

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
ORPHANS' COURT**

IN RE:	:	No. 41-16-0105
	:	
ESTATE OF	:	
DENNIS H. SMITH,	:	
decedent	:	

OPINION AND ORDER

Jeannette Shires (Petitioner), asks the Court to rule that she was in a forty-two year common law marriage with Dennis Smith (Decedent). She asks that the letters of administration granted to Dale E. Smith in the Estate of Dennis Smith be revoked and that she be granted letters of administration.

Facts

Dennis Smith, age 75, died intestate on January 31, 2016, at 154 W. Water St., Hughesville, PA, in Lycoming County. He was a retired lineman from PP&L. The testimony indicates that after retiring in 2003, Dennis Smith no longer resided at his family home at 17 Howard St. in Montoursville, PA, but rather, resided at 154 W. Water St. in Hughesville, PA, with Jeannette Shires (Petitioner). He died in Petitioner's home but the McCarty-Thomas Funeral Home disallowed Shires from making funeral arrangements. N.T., 08/19/2016, at 36. Dennis Smith is survived by Jeannette Shires, one brother and two sisters, and has no issue.

Testimony

Testimony of Petitioner

Petitioner testified that Decedent was her husband. They began dating in 1974 and Decedent moved in with her in 1987 (i.e. twenty-nine years ago). She testified that

shortly thereafter, he paid for a ring for her and she bought him a ring and when they exchanged rings, he said “forever”. She also testified that Decedent told her that they were just as married as any other couple but did not have the paper that said it. N.T., 7/15/2016, at 13-14.

Petitioner went on to testify regarding Decedent’s involvement with her family life including walking her niece down the aisle and dancing the father daughter dance with her niece at the wedding. Petitioner testified that she called Decedent “sweetie” and “significant other”. She testified that they did not spend time with his family, that in fact he had never introduced her to his family. She testified to a specific incident where he seemed to avoid introducing her to his siblings:

I know one time we ran into his sister, Diane, and her husband at the [Lycoming County] fair but they talked and then we walked on and I asked him who it was and he said it was his sister and her husband.

N.T., 7/15/2016, at 9, 18.

Petitioner testified that she was aware that his brothers and sister lived in their parents’ home in Montoursville, PA, and Decedent would go there to pick up mail. Id. at 17. Petitioner testified that her sister owns the property, 154 W. Water St. in Hughesville, PA, where she resided with Decedent

Petitioner testified that on the evening prior to Decedent’s death they had been at a family party where he had been complaining of headaches (Decedent was known to have high blood pressure and the death certificate indicates that this contributed to his death). She stated Decedent was excited that their great nephew was learning to walk and he was planning to attend the flea market the next morning at 6 a.m., but, he died in bed with her that evening. The coroner was called to her home. She testified that a police officer told her that she didn’t have any rights. Id. at 20.

Testimony of Phyllis Jordan

Jordan is a friend of Petitioner and Decedent. She worked with Petitioner at PA Folding Carton Co. in Hughesville, PA, and would pick Petitioner up for work at 5 a.m. Jordan testified that when she visited Petitioner at the 154 W. Water Street address, Decedent would be there. She stated Decedent and Petitioner would be at parties together and lived together and if she were not available to drive Petitioner to work, Decedent would drive her. She stated Decedent would visit Petitioner at the workplace and that he took care of Petitioner after a knee surgery.

Jordan testified that Decedent did not state Petitioner was his wife and that Petitioner did not state that Decedent was her husband but that everyone knew they were together. She also stated that Decedent did not talk about his brothers or sisters.

Testimony of Diane Bower

Diane Bower testified that she has known Petitioner for 50 years. She moved back to Hughesville in 1990. She testified that Petitioner and Decedent acted like husband and wife but that Decedent did not refer to himself as Petitioner's husband.

Testimony of Mary Robinson

Mary Robinson (Robinson) is Petitioner's sister. She has known Decedent for 42 years since he and Petitioner began dating in 1974. She reiterated Petitioner's prior testimony that Decedent was at all their family events and that she also had never met Decedent's family. She did say that he once mentioned that his sister had a broken ankle. Robinson testified that Decedent never slept anywhere else but at Petitioner's residence and they had a committed relationship "just like my parents". Id. at 33. Robinson testified that Decedent was with Petitioner at the hospital when her daughter

was born, that he walked her daughter down the aisle, taught her daughter to ride a bike, how to tie her shoes and Decedent was “always there”. Id. at 34.

Robinson testified that she very gently brought up the matter of creating a will with Decedent and he told her he would do it after he retired. She informed him that one did not need a lawyer to write a will. She also stated that if one broached a subject with Decedent he did not like, he would get up and walk away. She learned quickly that it was not something he wanted to discuss:

You don't ask Denny about two things. You don't ask him about his money and you don't ask him about his family. We learned that a long time ago because he wouldn't talk about it.

Id. at 35.

Testimony of Susan Bitler

Bitler is Petitioner's employer. She testified that she knows Decedent and that she would see him sporadically at her company. She stated that Petitioner and Decedent were always together: that he came to her wedding and to her 70th birthday party with Petitioner. She testified that Decedent did not introduce Petitioner to people as his wife; however, he was very attentive to Petitioner.

Testimony of Nancy Shires

Nancy Shires is Petitioner's sister-in-law. She is married to Petitioner's brother and has known Petitioner for 46 years. She testified that the relationship between Petitioner and Decedent was no different than her relationship with her own husband. She reiterated the testimony that Decedent was at all Petitioner's family functions. She stated she met Decedent in 1975 and that she believed it was 1988 when Decedent and Petitioner exchanged rings. She testified that she went with Petitioner to look for a

ring for Decedent to buy her. Id. at 48. She also stated that she never met Decedent's family.

Testimony of Dennis Shires

Dennis Shires is Nancy Shires' husband and brother to Petitioner. He stated that he was aware of the Montoursville residence of Decedent but that Decedent always stayed at his sister's home. He also testified that Decedent did not hold himself out to be Petitioner's husband. Id. at 57.

Testimony of Diana Kuhns

Diane Kuhns is Petitioner's older sister. She was aware of the relationship between Petitioner and Decedent as they had been a couple for over 40 years. She testified that Petitioner and Decedent lived together and spent their daily lives together. They traveled together and cooked meals together. She stated Petitioner and Decedent spilt bills according to what they made. She stated that Petitioner and Decedent were essentially married but never got around to getting the paper. She stated Decedent was estranged from his family as he spent all holidays with the Petitioner's family. Id. at 61. She testified that she did not know whether Decedent said he was Petitioner's husband but she felt morally that he was. Id. at 62.

Testimony of Ruth A. Ulsh

Ulsh worked with Petitioner at Reeds' Sub Shop. They were waitresses there from 1973-1974. She stated that Decedent was shy. She testified that when she sent the couple Christmas cards she would address the envelope to Mr. and Mrs. Dennis

Smith. She has never known Decedent to sleep anywhere else but at Petitioner's. She said Decedent always treated Petitioner well, and treated her as a wife.

Testimony of Becky Walko

Becky Walko is Petitioner's niece. Born in 1976, she is the niece that Decedent walked down the aisle. She testified that Decedent was basically her father. She testified that she thought Petitioner and Decedent were husband and wife; however, she testified that when she helped her Aunt on the day of Decedent's death that she told funeral home staff that Decedent and Petitioner were not legally married. *Id.* at 77. She also could not recall the specific date when her father figure, Decedent, and Petitioner celebrated an anniversary. *Id.* at 78.

Testimony of Kenneth Kuhns

Kuhns has been Petitioner's brother-in-law since 1977. He knows the couple through Decedent's attendance at family dinners and his picture on the wall. Though he considered Decedent to be his brother-in-law he knew Decedent and Petitioner were not married. He did not know Decedent's relatives but was aware of their home in Montoursville and that Decedent did not reside there. Kuhns testified that Decedent did not introduce Petitioner as his wife and he was unaware of where PPL would call Decedent. He did offer his backyard as a location for Decedent and Petitioner to be married; however, Decedent did not commit. N.T., 8/19/2016, at 8.

Testimony of Terry Robinson

Terry Robinson (Terry) is Petitioner's brother-in-law. He had known Decedent for approximately 15 years and testified that Decedent was in his garage every day. *Id.*

at 9. He would introduce Decedent as his brother in law and Decedent never objected to such introduction although he knew they were not married. Terry testified that Decedent and Petitioner were a couple, acted like married people, that Decedent was at every holiday and at Sunday dinners. Terry accompanied Petitioner to the 17 Howard St. residence to return Decedent's truck and some handguns after Dennis's death. Dale Smith described Dennis's old bedroom at 17 Howard St. to Terry as full of "so much stuff...you couldn't hardly get in the door...there was just a little path. There was a bed in there some place, but [Dale Smith] didn't know where it was." Id. at 80.

Testimony of Dale Smith

Dale Smith is Decedent's younger brother by 5.5 years and executor of his estate. Dale Smith stated his address for the record as the family home in Montoursville: 17 Howard Street and that he had been constantly in residence there since the age of 12. Dale testified that there are four children in their family, that he is 5.5 years younger than Decedent, and that Decedent has a twin sister Diane Brown. They also have a younger sister Mary Ann Smith. He testified that PPL would call for Decedent at the Montoursville home. He testified that Decedent was not one to be at home a lot but that he saw his brother every day. He then testified that after Decedent retired in the 2002-2003 time range the frequency he saw his brother was once to twice a week as his brother would stop in to get a meal or gun.

Dale Smith testified that their father died in 1987. He testified that Decedent lived at home in 1987 at the time of their father's death and that he never mentioned his special friend Petitioner. He testified that the first time he met Petitioner was at the funeral home after Decedent's death. He testified that

[He] got a phone call from the funeral home, made an appointment to be there. My sister, Mary Ann and I we went down there and Andy, the funeral director, explained to us that they had picked up Denny at Jeanette Shires's home and that since they were not married Jeannette did not have the authority to make arrangements for the funeral.

Id. at 36.

He testified that the family gave Petitioner Decedent's veteran flag as they realized she had a lot of feelings for their brother. He was aware of rumors that his brother may be in a relationship but Dale Smith did not ask questions as Decedent just walks off when you ask him something "he doesn't like to be questioned about." Id. at 39-40.

He testified that Decedent stored woodworking tools in the basement of the Montoursville home. As Executor of Decedent's estate, Dale Smith testified to having to auction off an unbelievable amount of stuff including 70 guns and 200 hammers. Id. at 22. He testified that Petitioner provided him with combinations to access Decedent's safes. Id. at 44. Petitioner also brought Decedent's truck and two handguns from her residence to the Montoursville residence, which he did not ask her to do. He did ask Petitioner for the upcoming year and last year's tax return, which she provided to him.

Testimony of Mary Ann Merrill

Merrill is a friend to the Smith family and her husband is friends with Dale Smith. She did not know Dennis well and he never brought anyone with him. She testified that she saw Decedent in the Salvation Army once and asked him about his personal life and he did not even mention he had a girlfriend.

Testimony of Diane Brown

Brown is Decedent's twin sister. She testified that Decedent loved the outdoors and hunting and that though they were twins she graduated a year ahead of him in school. She testified that Decedent joined the Navy after high school. Diane testified that she moved out of the family home in 1964 and she was living in Indiana in 1987, when Howard Smith (their father) died. Brown moved back to the area when her husband retired in 2003. She testified that she was very surprised on the day of the funeral to meet Petitioner because she did not know of their relationship or about her brother's full life with her. She testified that she did not know where her twin brother lived. Id. at 59.

Testimony of Mary Ann Smith

Mary Ann Smith is Decedent's younger sister by eleven years. She is unmarried and has not worked in paid employment in 46 years. She has been a homemaker at the family home at 17 Howard St. in Montoursville, PA, Lycoming County. Mary Ann Smith was 10 years old when Decedent returned from the Navy. She testified that their father died in 1987, and that their mother died in 1999. She testified that she did her brother's laundry, cooked, changed his sheets, and took care of his dog. She testified that she saw him every day in the 1990s and that starting in 2003 she saw him in the daytime but did not see him in the evening. She testified that his dog died in 1978.

Mary Smith first heard of Petitioner when Petitioner's sister called her and she met Petitioner for the first time at the funeral home. She testified that she does not drive. She testified that she did not see her brother on the holidays.

Discussion

Whether Petitioner is the common law wife of Decedent and therefore entitled to be the administrator of his estate:

In order to establish a common law marriage, the party moving to establish the marriage must prove that *verba in praesenti* were exchanged between the two parties i.e. the present exchange of words uttered for the purpose of establishing the relationship of husband and wife. Staudenmayer v. Staudenmayer, 714 A.2d 1016, 552 Pa. 253, 1998 Pa. LEXIS 1486 (Pa. 1998). “The common law marriage contract does not require any specific form of words and all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time.” *Id.* at 1020 (quoting Estate of Gavula, 417 A.2d at 171). Evidence of “constant cohabitation and reputation of marriage” may also be introduced in support of the claim. *Id.* at 1021.

The burden to prove a common law marriage is a “heavy” burden and the claim must be reviewed with “great scrutiny.” Though the Staudenmayer court did not abolish common law marriage, it reaffirmed that claims for this type of marriage are disfavored.¹

At issue in Staudenmayer (a divorce action) was whether a common law marriage was entered sometime prior to the parties’ civil ceremony. Mr. Staudenmayer had received a tort settlement in 1983 and did not want it to be included as marital property. He argued that the parties were not married until the civil ceremony was

¹ Title 23 Domestic Relations Section 1102 (2005) abolishes common law marriage in the Commonwealth of Pennsylvania: No common law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid.

performed in 1984. Mrs. Staudenmayer produced evidence, however, that since 1978, the Staudenmayers had shared a residence with a deed in both names, shared a family name, and filed joint tax returns. Mrs. Staudenmayer testified that from 1978 on the couple introduced themselves as married people but she did admit that she did not tell her immediate family or his parents.

In spite of Mrs. Staudenmayer's evidence of constant cohabitation and reputation for marriage, the court agreed with Mr. Staudenmayer, finding that Mrs. Staudenmayer failed to prove "clearly and convincingly" the existence of the common law marriage contract through the exchange of *verba in praesenti*,

Here, in support of her claim that Decedent was her husband, Petitioner testified

He told me that he wanted to get me a ring but he wanted me to pick it out so I did and he paid for it. And then I went and I got him a ring. And I – of course, I had to have my ring sized and we came home – well, I came home and gave him the diamond I got his ring out, and he put the diamond on my hand and I put the ring on his and I said forever and he said, yeah, forever.

N.T. 7/15/2016, at 4-5.²

Petitioner was unable to testify to an exact date that the rings were exchanged³, however, and she did not produce the ring or Decedent's ring at either hearing. Petitioner submitted only one exhibit, an invitation to a wedding in 2006 that was

² Petitioner and Respondent debated via briefs regarding this testimony. Petitioner argues that as Respondent did not object to the testimony as it was elicited in violation of the Dead Man's Act he has waived his objection and the Court may consider the testimony. The Court agrees. See Hughes v. Bailey, 195 A.2d 281, 284, 202 Pa. Super. 263, 267-268, 1963 Pa. Super. LEXIS 557, *4-5 (Pa. Super. Ct. 1963) quoting Heller v. Fabel, 290 Pa. 43, 138 A. 217 (1927) ("[Where], as here, a witness has been examined and cross-examined at length, it is not error to refuse to strike out his testimony thereafter, unless it appears that the motion was made as soon as it became known that he was not competent to testify in the case"). See also Coughlin v. Coughlin, 173 Pa. Superior Ct. 23, 94 A.2d 79 (1953). To be timely, the objection should have been made at the hearing.

³ Although she did say it was shortly after Dennis Smith moved in with her in 1987. N.T. 7/15/2016, at 5, 13.

addressed to “Mr. and Mrs. Denny Smith” at the Water St. address in Hughesville. Further, Petitioner admitted that she and Decedent held no joint bank accounts. N.T., 7/15/2016, at 13. She testified that Decedent gave her money “for the light bill, the fuel bill, and if I needed help on something else he would help me with that, too.” Id. at 15. Finally, she testified that they both had vehicles titled solely in their own names. Id. at 18.

To counter Petitioner’s claim, Dale Smith introduced several exhibits. Respondent’s Exhibit D shows emergency clinic records from 8/31/01, and 08/09/04, where Decedent indicated that Mary Ann Smith was his Next of Kin and lists the Montoursville address as his residence. Exhibit E is an emergency clinic records from 02/11/07, where Decedent did list Petitioner as his Next of Kin but he still maintains the Montoursville address as his residence and describes Petitioner as his “friend”. Even on the form, Respondent’s Exhibit F, from Ecker Plastic Surgery Associates where the option of “SO” was available, between “Spouse”, and “Friend”, Decedent circled “Friend” in his description of Petitioner. Exhibit G, Decedent’s Tax Returns from 1998, 2000, 2005, 2006, 2007, 2008, and 2009 all list the Montoursville address and the taxpayer’s filing status as “Single”. Respondent’s Exhibit H, Decedent’s Tax Returns from 1985, 1986, 1988, 1989, 1990, 1991, 1992, and 1993, again list the Decedent as single with the Montoursville street address. Respondent’s Exhibit I is Decedent’s Designation of Beneficiary with Metropolitan Life Insurance from 1988. At such time, Decedent revoked his mother as beneficiary and listed his sister Mary Ann Smith as the

beneficiary.⁴ All of these exhibits demonstrate Decedent's choice not to use Petitioner's address in his public documents indicating that Decedent did not hold himself out to the community as being married.

Though the Court believes from the testimony in total that Decedent was residing with Petitioner from 2003 onward, the "reputation of marriage" was not established. Unlike in Staudenmayer, the parties had no joint bank accounts, did not file joint tax returns, did not own their home together, did not share a name and did not tell people they were married. Moreover, witnesses merely testified that Petitioner and Decedent were "like" a married couple and sometimes Decedent did not object when he was referred to as her husband. Thus, the Court finds that neither party held themselves out to be married to the other and Petitioner's claim that the parties entered into a common law marriage through the "exchange of words uttered for the purpose of establishing the relationship of husband and wife" is not supported by the evidence.

Conclusion

The Court sympathizes with Petitioner in that she appeared to provide a home for Decedent for at least 13 years, while his brothers and sisters benefited by having a boarder who did not live in their home but rather used it as a storage unit and a post office box. The Court does not find, however, sufficient evidence that supports the conclusion that Petitioner and Decedent intended to be married. To the contrary, the weight of the evidence supports the conclusion that Decedent did not consider Petitioner to be his wife and did not intend to provide for her after his death.

⁴ Respondent enclosed proof that such insurance benefit was paid to Mary Ann Smith.

ORDER

AND NOW, this 10th day of January, 2017, Petitioner's request to be granted letters of administration of the Estate of Dennis H. Smith, as his surviving spouse, is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Mary Kilgus, Esq. Petitioner's Counsel
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