least his second marriage of record, there is no claim that he was not in a relationship with Betty Faison, but rather the question is whether this relationship amounted to a common law marriage.

{¶ 26} As set forth by the majority, in order to establish the existence of a common law marriage, there must be clear and convincing evidence of the four factors set forth in *Nestor v. Nestor* (1984), 15 Ohio St.3d 143. In affirming the decision reached by the trial court, the majority found that Ms. Faison failed to present clear and convincing evidence as to the first element, that the parties had an agreement to marry *in praesenti* or

"at the present time." Black's Law Dictionary (5 Ed.Rev. 1979) 712. I disagree.

{¶ 27} At trial, Ms. Faison moved to submit five items into evidence: (1) a Transfer Certificate of Title showing that the Torbenson Drive property was transferred in the name of "Willie J. Faison" and "Betty Faison," the reverse side of which shows that a mortgage was given by "Willie J. Faison and Betty Faison, h.& w." to The Leader Mortgage Co.; (2) a Select Blue health insurance card issued in the name of Betty Faison with an effective date of April 1, 1995, under Willie Faison's account number; (3) a Pennsylvania Blue Shield vision card in the name of Willie Faison; (4) a Petition in Domestic Violence filed by Betty Faison against Willie Faison, and (5) an embroidered jacket bearing the words "Betty Faison, Wife of a Noble."<sup>1</sup> The defense then moved to submit an additional five items into evidence, including Mr. Faison's tax returns for the years 1993, 1994, 1995, and 1997, showing his status as a "single" filer, and an application for pension benefits signed on August 25, 2000, that designated Joan Faison as his spouse.

{¶ 28} The evidence presented at trial indicates Mr. Faison's awareness that the relationship between he and Ms. Faison was construed as a marriage. He testified that he was aware that Ms.

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<sup>1</sup>We note that Plaintiff's exhibit 5 was admitted into evidence and that the defense stipulated to the embroidered wording, but that the jacket was not submitted into evidence on appeal.

Faison adopted his last name in the mid-1970s, but he failed to mandate that she stop doing so; ultimately, he accepted this fact by advising his insurance carrier to add her to his work policy as "Betty Faison." Although he now claims this gesture was fraud, based on the insurance card submitted into evidence, she remained insured under his policy with a last effective date in 1995—an indication weighing in favor of a common law marriage as opposed to a decades-long fraud.

{¶ 29} In addition, Mr. Faison testified that the embroidered jacket bearing the inscription "Betty Faison, Wife of a Noble" was made by a now-deceased friend of his. While great emphasis is placed on the parties' separate bank accounts and separate credit card accounts, the mere existence of joint accounts is not an indication of a marriage. Moreover, while some tax records were submitted into evidence noting Mr. Faison's marital status as "single," the submission of only four tax returns bearing this designation in an over eighteen-year period is not dispositive.

{¶ 30} Willie and Betty Faison lived together for approximately eighteen years, they co-signed a mortgage together as husband and wife, they shared medical benefits as husband and wife and Betty Faison adopted Willie's name. Further, an admitted friend of Mr. Faison prepared clothing signifying the couple's relationship. Finally, when domestic violence charges were brought in common pleas court, they were brought under claims of marital abuse. Both

parties testified as to the rings that were given, the dates the rings were given, and the details of the ceremony.

{¶ 31} For these reasons, I believe that the elements necessary for a common law marriage have been met. I agree that the defense of laches would properly defeat such a claim, however, this defense was never properly pled. Laches is an affirmative defense and is waived if not raised in the pleadings or in an amendment to the pleadings. Civ.R. 8(C). See, also, *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 1998-Ohio-440. The trial court found that "[t]he Defendant raised the defense of laches." (Magistrate's Decision at 5), but such is not the case. A review of the record indicates that this defense was never raised in Mr. Faison's Answer or in any subsequent pleading filed with the court.

While Ms. Faison alerted the court to this error in her objections to the Magistrate's Decision, Mr. Faison again failed to address the issue, claiming only a failure to meet the elements of laches, and not addressing his failure to properly plead the defense. Therefore, Mr. Faison's failure to raise laches as an affirmative defense in his pleadings has acted to waive this defense.

{¶ 32} For the foregoing reasons, I would reverse the decision of the trial court.