

[Cite as *Black v. Hall*, 2010-Ohio-4677.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94113

BERNARD BLACK

PLAINTIFF-APPELLEE

vs.

**DELMAR HALL, ADMINISTRATOR
OF THE ESTATE OF DOROTHY
LEE WHITE, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case No. 09 ADV 0146828

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 30, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Delmar Hall, the former administrator of the estate of Dorothy Lee White,¹ Lamar White, and Denise White (collectively “appellants”), appeal from the decision of the probate court finding in favor of appellee, Bernard Black, declaring him to be the common-law surviving spouse of Dorothy Lee White (“Mrs. White”). Appellants allege that the trial court

¹On February 16, 2010, Delmar Hall was removed as administrator of the estate and the probate court appointed Michael E. Stinn as successor fiduciary on June 3, 2010.

erred in granting an extension to a temporary restraining order, that the trial court did not consider their evidence, and that the court erred in determining appellee to be the surviving spouse. After a thorough review of the record and pertinent case law, we affirm the determinations of the trial court.

{¶ 2} Mrs. White and appellee began living together in 1972 in a home in Cleveland Heights, Ohio. Appellee testified that he paid for the home, but it was titled only in Mrs. White's name. The two maintained joint bank accounts, introduced themselves as husband and wife, and even had a wedding reception. They applied for and received a marriage license, although it was never properly executed.

{¶ 3} On March 6, 2009, Mrs. White died. On April 2, 2009, Hall filed an application to administer Mrs. White's intestate estate with the Cuyahoga County probate court, which was granted. Hall listed the heirs as Lamar White and Denise White, Mrs. White's living children at the time of her death. A dispute arose as to the status of appellee and his ability to remain in the Cleveland Heights home. On April 3, 2009, before receiving letters of authority from the probate court, Hall instituted an eviction action against appellee in the Cleveland Heights municipal court. On May 4, 2009, appellee filed a complaint with the probate court seeking declaratory judgment and a temporary restraining order to prevent his eviction. On the same day, the probate court granted a temporary restraining order

preventing the eviction action from going forward. This order was extended 14 days to give appellee time to file a temporary injunction motion, which he did on June 1, 2009.

{¶ 4} On June 16, 2009, a hearing was held to determine appellee's status. The probate court magistrate heard testimony and admitted evidence as to the nature of appellee's relationship with Mrs. White. On August 4, 2009, the magistrate determined that appellee was Mrs. White's surviving spouse. Appellants objected and requested findings of fact and conclusions of law. The probate court adopted the decision of the magistrate over appellants' objections on August 17, 2009, dissolved the restraining order, and dismissed the motion for temporary injunction as moot. Appellants then filed the instant appeal assigning three errors for our review.

Law and Analysis

Extension of a Temporary Restraining Order

{¶ 5} Appellants first claim that "[t]he Probate Court erred in granting a second ex-parte Temporary Restraining order without good cause shown and without any notice to opposing counsel even though the Court knew of another pending case, that there was counsel on that case, and that harm would be incurred against the party being restrained." Citing no case law and relying solely on Civ.R. 65, appellants claim that the probate court should not have granted an extension to the temporary restraining order ("TRO").

{¶ 6} Civ.R. 65(A) specifies that “[a] temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.”

{¶ 7} The rule contemplates an order made without notice and specifies that “[e]very temporary restraining order granted without notice shall be filed forthwith in the clerk’s office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, *unless within the time so fixed the order, for good cause shown, is extended for one like period* * * *.” (Emphasis added.) Id.

{¶ 8} Appellants cannot appeal the extension of a temporary restraining order after it has been dissolved and no further remedy exists. “Like a preliminary injunction, a temporary restraining order makes no final adjudication for any issue. Such orders merely prevent designated parties from exercising their claimed rights pending a determination of the merits. *Gessler v. Madigan* (1974), 41 Ohio App.2d 76, 322 N.E.2d 127. In this case,

the order purported to hold the parties in their positions shortly before plaintiff filed his suit. It directed the parties to return to and remain at the status quo ante. Cf. *Edgewater Construction Co., Inc. v. Percy Wilson Mortg. & Finance Corp.* (1976), 44 Ill.Dec. 864, 2 Ill.Dec. 864, 357 N.E.2d 1307.” *Beasley v. City of E. Cleveland* (1984), 20 Ohio App.3d 370, 374, 486 N.E.2d 859. The same is true here. The grant of an extension of a TRO is not an adjudication of any issue.

{¶ 9} Also, this court need not address this assigned error because the probate court’s determination that appellee is Mrs. White’s surviving spouse renders the issue moot. The issue is not capable of repetition, which, in some cases, would allow this court to examine it. See *State ex rel. New World Communications of Ohio, Inc. v. Character* (1995), 100 Ohio App.3d 773, 775, 654 N.E.2d 1301. This court has no means to remedy any alleged harm caused by the extension of a TRO, nor have appellants suggested one. Appellants’ appeal from the grant of an extension of a TRO became moot when the probate court ruled on appellee’s declaratory judgment action, and therefore it will not be addressed.

Findings of Fact and Conclusions of Law

{¶ 10} Next, appellants claim that “[t]he Probate Court erred in excluding Appellants’ evidence in reaching their decision despite an appropriate Motion for Findings of Facts and Conclusions of Law.”

{¶ 11} Citing no case law or other authority, appellants argue that the magistrate excluded their submitted evidence when reaching its decision and ignored their request for findings of fact and conclusions of law. Civ.R. 52 gives a party the right to request findings of facts and conclusions of law when an issue is tried without a jury. However, all that is required to satisfy this right is “an opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law.” *Id.*

{¶ 12} In the present case, the magistrate issued a lengthy decision on August 4, 2009 that effectively stated the evidence presented in the case on which he relied to determine that appellee was Mrs. White’s surviving spouse.

This is all that is required. See *City of Strongsville v. Carr*, Cuyahoga App. No. 89666, 2008-Ohio-907, ¶26 (dealing with a similar argument in the Crim.R. 12(F) context). Simply because the magistrate chose to find appellee’s evidence more persuasive does not demonstrate that the magistrate or probate court erred. The credibility and weight to be given the evidence at trial is the prerogative of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Decisions of this type will be reviewed under an abuse of discretion standard. An abuse of discretion implies that the court’s attitude is unreasonable, arbitrary, or

unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 13} Appellants have failed to show the how the magistrate and probate court abused their discretion; therefore, appellants' second assignment of error is overruled.

Common-law Spouse

{¶ 14} In appellants' final assignment of error, they argue that "[t]he probate Court erred when determining Appellee was the surviving spouse of [Mrs. White] as that determination was contrary to law and against the manifest weight of the evidence."

{¶ 15} It is well established that when some competent, credible evidence exists to support the judgement rendered by the trial court, an appellate court may not overturn that decision unless it is against the manifest weight of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. The knowledge a trial court gains through observing the witnesses and the parties in any proceeding (i.e., observing their demeanor, gestures, and voice inflections, and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. *In re Satterwhite*, Cuyahoga App. No. 77071, 2001-Ohio-4137, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. In this regard, the reviewing court in

such proceedings should be guided by the presumption that the trial court's findings were indeed correct. *Seasons Coal Co.*, supra. As the Ohio Supreme Court has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

{¶ 16} Although the General Assembly abolished the institution of common-law marriage in 1991, that decision did not apply to those relationships that had already attained such status. See R.C. 3105.12. The state of Ohio still recognizes common law marriage under certain circumstances. "The Supreme Court of Ohio has set forth the essential elements of a common-law marriage as follows: (1) a mutual agreement to marry in praesenti² while competent to contract; (2) cohabitation as husband and wife; (3) holding out as husband and wife; and (4) a reputation as being husband and wife. *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, 472 N.E. 1091.

The party alleging a common-law marriage has the burden of proving all of the elements by clear and convincing evidence. *Id.* at 146." *St. John-Boyd v. Boyd*, Cuyahoga App. No. 89047, 2007-Ohio-5336, ¶4. The *Nestor* court found that "[w]here there is no direct proof in reference to the formation of the marriage in praesenti, testimony regarding cohabitation and community reputation tend to raise an inference of the marriage." *Id.* at 146. "This

court has also held that an agreement to marry in praesenti may be proven either by way of direct evidence which establishes an agreement to marry or by proof of cohabitation and reputation.” *Boyd* at ¶9.

{¶ 17} Testimony was adduced that appellee lived with Mrs. White for more than 30 years, they shared a bedroom, traveled together, introduced each other as husband and wife, shared a bank account, shared household expenses, and carried on a sexual relationship. Photographs of the couple’s wedding reception were introduced that showed them ceremonially cutting and sharing wedding cake and dancing. An unsolemnized marriage certificate was introduced bearing their names. Mrs. White’s death certificate originally listed appellee as her surviving spouse. Mrs. White’s granddaughter testified that she grew up calling appellee “papa,” referring to him as her grandfather. While the testimony of appellants’ witnesses was in conflict with this evidence and testimony, the credibility of the witnesses is best judged by the trier of fact. *DeHass*, supra.

{¶ 18} The facts presented in this case do not constitute that rare case where the trier of fact lost its way and created a manifest miscarriage of justice that necessitates this court’s intervention. Therefore, appellants’ third assignment of error is overruled.

Conclusion

²This term means “[a]t present; right now.” Black’s Law Dictionary (8 Ed. 2004).

{¶ 19} Appellants have failed to demonstrate any error on the part of the magistrate or probate court. The evidence presented showed that appellee and Mrs. White had a longstanding relationship that satisfied all the requirements of a common-law marriage established prior to 1991. The temporary restraining order and temporary injunction were necessary to preserve the status quo while the probate court determined whether appellee was the surviving spouse of Mrs. White.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR