

94PR2106 (7/17/95)

PROBATE COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 94 PR 2106

IN THE MATTER OF THE ESTATE OF

DONALD L. ROBINSON, JR., Deceased

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER came on for a trial to the Court on July 5, 1995 through July 7, 1995 and on July 12, 1995. The Court heard testimony of witnesses, received extensive documentary evidence, heard the statements and arguments of counsel, and reviewed the applicable legal authority. Being fully advised, the Court hereby makes the following Findings of Fact, Conclusions of Law, and Order.

I

Donald L. Robinson, Jr. (herein "Robinson") died , a resident of the City and County of Denver, on November 7, 1994 at the age of 38. On November 14, 1994, following Robinson's death, his mother Joan M. Robinson was informally appointed by the Registrar of the Probate Court as Personal Representative of his estate alleging that she had statutory priority for appointment under C.R.S. § 15-12-203 as Robinson's nearest relative. On the application she stated that the decedent was not married at the time of death. Subsequently, Ms. Ljiljana Pecht (herein "Pecht") objected to the appointment of Joan M. Robinson and filed this Petition for Adjudication of Intestacy, Determination of Heirs and Formal Appointment of Personal Representative, asserting that she is Robinson's surviving spouse by virtue of the common law marriage doctrine. Joan M. Robinson, in her individual capacity as Robinson's mother, disputes Pecht's claim. This controversy formed the subject of the trial to the Court.

II

Colorado is one of only a few jurisdictions which continues to recognize the doctrine of common law marriage. During the hearing, the background and basis of the doctrine were described to the Court as a concession to frontier inconvenience, when distances between population groups were long and travel dangerous, persons with authority to perform marriage ceremonies were scarce, and the process of obtaining a marriage license was difficult and cumbersome to citizens who were sometimes isolated and poorly educated. Out of these circumstances grew the willingness of some states under certain objective circumstances to recognize selected cohabitation relationships as legal marriages in order to avoid what is otherwise referred to in the case law as "meretricious relationships."

The Court is guided in this case by well-established legal requirements for a valid common law marriage in Colorado which are summarized in the case of *People v. Lucero*, 747 P.2d 660 (Colo. 1987). These requirements are as follows:

- mutual consent or agreement of the parties to be husband and wife; followed by
- mutual assumption of the marital relationship.

The Court has also considered the placement and the degree of the burden of proof. The burden of proof of the existence of a common law marriage is on Pecht, as the party claiming that the marriage in fact existed. *Valencia v. Northland Insurance Co.*, Colo. App., 514 P.2d 789 (1973).

As to the degree of proof required, C.R.S. § 13-12-127 provides that "the burden of proof in any civil action shall be by a preponderance of the evidence." The Court is persuaded that this standard controls in this case. In *Employees Mutual Liability Insurance Co. of Wisconsin v. Industrial Comm'n*, 124 Colo. 68, 234 P.2d 901, 903 (1951) the Colorado Supreme Court stated that the evidence of a common law marriage should be "clear, consistent and convincing." Later, in its *Lucero* opinion, the Colorado Supreme Court observed

"This language was not chosen in order to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence." *Lucero*, p.664 at n.6.

This Court concludes that the quality of the proof necessary to establish a common law marriage must be clear, not vague; convincing, not merely persuasive, but need not exceed the standard of preponderance. The Petitioner, Pecht, must prove therefore, by a preponderance of the evidence, that a marriage existed between Robinson and herself.

The Court in *Lucero* recognized that in many cases where a common law marriage is asserted there will be no express agreement, *Id.* at 664. See *Taylor v. Taylor*, 10 Colo. App. 303, 305, 50 P. 1049 (1897). Here, Pecht argued that the agreement with Robinson was not one expressed in words between them but was a mutual understanding which grew and developed over time about the nature of their relationship. Furthermore, where, as here, the surviving party (Pecht) is incompetent to testify under the Dead Man's Statute C.R.S. § 13-90-102, the existence of the agreement must be gathered from the testimony of persons observing and circumstances surrounding the relationship.

A variety of evidence can be considered by the Court in making the determination of the existence or non-existence of the agreement to assume the marital relationship. *Lucero* 747 P.2d at 664-65. The use of a common surname by the "wife" and children born to the relationship, accumulation of jointly-titled property, consistent public acknowledgment and reputation of the marriage, cohabitation, common travel, length of the relationship, and related considerations are mentioned by courts as entering into the analysis. *Id.* at 665. The Court has considered all of the evidence presented at trial and has concluded that Pecht has failed to establish the existence of the marriage by a preponderance of the evidence. The following findings substantiate the Court's conclusion in this regard.

The evidence was uncontradicted that Robinson and Pecht shared a common residence. At the time they began sharing a residence Robinson was married; Pecht was divorced. Several years later, Robinson was divorced and, throughout the duration of the relationship and cohabitation, there was no legal impediment to a marriage. C.R.S. § 14-2-110(1).

In addition to cohabitation, the evidence established a long-term and committed relationship between Robinson and Pecht extending from the mid-1980s until the date of Robinson's death. Periods of separation were relatively brief and were not uncharacteristic of problems associated with comparable long-term relationships. The parties lived together in a condominium which, although it was owned by and titled solely in Pecht's name, was viewed by both Robinson and Pecht and by third parties as their common residence. To a limited extent, Robinson and Pecht shared domestic responsibilities such as cooking, cleaning, maintenance and repairs; unquestionably Pecht, who worked full-time, night shifts, bore the primary responsibility for maintaining the residence.

While aspects of their living arrangement are consistent with a marital relationship, much of the testimony also supported the view that Robinson and Pecht were living together as "boyfriend" and "girlfriend", as "roommates," or had entered into a relationship based on need and convenience. See *Cordas v. Ryan*, 72 Colo. 521, 212 P. 490 (1922). In January of 1994 Pecht wrote to Denver C.A.R.E.S., an alcohol treatment facility, as follows:

"This is to certify that Donald L. Robinson, Jr. currently resides in my home.

"He was laid off recently and has been unemployed. I am giving him Room and Board so he can get help for his problem. He has lived here 7 years.

Thank you

Ljiljana Pecht
460 So. Marion Pkwy
Denver, Colorado 80209
777-6825"

This evidence, along with similar testimony and documents, which suggest that Robinson and Pecht viewed their relationship as a long-term friendship/romance based partially on Robinson's needs and Pecht's generosity, outweighs the inference which otherwise could be drawn from their cohabitation, i.e., that they had married and intended to live permanently as husband and wife. See *Klipfel's Estate v. Klipfel*, 41 Colo. 40, 92 P. 26 (1907).

In financial matters the testimony established that Pecht was unquestionably the more responsible of the parties. She frequently paid bills which had been incurred to maintain the home and there appeared to be an unequal sharing of the financial responsibility. Robinson worked irregularly at part time jobs and was financially less secure. Many of the witnesses testified that Robinson liked to spend money. Many of the purchases he made were for his personal consumption, such as clothes, and yet he used Pecht's credit cards regularly and drove Pecht's cars. Robinson and Pecht simultaneously purchased life insurance policies naming each other as beneficiaries; Pecht paid the initial premiums on both policies from her own funds. At times, Pecht paid health and dental insurance premiums for both herself and Robinson. In 1994 Pecht applied for and secured a mortgage on her residence, using the proceeds to discharge all consumer debt standing in her name. Some of the debt may have been incurred by Robinson using Pecht's credit cards. Again, without other evidence, an inference could be drawn from this financial relationship that Robinson and Pecht were married.

The Court finds that this inference was dispelled by evidence that, even in her financial affairs, Pecht did not represent herself as married. In 1994, when she applied for the mortgage, she told the bank she was "single." When the life insurance policies were purchased, the parties described each other as "fiancée." The Court finds particularly persuasive those representations made by parties in connection with matters governed by the laws of perjury or fraud or in matters where marital status would or could be a significant factor in a third party's action, particularly where that third party's actions could have negative consequences due to the representations of marital status. For example, in completing a loan application in which a party reveals private financial details which will be investigated and relied upon by a lender and in which the applicant is required to certify the accuracy of information under risk of criminal penalty, the Court would expect the information given by Pecht to a banking institution lending her money to be more truthful and precise than a comment made in casual, social conversation. In the loan application in 1994 Pecht represented herself to be single.

The Court has also accorded substantial weight to the filing of tax returns and related tax documents. Both Pecht's and Robinson's returns were admitted as exhibits during the trial. Neither Robinson nor Pecht ever filed as a "married" person throughout the duration of their relationship, in fact, both consistently declared his or her marital status to be "single." In 1994 Pecht signed a W-4 form in connection with her employment by Denver General Hospital in which she declared herself to be "single;" likewise Robinson's W-4 forms executed in 1991 and again in 1992 were marked "single." Petitioner argues that this fact should be disregarded because lay people may easily misunderstand the meaning of the term "married" when used by the Internal Revenue Service, and believing that a ceremonial marriage is contemplated, answer questions differently for tax purposes. This position is disingenuous where Pecht is concerned, inasmuch as her tax returns throughout the period the alleged marriage existed, were prepared and filed for her by professional return preparers whose duties to advise clients of the meaning of IRS nomenclature and whose professional liability for assisting with the preparation or filing of false returns undermines the argument made by Petitioner.

Furthermore, the testimony established that Pecht's mother had died in the early 1980's leaving Pecht as Personal Representative of the estate. In that estate a man had filed a claim as common law husband of Pecht's deceased mother, a claim which Pecht denied and ultimately defeated. While the Court does not infer that Pecht is therefore an expert on common law marriage, the prior exposure to the legal doctrine tends to vitiate Pecht's argument that she was confused about when to say she was married and when to say she was not.

In addition to her financial generosity toward Robinson, Pecht exhibited an extraordinarily compassionate and supportive demeanor towards Robinson and Robinson's family. Consistently the testimony established that Robinson was a chronic alcoholic. In his drunken condition he was frequently rude and abusive towards people around him, whether they were waiters in restaurants or intimate friends and family--including Pecht. There was very little testimony that Pecht was intolerant with this behavior although Robinson's sister testified that his behavior towards Pecht was so unpleasant at times that it was uncomfortable for her to observe. The Court notes also that the testimony established that Robinson and his sister spent their earliest childhood years in a home with an alcoholic father. Undoubtedly, some of the discomfort felt by Robinson's sister, Gail Cox, arose from this experience in her own life. Nevertheless, the testimony uniformly established that Pecht continued to live with Robinson up until the day of his death, to provide him with emotional and financial support, and to make continuing efforts to secure treatment for his condition. In fact, the testimony was uncontradicted that Pecht worked in cooperation with Robinson's

family and friends to secure medical and psychological assistance for Robinson and his alcoholism.

Substantial evidence was also introduced that Robinson's father was both alcoholic and mentally ill. He was described as a difficult person to take care of who had significant medical problems in addition to his alcohol dependency and other mental illness. Nevertheless, he lived in Pecht's condominium, with Robinson and Pecht, for approximately six months and was cared for both by Robinson and by Pecht. The testimony suggested but did not prove that Pecht bore the laboring oar on this unpleasant undertaking as well. It is Pecht's position that this action on her part is additional circumstantial evidence which should lead the Court to the conclusion that she and Robinson were married.

Overall, Petitioner argues that her attitude and behavior in regards to Robinson's alcoholism and generally personality problems, as well as her nursing care for Robinson's ill father, supports an inference that a marital agreement had been entered into between Robinson and Pecht and that, absent such an agreement, Pecht would not have been so tolerant and supportive. While this is persuasive, the Court finds that it is only one explanation. The Court finds that Pecht's reputation and demeanor--and occupation-- are of a helpful, loving, and supportive person. Pecht is a professional nurse. Not surprisingly, she is motivated by a desire to be helpful and supportive. Her willingness to remain in a difficult relationship with a man who was portrayed by the witnesses as almost repulsive at times, is admirable and quite likely not something the average person would be willing to endure; it is also consistent with her own personality and character. Whatever motives or emotions Pecht may have had concerning Donald Robinson and his behavior, the Court is not persuaded that the only or even the most likely explanation for Pecht's behavior was that she and Robinson had agreed to be married and that she felt legally obligated to remain in the marriage and to provide nursing services to Robinson's father.

In their testimony, numerous witnesses likened the relationship to a marriage. Mr. Higuera, a nurse at Boulder Community Hospital; Mr. Goodside, an insurance salesman; John Taylor, one of Robinson's close friends, all of whose testimony was highly credible, testified that the relationship was "normal", "just like any other couple" and otherwise similar to a marriage. In his deposition testimony introduced at trial Robinson's friend, James Qualey, testified that Robinson and Pecht behaved "just like husband and wife." Again, the Court is satisfied that the Lucero standard requires more than a loving, committed, compatible couple. What the Court must determine from the testimony and the evidence which describes the relationship is whether or not the evidence suggests, supports or leads to the conclusion that an agreement to be married was entered into between these parties. In this case, the Court does not feel that this conclusion, on balance, follows from the evidence presented.

The Court allowed various witnesses to be questioned and to testify as to any declarations either Robinson or Pecht had made regarding the status of their relationship. See *In Re Foley's Estate*, 76 Colo. 286, 230 P. 618 (1924). The Petitioner's sister, Deanna Harper, testified that Pecht and Robinson lived openly as husband and wife sharing a common bedroom in Pecht's condominium with Robinson referring the Pecht from time to time as "the wifey" or "my better half." Harper also testified that she viewed the relationship as a husband/wife relationship. Bonnie Brown, a nursing friend of Pecht's testified that she knew Robinson and Pecht briefly but believed them to be married. Robinson's brother-in-law, David Cox, testified that Robinson and Pecht were not married and that, on the day Robinson died, Pecht lamented their failure to marry while Robinson was alive.

Don Hurd testified that he was Robinson's "best friend." While he testified that he knew Robinson and Pecht were not "married in a formal sense" he believed them to be married in 1994 because they were in a committed relationship where they shared domestic

responsibilities. Mr. Hurd's testimony was somewhat less credible than other witnesses because he expressed anger towards Respondent's counsel and "the situation" generally. He undoubtedly wanted to be helpful to Ms. Pecht in her case before this Court.

Higuera testified that although he never heard Robinson and Pecht use terms such as husband and wife, he felt that they were just like a married couple in their demeanor and that his opinion was drawn from his personal experience in a long term marital relationship rather than from representations that Robinson and Pecht made to him. Another of Robinson's close friends, John Taylor testified that during their relationship he never heard Robinson refer to Pecht as his wife. Hurd, Taylor, Higuera, and a number of Pecht's personal friends clearly felt that the length and closeness of the relationship was consistent with marriage, although they almost uniformly failed to present testimony of the existence of a marriage.

Overall, in its analysis of the evidence presented, the Court regards as highly significant the pattern of inconsistency which attended the declarations of marital status made periodically by both Robinson and Pecht. Dozens of documents were introduced during the trial where both parties variously referred to each other during the period of their relationship as "girlfriend," "fiancée," "friend," "roommate," "spouse," "common-law spouse," "wife," "husband," and the like. Nor is there a discernible pattern which could be accounted for by virtue of the dates of the documents. In one document dated January 1994 Pecht declares Robinson to be her husband but, later that year, in October 1994, just a few days prior to his death, she describes her marital status as "single."

"While the holding out as husband and wife must be clear and substantial, slight inconsistency in this regard will not destroy an otherwise valid common law marriage. In all cases, however, there must be more than a holding out to a select group of people; it must be holding out to the world, or to the community at large."

52 AmJur2d Marriage Section 52, citing *ex parte Threet*, 160 Tex 482, 333 SW 2d 361. In the instant case, Petitioner Pecht argues that she and Robinson held themselves out to a small circle of friends and co-workers and that the fact that Robinson's family and others they came in contact with were unaware of the purported marriage agreement, is insignificant. The Court disagrees. From the pattern of evidence presented in this case, the Court cannot conclude that Robinson and Pecht had entered into an agreement to be married and that they, thereafter, lived and conducted their affairs in such a way as to give rise to a general, public reputation as husband and wife.

A number of credible witnesses testified that Pecht and Robinson had expressed a desire or intent to marry in the future. The insurance salesman testified that Robinson and Pecht met with him together on several occasions and consistently described each other as "my fiancée." Robinson's friend Mark Richardson's testimony, through his deposition, was that Robinson discussed a future marriage to Pecht. The Court is aware that the case of *Radovitch v. Radovich*, 84 Colo. 250 269 P. 22, gives substantial weight to such plans and the testimony about the existence of such plans as evidence tending to disprove the existence of the common law marriage. It is persuasive in this case as well.

The Court has accorded minimal significance to the fact that Ms. Pecht failed to use Robinson's surname until after his death and no significance to the fact that she used the surname Robinson on one occasion after his death. The Court is persuaded that there are many personal, professional and social reasons in contemporary society why married women do not take or use their husband's surnames, see *Nestor v. Nestor*, 472 N.E.2d 1091 (Ohio 1984), and Pecht's failure to do so is not persuasive evidence of a lack of an

agreement to be married. Somewhat more significant in the Court's view was the relative absence of jointly owned property or evidence of joint purchases of shared property. Except for life insurance policies purchased by the parties in late 1992, all of the parties' assets were owned and titled separately.

Individually, the Court found unpersuasive and not determinative the various employment, hospital admission and other forms supplied by both Petitioner and Respondent. On a number of forms Robinson gave false, misleading and incomplete information regarding matters unrelated to his marital status. This undermines the reliability of the answers relied upon by Petitioner to prove Robinson's attitude about this relationship and fails to support Respondent's argument that it disproves the existence of the relationship. The Court concludes that both Robinson and Pecht responded to questions about and represented their marital status inconsistently throughout the duration of their relationship both in written and in oral communication with third parties.

Some of Petitioner's most convincing evidence consisted of three employment-related documents allegedly signed by Robinson in late 1994 in which Robinson refers to Pecht as his spouse. Respondent introduced the expert opinion of Mr. Bradley a forensic documents examiner that the three signatures were forgeries. Petitioner introduced another expert, Mr. Vacca, who testified that the signatures could be those of Robinson. There was uncontroverted testimony that the notarization of all three documents was fraudulent. The Court feels that this documentary evidence was inconclusive. The Court also has concluded that the resolution of this mystery is not dispositive of the case.

Under the standard in *Cordas v. Ryan*, 72 Colo. 521, 212 P. 490 (1922), the Court is required to find that the evidence, from which the Court can find the implied contract, must be consistent. By this standard the Court does not need to find that there is not even a shred of contrary evidence, but instead that, over all, the Court can conclude, at the completion of the presentation of evidence and argument, that there probably existed an agreement to be married and that generally speaking the reputation of the couple in the community was as a married couple. In this case the Court cannot make such a finding.

In reaching this conclusion, the Court has considered and weighed the inconsistent representations made by Robinson and Pecht as to their marital status, their public discussions about and references to future plans to marry, the absence of jointly acquired property, the representations made in loan applications and returns which the Court deems to be significant legal documents and their general community reputation, or lack of reputation, as husband and wife. Typical of many cases where a claim of common law marriage is made, Robinson and Pecht lived together and there is evidence that from time to time, in certain circumstances they represented theirs to be a marital relationship. On the other hand, there were at least as many occasions when they represented their relationship to be otherwise, discussed plans to marry in the future or otherwise depicted a non-marital relationship.

The determination of whether a common law marriage exists turns on these issues of fact and credibility, *People v. Lucero*, 747 P. 2d 660 at 665; see also *Valencia v. Northland Insurance Company*, Colo. App. 514 P.2d 789 (1973). The Court has considered the credibility of witnesses and the weight of the evidence presented and has concluded that, in this case, no common law marriage existed.

The second prong of the Lucero test is whether the couple has, following an implied agreement to be married, mutually held themselves out to the community at large as a married couple. Because the Court has already commented on its finding that the evidence of "holding out" was conflicting, confusing and contradictory and tended to undermine the existence of an agreement, the Court will not deal separately with the second prong of the test here except to observe that, overall, in this case the public reputation was insufficient to support a finding of common law marriage.

V

Because the Court has made a finding that a marriage did not exist between Robinson and Pecht under the common law marriage doctrine in Colorado, Pecht is not Robinson's surviving spouse and does not have priority for appointment as Personal Representative; accordingly, this part of the Petition is DENIED.

DATED this 17th day of July, 1995.

BY THE COURT:

C. Jean Stewart
Judge, Probate Court