

IN THE COURT OF APPEALS OF IOWA

No. 7-031 / 06-0820

Filed June 13, 2007

IN RE MARRIAGE OF KEVIN DONALD SHILLING AND MARGARET ANN SHILLING

**Upon the Petition of
KEVIN DONALD SHILLING,**
Petitioner-Appellant,

**And Concerning
MARGARET ANN SHILLING,**
Respondent-Appellee.

Appeal from the Iowa District Court for Adair County, Peter A. Keller,
Judge.

Kevin Shilling appeals a district court decision holding that he did not
prove his claim asserting the existence of a common law marriage. **AFFIRMED.**

Catherine K. Levine, Des Moines, and A. Zane Blessum, Winterset, for
appellant.

Margaret Shilling, Greenfield, pro se.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Kevin Shilling appeals the part of a district court judgment holding he did not prove the existence of a common law marriage between his former wife, Margaret Shilling, and Clifford Benedict. We affirm.

The parties' marriage was dissolved in September 1997. The decree incorporated a stipulation providing, among other things, that Margaret would receive a portion of Kevin's military pension and that if she became married she would no longer receive any of that pension.

On April 2005 Kevin filed what he denominated a "Petition to Modify Stipulation and Agreement." He alleged Margaret was cohabiting and portraying herself as a married woman. He requested the court "discontinue retirement pension payments to [Margaret]."

Margaret answered, denying material allegations of Kevin's petition.¹ At trial Kevin asserted that a common law marriage existed between Margaret and Clifford Benedict. Following trial the district court found Kevin had not proved "by even a preponderance of the evidence" his claim of a common law marriage. Kevin appeals, claiming the court erred in finding that no common law marriage existed.

In a relatively recent case our supreme court has cataloged many of the general principles concerning marriage in Iowa. It stated, in part:

Two forms of marriage are recognized in Iowa. One is ceremonial, governed by statute. This form of marriage was recognized in our first code in 1851 and the requirements established then are essentially the same now. The second form of marriage is informal, known as a common law marriage. This type

¹ Margaret included a counterclaim. The counterclaim and the district court's resolution of the issue in the counterclaim are not at issue on appeal.

of marriage has been recognized in Iowa for well over a century. Although a common law marriage is as valid as a ceremonial marriage, there is no public policy favoring this type of marriage. Thus, claims of common law marriage are carefully scrutinized and the burden of proof rests with the party asserting the claim.

Three elements must exist to create a common law marriage: “(1) [p]resent intent and agreement . . . to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife.” All three elements must be shown to establish a common law marriage.

In re Marriage of Martin, 681 N.W.2d 612, 617-18 (Iowa 2004) (citations and footnote omitted).

We review claims of a common law marriage *de novo*. *Id.* at 646. The burden is on the party claiming the existence of a common law marriage to prove it by a preponderance of the evidence. *In re Marriage of Grother*, 242 N.W.2d 1, 1 (Iowa 1976); *cf. State v. Ware*, 338 N.W.2d 707, 711 (Iowa 1983) (stating proof of a common law marriage must be by a preponderance of clear, consistent, and convincing evidence); *In re Estate of Fisher*, 176 N.W.2d 801, 805 (Iowa 1970) (same).

The unrefuted and unchallenged evidence shows that Margaret and Clifford lived together continuously from at least February 2004 through the time of trial in February 2006. We therefore find Kevin clearly proved the second, “continuous cohabitation,” element of a common law marriage.

As noted below, Margaret and Clifford publicly announced in February 2004 that they were engaged to be married. It is thus clear that they did at least at one time intend to become married. However, “[t]he present-intent-to-be-married requirement precludes a common law marriage based on an intent to be married at some future time.” *Martin*, 681 N.W.2d at 617. It does not appear that the district court expressly addressed or decided whether Kevin had proved the

first, “[p]resent intent and agreement . . . to be married by both parties,” element of a common law marriage. We find it unnecessary to address this element because, for reasons stated below, we find the third element to be dispositive.

The public declaration or holding out to the public is considered to be the acid test of a common law marriage. This means there can be no secret common law marriage. Yet, it does not mean that all public declarations must be entirely consistent with marriage. A substantial holding out to the public in general is sufficient.

Id. at 618 (citations omitted).

In about late 2003 Margaret and Clifford purchased an engagement ring and wedding rings. Clifford’s daughter later announced their engagement in a local newspaper. An engagement party was held at a local restaurant in February 2004. At that party Margaret wore the engagement ring, and she and Clifford wore the wedding rings.²

Before Margaret and Clifford were to get married, a daughter-in-law of Margaret and Kevin suggested to Margaret that if she married she would lose her military benefits. Margaret contacted a “JAG attorney” who told her that if she married she would “lose her money.” Margaret and Clifford did not proceed to a wedding ceremony, and Margaret considered their engagement ended by February 2005.

Margaret and Clifford did each wear a wedding ring in public on a few occasions after their engagement party. According to testimony of the daughter-in-law, Margaret stated she and Clifford did not “need a piece of paper” and Margaret considered Clifford and herself to be husband and wife. Although the

² Whenever Clifford wore the ring, he wore it on his right hand, as he does not have a left hand.

record is unclear on the point, it appears that such statement by Margaret, if in fact made, was made before Margaret consulted with the JAG attorney. A second daughter-in-law of Margaret and Kevin testified Margaret had told her she considered herself "married to Clifford in her heart." Nothing in the record suggests either daughter-in-law, or either of their husbands, has a good relationship with Margaret and Clifford, and some evidence suggests the contrary.

The foregoing constitutes some evidence that Margaret and Clifford gave public indications of considering themselves married. The great preponderance of the evidence, however, is to the contrary.

Both Margaret's testimony and that of the second daughter-in-law make clear that Margaret and Clifford had contemplated a wedding ceremony. Margaret would not consider herself married unless "married with a minister." After Margaret consulted with the JAG attorney and found out that if she married she would lose her right to a portion of Kevin's military pension, Margaret and Clifford decided not to get married. Margaret viewed their engagement as ended.

There is no evidence that Margaret and Clifford ever identified themselves as wife and husband on any deed, title, tax return, or other document. Neither Clifford nor Margaret has ever affirmatively represented to anyone that they were married, and they have never agreed to treat themselves as married. Whenever aware that a member of their community believed that she and Clifford were married, Margaret took steps to disabuse the person of the belief.

Clifford's daughter lives in the same community as Clifford and Margaret and sees Clifford almost daily. Neither Clifford nor Margaret has ever represented to her that they are married, and she has never heard anyone express a belief that they are. She introduces Margaret as Clifford's girlfriend, and believes that is how acquaintances view them. Kevin's own aunt has never heard anyone suggest a belief that Margaret and Clifford are married. Neither Margaret nor Clifford has ever suggested to her that they are married. She views them as boyfriend and girlfriend.

In summary, although some evidence might support a finding that Margaret and Clifford have held themselves out to the public as married, the stronger, more compelling, and overwhelming evidence is to the contrary. We agree with and affirm the district court's determination that Kevin did not prove by even a preponderance of the evidence the third essential element of a common law marriage between Margaret and Clifford, a substantial holding out to the public in general. We therefore affirm the court's resulting judgment denying Kevin's request to terminate Margaret's receipt of a portion of his military pension.

AFFIRMED.