

[Cite as *Douple v. Wagner*, 2011-Ohio-1281.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DARYL R. DOUPLE, EXECUTOR :
OF THE ESTATE OF :
JOHN L. LENZ :

Plaintiff-Appellee :

v. :

R. ANN WAGNER, et al. :

Defendants-Appellants :

C.A. CASE NO. 24228

T.C. NO. 10MSC138

(Civil appeal from Common
Pleas Court, Probate Division)

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OPINION

Rendered on the 18th day of March, 2011.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Ruth Ann Wagner (“Ann”) and her son, Bruce Andrew Robert Wagner (“Robert”), filed August 27, 2010. On May 14, 2010, Daryl R. Double, as executor of the estate of John L. Lenz, filed a Complaint for Declaratory Judgment, naming Ann, Robert, Richard E. Gump, as trustee of the John L. Lenz testamentary trust, Orville Roberts, and the Attorney General of Ohio as defendants, seeking a determination “whether R. Ann Wagner is the common law spouse of decedent John L. Lenz.”

{¶ 2} A hearing was held on June 29, 2010, at which Ann, Robert, Joe Nonnamaker, John’s accountant and financial advisor, and Daryl testified. Orville Roberts was present at the hearing but did not testify. After the hearing, Richard filed a post-trial brief, and Ann and Robert filed post-trial proposed findings of fact and conclusions of law. On July 30, 2010, the probate court issued an “Entry Declaring that Ann Wagner is not the Common Law Spouse of John L. Lenz.”

{¶ 3} Ann, who was 81 years old at the time of the hearing, testified that she met John in 1975, at a ballroom dance at Wright Patterson Air Force Base. Ann had been divorced from the the father of her four children since 1974. John was 14 years older than Ann, having been born in 1915. Several weeks after they met, Ann testified that she accompanied John on a business trip to Houston and Dallas, Texas. She stated that they were sexually active together on the trip and shared a room. Upon their return, they “went to a lot of dances together on weekends,” and Ann often stayed in John’s home. Ann

testified that she and John did not try to hide their relationship, and that Robert, Ann's youngest child, who was 15 at the time, was aware of her relationship with John. Ann testified that John and Robert became close, and that Robert began working for John. According to Ann, Robert "even said I claim [John] as my father." In 1976, Ann began working for John as well, having previously worked in an accounting firm. Ann testified that she traveled to England, France and Germany with John in 1978, where they shared rooms and had sexual relations. Ann did not know how John registered them at the hotels.

{¶ 4} Ann testified that she felt absolutely committed to John in the early 1980's. John bought Ann her first car, and she stated that he took care of her. According to Ann, she "was very undecided whether to take the car because I felt I would be hooked if I took the car. And out of strength or weakness I did and I drove the car." She described their social life as "mostly Polka dances and Waltz and dinner." She stated that they liked to go to the Pine Club, the Oakwood Club and Neil's Heritage House. John owned a company in Cincinnati, and Ann testified that "we would go down there and stay at the Cincinnati Club. * * * he would go to the company. I would shop and then we would have dinner and come back."

{¶ 5} John did not celebrate birthdays, according to Ann. The only jewelry that John gave to Ann was a locket that belonged to his mother, who died when John was one month old. The locket was John's sole possession from his mother, and he gave it to Ann in the early 1980's.

{¶ 6} Ann testified that John took care of their finances, and that she and John had joint accounts that John funded. The record contains the following statements in Ann's and

John's joint names: Money Maker Investment statements from Third National Bank and Trust Company, dated from 1976 to 1988, with a balance of over \$14,000.00, along with a copy of a check on the account in the name of Ann Wagner and John Lenz; a savings account statement from The Central Trust Company, dated December 31, 1979, with a balance of \$998.01; a checking account statement from The Central Trust Company; statements from Society Bank, dated 1986 to 1999, showing a maximum balance of over \$40,000.00; and checking account statements from Key Bank in 1996. Ann identified a business credit card from Fifth Third Bank in the name of "Day-Hio Products Company" that also bears Ann's name, and she stated that she used the card "all the time."

{¶ 7} Ann stated that John owned multiple houses and that she and John stayed primarily in two of them. Ann testified that John would work at night until 12:00 or 1:00 a.m., and that she performed the traditional duties of a wife, such as cooking, laundry, and grocery shopping. Ann stated that John called her "Mrs. Lenz," and that he also sometimes called her "mother." She identified a proposal from "Pella Sales, Inc.," dated August 25, 1983, for their home on Harman Boulevard, which indicates that it was submitted to "Mr. and Mrs. John Lenz." According to Ann, John set up bank accounts for her children and grandchildren, and he attended family events, including Robert's children's baseball games and ballets. He had also been to the homes of Ann's two sisters and brothers-in-law and was accepted by them. According to Ann, John refused to attend weddings or funerals. When they used to send Christmas cards, Ann testified that they signed them "John and Ann."

{¶ 8} Ann testified that John purchased two crypts at the Woodland Cemetery

mausoleum for himself and Ann in 1982, and she stated that they intended to “stay together” in death. She identified a letter John wrote to the Meyer & Boehmer Funeral Home, dated July 3, 1991, listing his wishes as “no viewing, closed casket, no publicity, no releases to the media,” and identifying Robert and Ann as his contacts. Ann stated that John was very private and did not want an obituary, or for anyone to know when he died. In 2000, John sold the crypts and purchased two more because “he changed where he wanted buried.” The authorization form for internment at Woodland Cemetery lists Ann as John’s next of kin.

{¶ 9} In the early 1990's John had prostate cancer and a tumor in his cheek requiring radiation. Ann took care of him during this time. In 1997, John injured his leg in an accident and, after surgery, he was in a wheelchair until his death in 2009. Ann testified that she bathed him, cut his hair, put drops in his eyes, fed him and lifted him in and out of the wheelchair. She identified a document, dated August 28, 2001, appointing her as John’s attorney-in-fact.

{¶ 10} John’s death certificate indicates that he was married at the time of his death and it identifies Ann as his surviving spouse. In response to the question, “when you were listed as wife, did you believe that to be true,” Ann responded, “Yes, I did.” Ann testified that in their 34 years together, John behaved like a husband and she behaved like a wife.

{¶ 11} Robert testified that he met John in 1975, and that John treated him like a son. Robert referred to John in the community as his step-father. Robert stated that John called Ann “mom” around him, and he stated that they acted as husband and wife. According to Robert, John taught him about his business, and Robert “would go with him

everywhere. * * * We would take trips to Cincinnati when we had business down there, you know, he would talk to me as we were traveling down I-75, you know, just learn the ropes of the business as I was a young man.” Robert stated that he has worked for the Lenz Company since 1976. Robert stated, he first worked in “assembly, putting together hydraulic tank accessories. Shortly after that, I worked with Orville Roberts in maintenance. I was about 18 at that time. Between 18 and 21. * * * Then when I was 21, John asked me to come inside and be an inside salesperson. And from then it just kind of blossomed and I basically, took over or assumed the role as far as managing the corporation.” At the time of John’s death, Robert held the position of vice president. Robert stated that John was a “very hard worker,” working seven days a week, and that John expected Robert to work “six days a week, work late, go in on Sundays, as well. You don’t take vacations.”

{¶ 12} Robert stated that John attended his daughter’s ballet events and some of his son’s baseball games. Robert testified that John did not like weddings or funerals and would not attend them. John did not attend Robert’s wedding. According to Robert, regarding funerals, he “always went for John. All the funerals of his business acquaintances. I always attended the funerals, viewings, * * * And then I would sign his name and my name on the register.”

{¶ 13} Robert testified that when Ann met John, she and Robert were living in an apartment in Kettering, and John resided at 338 Central Avenue, a home he still had at the time of his death. Robert stated that John owned six homes, and Robert and Orville Roberts assumed the responsibility for their maintenance. Robert identified a deed for a home at

228 Harman Boulevard in the name of “43 Building Company,” dated August, 1981. According to Robert, the company name was “a property owner’s name that [John] would make up so, he can hide his identity or who owned the home.” Robert stated that John regularly used company names when purchasing homes. Robert stated that the Harman Boulevard home was purchased for Ann and John. Robert identified a closing statement, dated January 6, 1984, for a home at 232 Spirea Drive, and the purchaser is “Spirea Realty Co.” Robert testified that the home was purchased for Ann. Robert identified a closing statement for a home at 215 Spirea, dated October 22, 1984, and the document states that the buyer is “215 Company.” Robert stated that John also purchased this home for Ann, and that the two Spirea homes and the Harman Boulevard home were in close proximity to each other. Robert identified a deed dated March, 1987, for a home at 1000 North Keowee Street, indicating that the buyer is “Webster Realty Company,” with an address of P.O. Box 1044, Dayton, Ohio. Robert stated that the P.O. Box was John’s company address. Robert stated that John bought this home to preserve its historical significance, and that Robert and his wife initially planned to live there. Robert lived in the carriage house and worked on the property, but after he and his wife married and had children, they decided not to live there. Robert identified a deed, dated October 5, 1989, in the name of John L. Lenz, trustee, at the above P.O. Box, for property located at 23 Ridgeway Road, and he indicated that John and Ann planned to live there because there were bedrooms on the first floor and they did not have to use the stairs. Robert identified a deed for a home at 325 Far Hills Avenue, dated February 20, 1996, in the name of “Buckeye Leasing, Inc.” According to Robert, “John wanted this home so that he could work out of it at night because he was a night owl. And

he did not want to go up to the office anymore in his later life.” Robert identified a deed for property located at 335 Shafor Boulevard, dated April 2, 1998, in the name of “Buckeye Leasing and Investment Company,” and Robert testified that “this was a home where we purchased for mom and John. So, they could be on one level.” This became John and Ann’s principal residence after John’s accident because there “was easy access for the wheelchair. One floor, the halls were wide and it was just easy to maintain.” Finally, Robert identified a deed for a home at 2765 Ridgeway Road, in the name of “4101 Company LLC” and dated December 14, 2000. The home was known as “High Acres” and belonged to the Rike family at one time. John purchased this home for preservation purposes. Robert testified that he was involved in the purchases of each of the homes, and he was not surprised that the homes were purchased in fictitious names. According to Robert, John “liked to be very discrete. We understood that. Mom and I understood that and we respected that.” Robert stated that he retrieved the records of the above homes from his files. According to Robert, John “was notorious for not putting paperwork away. Just could not file and so forth. So, I just took over taking care of that as well.”

{¶ 14} Robert stated that John’s company employed about 65 people, that it was started in 1946, and that the company manufactures hydraulic fittings. John incorporated the company in 1959. Robert stated that the employees in the company knew that John and Ann were together, that Ann worked there for many years, and that she and John would “come and go together.” Robert stated that John and Ann conducted their financial affairs through the company.

{¶ 15} Regarding John’s death, Robert stated that John’s “wishes was to keep quiet

of his death.” An obituary “was prohibited.” At the funeral, “it was just mom and I at the funeral home. That’s the way he wanted it.” Robert understood that John wanted to be buried next to Ann in 1982, and he stated that he assisted John with the arrangements at Woodland Cemetery. Robert described John’s health as “very strong” until his accident. The accident occurred in the garage at 228 Harman Boulevard, when John got his knee stuck “between the driver’s seat and the back of the coupe,” where he remained for over 12 hours. During that time Ann was “calling different houses” trying to find John. A neighbor eventually heard John yelling and came to 232 Spirea where Robert lived. According to Robert, he “immediately ran over to the house and found him and called 911. I attempted to get John out, I said I have to get 911 here I need help. * * * He did not want any ambulance to show up or any police or anything. But eventually, I had no choice, I had to call 911.” John was hospitalized for at least 10 days, and Robert “often slept on the floor at night because that’s what he wanted me to do.” Robert identified the admitting form from Kettering Hospital identifying Robert as the “patient representative” and Robert’s relationship to him as “son.”

{¶ 16} According to Robert, John had few friends and he “didn’t want anybody to know who he was.” When John died, Robert stated that he and Ann did not receive any condolence cards “because nobody knew.” Robert stated that in his mind John and Ann were husband and wife for 34 years. Robert stated that his wife and children called John by his first name.

{¶ 17} On cross-examination, Robert testified that Daryl Douple asked Ann to go to the funeral home to have the death certificate identifying her as John’s surviving spouse

corrected “because Daryl thought it was important.”

{¶ 18} Joe Nonnamaker testified that his brother introduced Joe to John in 1976. Joe and Glenn Boyles, John’s accountant, became partners in Lima, Ohio, and they performed all of John’s accounting work. Joe described John as “a private person.” According to Joe, “John didn’t like paperwork. John didn’t like contracts.” Joe testified that he has filed Ann’s tax returns since the early 1970s. According to Joe, “Ann was just always there. And we did her return and we did Robert’s at the same time.” When asked what he believed Ann and John’s relationship to be, Joe responded, “They were husband and wife.”

{¶ 19} The following exchange occurred:

{¶ 20} “Q. Did John ever talk to you about Ann being his wife?

{¶ 21} “A. Yes.

{¶ 22} “Q. How did that come up? Can you tell us?

{¶ 23} “A. Okay. Money was a big deal to John. So, about every tax season about in April we would be doing his 1040, it started sometime in the early ‘80s. We would get into the conversation, I want to file married, joint.

{¶ 24} “Q. With Ann?

{¶ 25} “A. With Ann. Because this was tax season. I want to file joint. And John and I had this relationship, of teasing, aggravating, whatever you want to call, John was very quick witted. And I am to (sic). So, we had a lot of fun. So the first couple of years, it was kind of funny, yea, we’re going to do this. I finally came down and I said John, if you’re married, okay. I didn’t come to the wedding, that’s okay. Show me a wedding

certificate, marriage certificate, I'll file you joint. Otherwise, I'm not. Because this was back when I started working with this guy in '76, one of the things I learned early on was, * * he would have to not just tell me something, I had to see it. And he didn't have - - he couldn't show me the marriage certificate. I will tell you it was a real issue in 1985, is when it really came to a head, tax time, sitting there, I want to file joint. And I finally, like happened other times, I said that's it, show me the wedding certificate, marriage certificate, or don't bring it up. * * * So, that was probably the last time he ever said anything to me about it.

{¶ 26} "Q. Was he serious when he said that?

{¶ 27} "A. Yes, he was deadly serious. He was deadly serious, she's my wife. He said she's my wife. Well, this same time is when I was taking a change in my life, all right. In my career. I had to tell John because you know being fair. I was starting my own business. I was a CPA[.] I lived at that time in Lima, Ohio. I went to John and said John, so, you know, this is my plans. I don't want to do this the rest of my life. I'm going to start a restaurant business. The business is going to be in Canton, Ohio. You got to know this because this is what I'm going to do. And of all the years I knew him, * * * he sat there and started crying. This is a very strong man. He sat there and started crying and he says, you came on board, I accepted you, you promised to take care of it. I said John, I'll always be here. He says, I want you to take care of Ann. I want you to take care of Robert. And I want you to make sure my companies prosper. That was our conversation that day. And I said okay. I'll always be here for you. I'm going to have my business, I'll always be here for whatever I got to do. And so, I did. I'm still doing his work. Whenever they got

a problem, I'm here. * * * But his thing to me was I'll tell you, Ann's my wife, he called her his wife, he said take care of Ann, take care of Robert, take care of my company. I said fine. And I lived up to my end of my bargain.

{¶ 28} "Q. Mr. Nonnamaker, when you told John he couldn't file married for him and Ann because he didn't have a marriage certificate, did you know anything about common law marriage or the concept of common law marriage?

{¶ 29} "A. All I knew about common law marriage until after John's death, I thought common-law marriage is something that happened in Hollywood. It sounds funny that you ask me that question. It's Hollywood when someone gets a divorce there is this common law marriage they get part of the estate, you know, not the estate but the proceeds. That's all I knew. * * *

{¶ 30} "* * *

{¶ 31} "Q. You told John he had to have a certificate?

{¶ 32} "A. Right. He has to have a certificate. You got to understand, I'm not going to file a return be it his 1040, or one of his tax returns, unless I know it's right. And the history with John is you got to have the documents, you don't just take what John says. I don't want that to sound bad about the man but it's reality.

{¶ 33} "Q. You were pretty hard on him about that subject?

{¶ 34} "A. Yes. * * * It was John's company. And we would get into it and if he would do things, let's say he did something I didn't think he should. Let's say he bought a building or companies he shouldn't have. And he had done that. * * * And like I said I told him what he couldn't do and he had an option, I mean he didn't have to keep me as his

accountant. But you got to understand something, he and I went through about two or three big audits. He survived some very large tax audits. Because I made sure that he did what he had to do was right. We had times we didn't talk for months. Because he would be very upset about it. It was a long term relationship. We were not social friends. I was his accountant and his financial advisor.

{¶ 35} “* * *

{¶ 36} “Q. * * * Working with John did you ever see how he treated Ann in anyway?”

{¶ 37} “A. No, I didn't. But they were always together. I mean they lived together. The best of my knowledge they were private people. Not that sociable. On John and Ann's tax return, it did not show an address. His tax return was the post office box.”

{¶ 38} Joe testified that he estimated the value of John's estate to be about 33 million dollars at the time of his death. He testified that Daryl and Richard did not understand the extent of John's estate when he died. According to Joe, “But unless you were right there looking at the companies. (Sic) When you have got a company that has millions and millions of dollars of just cash it's hard, how would anybody know? John didn't show off. John didn't wear jewelry. * * * .”

{¶ 39} The following exchange occurred;

{¶ 40} “Q. In all the years you served John did you ever get the impression that John's relationship after he told you that [Ann] was his wife ever changed?”

{¶ 41} “A. No, he continued up until the day he died to do what he told me he was

going to do and I was suppose[d] to do. That was to take care of her. I mean, she had credit cards, remember I told you she had credit cards, I knew she was taken care of there, she was an employee of the company, she had a company car, just being an employee of a company doesn't mean you have a company car, he paid bills on all the houses, he bought houses for her for them to live in, he had his accident, so, they couldn't live there anymore, so they bought another house. The original house that he bought for them to live in was still his but [he] let Ann rent it out. So, Ann collected rent on the house. Which we put on her 1040 under rent. So, everything he said he was going to do, he did. But it didn't change in any way shape or form that I could tell."

{¶ 42} Finally, Joe testified that his and John's relationship was not governed by a contract.

{¶ 43} On cross-examination, the following exchange occurred:

{¶ 44} "Q. * * * When the marital issues came up, was this John asking you how he could save taxes?

{¶ 45} "A. No, not at all. It always just came up at tax time. * * * He didn't say, wow, we do this, I'm going to save money. * * * I'm telling you I know John's motivation and by bringing it up at that time, wow, if I just go ahead and file married, we could save this money. He never said I'm going to save money. We're married, we should be filing joint."

{¶ 46} The following exchange occurred on redirect regarding John's desire to file a joint return:

{¶ 47} "Q. And when the conversation came to an end was it because John made it

come to an end or did you make it come to an end?

{¶ 48} “A. I told John give me the wedding, marriage certificate or quit bringing it up. It’s like sometimes after awhile it breaks on you. If I can do this for you John, I will, but without a certificate I can’t. * * *

{¶ 49} “Q. Was that a pretty cross conversation?”

{¶ 50} “A. Yes, he wasn’t happy.

{¶ 51} “Q. Was that the conversation when he cried?”

{¶ 52} “A. Yes. Yes, that’s when he cried. That’s when he broke down and then we had this conversation about taking care of the money. It all tied together like that. * * *

{¶ 53} “Q. So, if you wouldn’t file them as married, make sure they’re taken care of?”

{¶ 54} “A. Right. That’s what this is all about. That’s what he told me and that’s what I told him I would do.”

{¶ 55} Daryl Douple testified that he drafted John’s Last Will and Testament and filed it in the estate proceeding. Daryl met John in 1995 “as a result of [John’s] relationship with [Richard] Gump.” Daryl and John met for 1.2 hours about drafting his will. According to Daryl, he did not recall “any specific discussion about the range of assets that [John] owned. There was discussion about specific assets that he * * * wanted me to make reference to in the will. There was no conversation about all of what he owned.” Daryl stated that John was “very private and was reluctant to get into long discussion about assets or other personal issues.” Daryl did not recall asking John if he was married, but he stated that he understood from Richard that John was not married. According to Daryl, “there

would have been nothing in my conversation with [John] that would have indicated to me that he was married. And again, I want to make it clear, I wrote the will on that basis. If there had been some indication to me that he was married, then it would have been different.” Daryl testified that John “did advise me that he wanted to take care of [Ann]. I understood there was a relationship of some sort there * * * as well as with Robert Wagner. And it was indicated at my meeting with [John] that he did want to provide a home for Ann * * * to live in. In fact, he provided her a choice of two homes and he wanted to provide her an income for life, as well as [Robert]. * * * .” After seeing John’s death certificate, Douple asked Ann if there had been a formal wedding ceremony since the date the will was prepared. When Ann said no, he asked her to have the certificate corrected.

{¶ 56} Counsel for the testamentary trust presented a certified copy of a general warranty deed, executed by John, in his name, and dated July 7, 2000, indicating that John is unmarried. Counsel also presented a certified copy of an Application to File an Affidavit to an Ohio Birth or Death Certificate indicating that John’s marital status at the time of his death was “never married,” and identifying Ann as John’s “companion.”

{¶ 57} In determining that Ann was not John’s common law wife, the probate court noted, “there is no direct evidence establishing an agreement of marriage between Ann and John. There was absolutely no testimony that the subject of marriage was ever discussed nor was there evidence to demonstrate that their relationship changed to indicate that a marriage had occurred. Therefore, the Court must examine all of the facts and circumstances to determine if this element has been met.” After reviewing the evidence presented, the court concluded, “While there is evidence that gives some inference to an agreement to

marry, such as the length of their relationship, it is not clear and convincing. Evidence also exists, such as the deed where John is listed as ‘unmarried,’ which suggests that there was no agreement to marry. Therefore, Ann failed to prove, by clear and convincing evidence, an agreement to marry in praesenti.”

{¶ 58} The probate court next determined that Ann did prove that she and John cohabitated and had sexual activity in the open manner of husband and wife.

{¶ 59} Finally, the court determined that Ann failed to establish by clear and convincing evidence that she and John held themselves out as a married couple in their community.

{¶ 60} It was significant to the probate court that Ann did not testify that she ever introduced John as her husband or that he introduced her as his wife, or that they announced that they were married to anyone. Ann did not know how John registered them in hotels when they traveled. It was also significant to the court that there was no testimony of any other family members besides Robert’s that Ann and John were believed to be married. Ann’s grandchildren called John by his first name and not grandfather, the court noted. According to the court, “[s]trikingly, there was no testimony that John and Ann held themselves out as a married couple to John’s employees and Ann’s co-workers. Recognizing that two people are a couple is not the same as recognizing them as husband and wife.”

{¶ 61} In conclusion, the court noted, “even though the maintenance proposal from Pella in 2001 was addressed to Mr. And Mrs. Lenz, the salesperson is not a member of Ann and John’s community. Also, the document is dated well after October 10, 1991, the date

by which a common-law marriage must be established. While the nurse at the hospital placed Ann's name on the death certificate as John's wife, this act took place after October 10, 1991."

{¶ 62} Before addressing the merits of Robert and Ann's brief, we note that Richard did not file a brief in response but instead submitted "Defendant-Appellee's Statement in Lieu of Appellee Brief." According to Richard, Ann entered into a Settlement Agreement in a related matter with Daryl, Richard, Robert, and Orville, pursuant to which she waived her right to elect against John's will in the event that we conclude that she is John's common law wife. Richard asserts that if we so decide, "such decision by this Court will have no adverse legal impact on Appellee Gump." The Settlement Agreement is attached to the trustee's brief. Ann and Robert filed a Reply Brief asserting that Richard's "Statement" fails to comply with App.R. 16, and also that the Settlement Agreement is not part of the record before us, pursuant to App. R. 9. We agree with Robert and Ann and will not consider Richard's "Statement" or the Settlement Agreement.

{¶ 63} In their brief, Robert and Ann assert three assignments of error which we will consider together. They are as follows:

{¶ 64} "THE PROBATE COURT ERRED WHEN IT IGNORED UNCONTRADICTED EVIDENCE IN DECLARING THAT R. ANN WAGNER WAS NOT THE COMMON LAW WIFE OF JOHN A. LENZ," And,

{¶ 65} "THE PROBATE COURT ERRED BECAUSE, HAD IT CONSIDERED ALL EVIDENCE, IT WOULD HAVE FOUND CLEAR AND CONVINCING PROOF THAT R. ANN WAGNER WAS THE COMMON LAW WIFE OF JOHN A. LENZ," And,

{¶ 66} “THE PROBATE COURT ERRED BECAUSE IT FOUND CERTAIN FACTS BASED UPON IMPROPER INFERENCE.”

{¶ 67} “Common law marriages have never been favored in Ohio,” and they have been prohibited since October 10, 1991. *State v. Burkitt* (May 19, 1993), 80 Ohio App.3d 214, 227.

{¶ 68} “The necessary elements to establish a common-law marriage were set forth long ago by the Ohio Supreme Court in *Umbenhowe v. Labus* (1912), 85 Ohio St. 238 * * * . The syllabus provides as follows:

{¶ 69} ““An agreement of marriage *in praesenti* when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move established a valid marriage at common law * * * .”

{¶ 70} ““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 [29 O.O. 143].

{¶ 71} ““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 * * *.’ *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, 146, * * * .

{¶ 72} “In *Nestor v. Nestor*, the Ohio Supreme Court in a per curiam opinion noted the following:

{¶ 73} ““Where there is no direct proof in reference to the formation of the contract of marriage *in praesenti*, testimony regarding cohabitation and community reputation tends to raise an inference of the marriage. This inference is given more strength according to the circumstances of the particular case. The inference is generally strengthened with the lapse of time during which the parties are living together and cohabitating as man and wife.

{¶ 74} ““Where there is direct evidence concerning the formation of the contract of marriage *in praesenti* and a finding by the court, as here, that such a contact exists, the evidence of long-time cohabitation and reputation of living together as man and wife should be given even greater weight to further the inference of marriage.’ *Id.*” *In re Estate of Thompson*, Montgomery App. No. 23230, 2009-Ohio-6139, ¶ 50-56.

{¶ 75} Regarding the final element at issue, namely the reputation of the parties in the community as being man and wife, the *Nestor* court determined, “in order to establish a common law marriage it is not necessary that they disseminate information to all society generally, or to all of the community in which they reside. Rather, there must be a holding out to those with whom they normally come in contact. A common law marriage will not necessarily be defeated by the fact that all persons in the community within which the parties

reside are not aware of the marital arrangement, nor by the fact that all persons with whom they normally come in contact are also unaware of the arrangement.” *Nestor*, at 146.

{¶ 76} We apply the manifest weight standard of review to a trial court’s decision regarding common law marriage. *Jones v. Jones* (October 13, 2000), Montgomery App. No. 18082. “Accordingly, we must review all of the evidence, and after giving due deference to the factual findings of the trial court, determine if we are persuaded by clear and convincing evidence that a common law marriage existed. (Citation omitted). Reversal is only appropriate if we find that the trial court lost its way when making its factual findings. (Citations omitted). * * * A judgment supported by some competent, credible evidence going to all the elements of the case will not be reversed as against the manifest weight of the evidence.” *Id.*

{¶ 77} Ann and Robert argue herein that the probate court ignored uncontradicted evidence of an agreement *in praesenti* to become husband and wife. They assert the court ignored John’s 1981 purchase of the Harman Boulevard home, and testimony of their agreement to spend their lives together as demonstrated by John’s purchase of joint burial plots for them. They further assert that the court did not properly consider the evidence presented in the context of John’s private nature and “eccentricities.” According to Ann and Robert, the probate court erred in only considering evidence of one bank account. Finally, they assert, the probate court “ignored the context of Ann’s testimony regarding John’s gift to her of his mother’s locket, context that is important for at least three reasons.” Ann and Robert point out that John gave Ann the only possession he had that belonged to his mother, at a time when their relationship became permanent and at the same time that John

asked Joe to file their taxes jointly because Ann was his “wife.” Ann and Robert assert that the probate court improperly focused on the fact that “Ann never received any other type of ring or jewelry as a token of their marriage.” In addition to the above evidence, Ann asserts that she and John assumed the traditional roles of a married couple, and that they were together for 34 years, cohabitating, traveling, and engaging in sexual relations.

{¶ 78} Having thoroughly reviewed all of the evidence, we agree with the probate court that Ann and Robert failed to establish, by clear and convincing evidence, the agreement of marriage *in praesenti*, or a meeting of the minds between John and Ann to take each other as husband and wife. As the probate court noted, there was no direct evidence that the subject of marriage or an agreement to marry was ever discussed between John and Ann. Certainly there was some evidence to support Ann’s claim that she considered herself to be John’s wife; she lived with him, traveled with him, cooked and cleaned for him, and cared for him after his accident and when he was ill. The length of their relationship also supports such a conclusion. There was conflicting evidence, however, as to whether John agreed to be married to Ann. John did not purchase a wedding ring for Ann, and we cannot conclude from the evidence presented that John gave Ann his mother’s locket specifically as a token of marriage. While they had several joint bank accounts over the years, John managed their finances through his company. John purchased multiple homes, including the home on Harman Boulevard, in the names of fictitious companies, and he did not put his or Ann’s name on any of the deeds. The only deed in the record in John’s name alone identifies him as unmarried. Finally, a common law marriage, like a ceremonial marriage, is contractual in nature. The testimony was clear that John “didn’t like contracts.” He did

not enter into a contractual relationship with Joe, whom he knew almost as long as he knew Ann. John's aversion to contractual relationships supports an inference that he did not agree to enter into a mutual contract of present marriage with Ann. The evidence was clear that John did not like weddings, and he did not even attend the wedding of Robert. While we agree with Ann and Robert that John was very private, his confidential nature does not, as Ann and Robert assert, overcome the absence of any evidence of John's agreement to enter into a marriage contract, the essential element of a common law marriage.

{¶ 79} Regarding the probate court's determination that Ann failed to establish by clear and convincing evidence that she and John held themselves out as a married couple in the community, we note that while Joe stated that John referred to Ann as his wife, he further stated that "money was a big deal to John," and discussions of John and Ann's status only occurred "every tax season" in the context of financial planning. Joe did not observe John's treatment of Ann. Mr. Douple testified that Richard represented to him that John was not married, and Mr. Douple stated that he was only aware that John and Ann had "a relationship of some sort." Ann's and Robert's testimony regarding John's private nature established that Ann and John's social community was very small, consisting mostly of Ann's family. Ann's grandchildren called John by his first name and not grandfather. The fact that Robert's neighbor ran to Robert's home upon hearing John yelling in the garage when he was injured does not establish that the neighbor believed John and Ann to be married, as Robert and Ann assert. A long-time employee of John's, Orville Roberts, was present for the hearing, but counsel for Ann and Robert did not call him, and there was no testimony that Ann and John held themselves out to be married in their workplace

community. We agree with the trial court that recognizing that two people are a “couple” is not the same as recognizing them as married.

{¶ 80} Having thoroughly reviewed the record, we cannot conclude that the trial court’s judgment is against the manifest weight of the evidence. In other words, we are not persuaded by clear and convincing evidence that a common law marriage existed between Ann and John. Accordingly, John’s assigned errors are overruled, and the judgment of the trial court is affirmed.

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GRADY, P.J. and FAIN, J., concur.

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