

COLORADO COURT OF APPEALS

Court of Appeals No. 00CA1115
Eagle County District Court No. 99DR163
Honorable David R. Lass, Judge

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In re the Marriage of

Donald Kowalski,

Appellant,

and

Judith H. Roth,

Appellee.

JUDGMENT AND ORDERS AFFIRMED

Division A
Opinion by JUSTICE KIRSHBAUM*
Ruland and Criswell*, JJ., concur

NOT SELECTED FOR PUBLICATION

July 19, 2001

Stevens, Littman & Biddison, LLC, Andrew C. Littman, Craig A.
Weinberg, Boulder, Colorado, for Appellant

Polidori, Franklin & Monahan, LLC, Lesleigh Wiggs Monahan, Gary
A. Zeidner, Lakewood, Colorado, for Appellee

*Sitting by assignment of the Chief Justice under provisions of
the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S.
2000.



Donald Kowalski (Kowalski) appeals from the trial court's declaratory judgment determining that he was not married to Judith H. Roth (Roth) under the common law and its orders dismissing his petition for dissolution of marriage and denying his post-trial motion to amend his petition. We affirm.

Kowalski and Roth met in 1993. They moved from New York City to Avon, Colorado, in 1994. In Avon, they lived in an intimate relationship in an apartment first leased and later purchased by Roth with funds obtained from the sale of her Manhattan apartment. In 1998, Roth sold the Avon apartment and purchased a townhouse in Vail with the sale proceeds and additional funds she borrowed from her brother. Kowalski and Roth briefly lived in the Vail townhouse until she sold that property. A short time later, they ceased living together.

During the time they resided together in Colorado, both parties had part-time employment and placed their earnings in a joint checking account used for their living expenses. In addition, Roth received alimony payments of \$1000 per month as the result of a 1984 New York dissolution of marriage proceeding, and Kowalski received pension benefits from his prior employment with General Motors. The alimony and pension funds, which respectively comprised each party's primary income, were placed, respectively, in her or his own separate bank account.

During their residency together in Colorado the parties executed two documents indicating that they were married under

the common law. One of the documents was required by Roth's employer to obtain the benefit of a ski pass for Kowalski. The other document, which contained a "common law marriage questionnaire," was required by General Motors to obtain coverage for Roth under Kowalski's health insurance policy.

In 1999, after the parties had ceased living together, Kowalski filed a petition for dissolution of marriage, alleging that he and Roth were married under the common law. Roth denied Kowalski's allegations and sought dismissal of his petition as well as a declaratory judgment that no common law marriage existed between them.

Following an evidentiary hearing, the trial court found that Kowalski had failed to meet his burden of establishing the existence of a common law marriage. Accordingly, it dismissed his petition for dissolution of marriage and entered a judgment declaring the nonexistence of a marital relationship between Kowalski and Roth.

Kowalski subsequently filed a motion to alter or amend the judgment and a motion to amend his petition. The trial court denied both motions, and this appeal followed.

I.

Kowalski contends that the trial court erred in its determination that no common law marriage existed between himself and Roth. We disagree.

In Colorado, a common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. People v. Lucero, 747 P.2d 660 (Colo. 1987). A mutual and open assumption of the marital relationship may be shown by cohabitation and a general understanding among persons in the community that the parties hold themselves out to be husband and wife, as well as by specific behavior such as maintenance of joint banking and credit accounts, purchase and joint ownership of property, use of the man's surname by the woman, and filing of joint tax returns. Crandell v. Resley, 804 P.2d 272 (Colo. App. 1990).

The determination of whether a common law marriage exists requires resolution of issues of fact and credibility; such determination is properly within the trial court's discretion. People v. Lucero, *supra*; Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991). The trial court's assessments of the weight of the evidence and the credibility of the witnesses must be accepted on appeal unless they are so clearly erroneous as to find no support in the record. Flagstaff Enterprises Construction, Inc. v. Snow, 908 P.2d 1183 (Colo. App. 1995).

Here, the trial court heard conflicting testimony by the parties concerning the nature of their relationship. Kowalski testified their common law marriage began upon their completion of the application for issuance of the ski pass, that completion

of the document to obtain health insurance coverage confirmed his view, and that they held themselves out as a married couple to friends and associates.

Roth testified that she never intended to be married to Kowalski; that she had informed family members, friends, and business associates that Kowalski was only her "boyfriend"; that her ex-husband who knew of her relationship with Kowalski continued to pay her alimony which was contingent upon her remaining single; and that if she signed the two documents, she did so only to gain the resultant benefits and not with the intent to commence a common law marriage. In addition, she presented evidence that: (1) the significant purchases of real property during the parties' relationship were made with her personal funds, as supplemented by a loan to her from her brother; (2) the parties filed individual tax returns; and (3) her validly executed will referred to Kowalski as her "friend," not her husband or heir, and did not name him personal representative or bequeath him significant property.

Kowalski maintains that the two executed documents conclusively establish that the parties mutually consented to be married. However, in Whitenhill v. Kaiser Permanente, 940 P.2d 1129 (Colo. App. 1997), a division of this court concluded that an affidavit executed by the parties for the purpose of receiving medical assistance was alone insufficient to constitute an express agreement to be husband and wife under the common law.

We are not persuaded to conclude otherwise here. The parties' intent and the circumstances surrounding completion of the documents, as well as evidence concerning their respective or mutual marital intent and the community's understanding of their relationship, were considered by the trial court in reaching its decision.

Numerous witnesses testified concerning their conception of the parties' relationship. Roth's brother testified that he had specifically clarified with Roth that she did not intend or believe herself to be married to Kowalski. Six friends or business associates of the parties testified that they did not consider the parties to be married and that Roth clearly had corrected them to the contrary if they indicated such an assumption. One witness who worked with Kowalski stated that he believed the parties were married based upon statements made by the parties, but the witness could not recall any specific statement made by Roth to that effect. Finally, a police officer testified that Roth had referred to Kowalski as her husband during the officer's investigation of domestic violence between the parties. The court reviewed the file in the domestic violence case and found no other reference to the parties as husband and wife by counselors or advocates or in the disposition of the case.

The trial court reviewed the conflicting evidence and concluded that Kowalski had failed to prove that the parties had

contracted a common law marriage based upon their mutual intent. Because the trial court's determination is supported by the record, it is not clearly erroneous, and we may not disturb it on appeal. See Flagstaff Enterprises Construction, Inc. v. Snow, supra.

II.

Kowalski also contends that the trial court erred by failing to allow him to amend his petition to join a claim for restitution based upon a theory of unjust enrichment. We again disagree.

Prior to ruling upon Kowalski's motion to amend his petition, the trial court denied his motion to alter or amend the judgment, rendering that judgment final. Once a final judgment has been entered, an amendment of pleadings is not permitted unless the original judgment is set aside or vacated. See Estate of Hays v. Mid-Century Insurance Co., 902 P.2d 956 (Colo. App. 1995); Wilcox v. Reconditioned Office Systems of Colorado, Inc., 881 P.2d 398 (Colo. App. 1994). No such action was taken here.

A trial court's ruling on a motion to amend a pleading will not be disturbed on appeal absent an abuse of discretion. Super Valu Stores, Inc. v. District Court, 906 P.2d 72 (Colo. 1995). We perceive no abuse of discretion here.

The judgment and orders of the trial court are affirmed.

JUDGE RULAND and JUDGE CRISWELL concur.