

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

May 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

SUSAN ANITA RAY,

Plaintiff - Appellee,

v.

WILLIAM FRANKLIN RAY,

Defendant - Appellant.

) C/A NO. 03A01-9511-CV-00385
)
) RHEA LAW
)
) HON. BUDDY D. PERRY,
) JUDGE
)
) AFFIRMED AND
) REMANDED

SHERRY B. PATY, Chattanooga, for Plaintiff - Appellee.

JAMES W. MCKENZIE, Dayton, for Defendant - Appellant.

O P I N I O N

Franks, J.

In this action the Trial Judge determined the parties had entered into a common-law marriage, and divided the marital assets and debts of the parties.

William Ray has appealed, insisting the actions of the Trial Court were in error.

William Ray was divorced from Appellee Susan Ray in 1970. Subsequent to the divorce, and during the next eighteen years, a daughter was born to the parties, During that time

period, they cohabited in Tennessee, Alabama, and Florida.

The Trial Judge found that during the six months they resided in Alabama, a common law marriage was entered. The Court's division of property gave the wife two-thirds of the remaining balance on a \$44,000 note for the sale of a house. All indebtedness was assigned to the husband.

The elements of a common law marriage in Alabama are capacity, present agreement or consent to be husband and wife, public recognition of the existence of the marriage and cohabitation or mutual assumption openly of marital duties and obligations. *In Re Estate of Glover*, 882 S.W2d 789 (Tenn. App. 1994), *citing Aaberg v. Aaberg*, 512 So.2d 1375, 1376 (Ala. 1987). Clear and convincing proof is necessary to prove the existence of such marriages. *Bishop v. Bishop*, 330 So.2d 443, 445 (Ala. 1976). This jurisdiction will recognize a valid common law marriage entered in a jurisdiction where such marriages are sanctioned. *Andrews v. Signal Auto Parts, Inc.*, 492 S.W2d 222 (Tenn. 1972).

Susan testified the parties had lived as husband and wife in Tuscumbia, Alabama from June 1978 to December 1978. She related that William introduced her to their landlord and his friends from work as "his wife". She testified the parties had a joint bank account and that she was carried on his medical insurance policy as his wife. She introduced evidence showing he had signed hospital admission forms and medical documents representing himself as her husband and that they filed a married joint tax return that year. The daughter of the parties, testified that although she was young when they

lived in Alabama, she remembered their referring to each other in public as husband and wife. She did not know until several years later that her parents were not married through a marriage ceremony, but they all had lived together, like a "normal family." William testified that the parties lived apart at times and he was not sure where Susan and his daughter lived during that period. He testified that although he had worked at nearby Muscle Shoals, Alabama, he could not remember if he had lived in Tuscumbia. The Trial Court concluded that his testimony was not credible.

The Trial Court's assessment of credibility is given great weight in our Court. *Leek v. Powell*, 884 S.W2d 118 (Tenn. App. 1994), and the record demonstrates William's testimony was very contradictory and evasive. The Trial Judge found Susan's testimony credible, that the couple had held each other out to the public as married, while living in the same household as husband and wife. This, along with William's written representations of marriage on the medical form, joint tax returns, and his insurance plan, constitutes clear and convincing evidence to establish the elements of capacity, present agreement, public recognition, and cohabitation. See *In Re Estate of Glover*; also see *Waller v. Waller*, 567 So.2d 869 (Ala. Civ. App. 1990). In *Waller*, the Alabama Court found the common law marriage between the parties where they had resumed their relationship after their divorce and lived together with their children, publicly holding themselves out as married, purchasing a new home with joint funds and executing a mortgage thereon as husband and wife. We agree with the Trial Court that the evidence

established the existence of a common law marriage.

Appellant argues that the Court erred in making him responsible for all outstanding marital debts and awarding the wife two thirds of the remaining balance on a note for the sale of their Walnut Grove home. He insists that an equal division of assets would be more equitable.

Under T. C. A. 36-4-121, the Trial Court is given wide discretion in dividing marital property. See *Fisher v. Fisher*, 648 S.W2d 244, 246 (Tenn. 1983). The review of the asset distribution is *de novo* with a presumption of correctness. T. R. A. P. 13(d); *Lancaster v. Lancaster*, 671 S.W2d 501, 502 (Tenn. App. 1984). An equitable division of the property does not necessarily mean an equal division. *Barnhill v. Barnhill*, 826 S.W2d 443 (Tenn. App. 1991).

The Trial Court found that the husband overstated the amount of money owed and that the husband's and his witness's testimonies regarding loan transactions were not credible. The evidence establishes that large amounts of cash were given for a discounted promissory note representing the sale of the marital home. Given these transactions, the wife's testimony that records of earlier transactions had been "padded," along with the husband's inability to produce any records demonstrating that the loans were actually incurred, amply demonstrate that the evidence does not preponderate against the Trial Court's division of the marital property and debts. T. R. A. P. Rule 13(d).

We affirm the judgment of the Trial Court and remand at appellant's cost.

Herschel P. Franks, J.

CONCUR:

Houston M Goddard, P. J.

William H Inman, Sr. J.