IN THE COURT OF APPEALS OF TENNESSEE

RUTH HALL LANE,	)	C/A NO. 03A01-9603-CH-00094
	)	KNOX COUNTY CHANCERY COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
	)	
v.	)	
	)	
	)	HONORABLE SHARON BELL,
	)	CHANCELLOR
	)	
	)	
ESTATE OF THOMAS ROBERT E. LANE, Deceased, NELLE ANNE JOHNSON LANE, Executrix, and NELLE ANNE JOHNSON LANE, Individually,	)	
	)	
Defendants-Appellees.	)	AFFIRMED AND REMANDED

DOUGLAS M. ANDERSON of ANDERSON & ANDERSON, Knoxville, for Appellant

JOHN E. McDONALD of JOYCE, MEREDITH, FLITCROFT & NORMAND, Oak Ridge, and JAMES C. CONE of JENKINS & JENKINS, Knoxville, for Appellees

OPINION

Susano, J.

Ruth Hall Lane (Ruth[1]) filed a petition for widow's rights, including an elective share of the estate of Thomas Robert E. Lane (Robert), asserting that she is the surviving spouse of the deceased. In so doing, she challenges the validity of a decree granting Robert an *ex parte* divorce, said decree being entered on September 29, 1958, by the Trial Justice Court of Anderson County. Robert's will leaves his estate to Nelle Anne Johnson Lane (Nelle), to whom he was married on February 17, 1959, and to whom he remained married until his death on July 29, 1994. The Chancellor dismissed Ruth's petition on the ground that it was time-barred by the equitable doctrine of laches. Ruth argues on appeal that a genuine issue of material fact exists. Consequently, she argues that summary judgment is not appropriate. We affirm the Chancellor's judgment.

I

The material facts are not in dispute. Robert and Ruth were married in Claiborne County, Tennessee, on March 15, 1941. In 1956, they separated, Ruth moving to West Virginia with their only child, and Robert staying in Knoxville. In August, 1957, Ruth took a teaching job in Gaffney, South Carolina; Robert remained in Knoxville.

[1]We will refer to the parties by their first names because they share the same surname.

On March 14, 1958, Robert filed for divorce in the Trial Justice Court of Anderson County. The divorce complaint alleged that Ruth had "been guilty of willful or malicious desertion or absence, without a reasonable cause, for two whole years." The complaint further alleged that Ruth and the couple's daughter were residing in Jackson, Mississippi, and that his wife's "exact address and other statistics [could not] be obtained by diligent inquiry." Ruth was served by publication in a newspaper, the *Clinton Courier-News*.

On September 29, 1958, the Trial Justice Court awarded Robert an *ex parte* divorce. On February 17, 1959, Robert married Nelle in Murray County, Georgia. Robert and Nelle thereafter lived together as husband and wife in Knoxville for more than 35 years. Robert's will names Nelle as executrix and leaves his estate, estimated at $584,000, to her.

The record includes portions of Ruth's discovery deposition. In it, she says that Robert visited her and their daughter in South Carolina "[r]egularly, every week or every two weeks," from 1957 through 1971. Ruth also states that in 1965, Robert accompanied them on a summer vacation to the World's Fair in New York and to Canada.

Ruth testified that she first learned of the divorce decree on May 24, 1971, when Robert provided her with a copy. She learned of his second marriage to Nelle in January of 1972.

Sometime in the late 1970s or early 1980s, Ruth's daughter and son-in-law went to Anderson County to investigate the circumstances surrounding the divorce. They apparently located and read the divorce papers, returned to South Carolina and told Ruth that Robert

> said that you were someplace in Mississippi and he couldn't find you. He ran it in that paper for two or three times or however they did, and that's how he got [the divorce].

Ruth took no further action regarding the divorce until after Robert's death. While consulting an attorney in October of 1994, she was advised that her divorce was "a fraud."

In the petition filed in this case on February 24, 1995, Ruth alleges as follows:

> This said divorce that was granted to Thomas Robert E. Lane (now Deceased) from Ruth Lane is void and the subsequent marriage of Thomas Robert E. Lane and Nelle Ann Johnson Lane is an absolute and complete nullity. . .

In addition to challenging the validity of the 1958 divorce, Ruth contends as follows:

> In the alternative, if the Court shall hold the said Anderson County divorce valid, the Deceased remarried Ruth Hall Lane by means of a common law marriage in the State of South Carolina before his purported marriage to Nelle Anne Johnson Lane. . .After September

> 29, 1958, and before February 17, 1959, Thomas Robert E. Lane held himself out in South Carolina to be the husband of Ruth Hall Lane, thereby creating a common law marriage.

The Chancellor dismissed Ruth's petition. Regarding the challenge to the divorce, the Chancellor found that "the petitioner has not shown good cause for her failure to attack the validity of the divorce at an earlier date," and applied the doctrine of laches to bar Ruth's claim. Regarding the common law marriage claim, the Chancellor found that

> between the pertinent dates, the petitioner did not know she was divorced and did not know she had the capacity to enter into a common law marriage and, therefore, could not have intended to enter into a common law marriage as a matter of law.

II

Since matters outside the pleadings were considered by the Chancellor, we treat her dismissal as a grant of summary judgment. Rule 12.02, Tenn. R. Civ. P. Our standard of review in such cases is well-settled. In deciding whether a grant of summary judgment is appropriate, we must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.03, Tenn. R. Civ. P. We take the strongest legitimate

view of the evidence in favor of the nonmoving party, allow all reasonable inferences from that evidence in his or her favor, and discard all countervailing evidence. *See* ***Byrd v. Hall,*** 847 S.W.2d 208, 210-11 (Tenn. 1993).

III

The first issue we address is whether the Chancellor erred in applying the doctrine of laches to bar Ruth's challenge to the 1958 divorce. *Gibson's Suits in Chancery* (Inman, 7th ed. 1988) defines the equitable defense of laches as follows:

> The neglect of a person to make complaint, or bring action in due season, he being *sui juris* and knowing the facts, or having the means of knowledge, is called laches. Where there had been gross laches in prosecuting rights, or long and unreasonable acquiescence in adverse rights, Courts of Equity refuse to interfere. . .The Court never lends its aid to one who, with knowledge of his rights and with opportunity to assert them, delays unreasonably so to do. Equity aids those who are vigilant, not those who sleep upon their rights, and always discourages stale demands.
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> The defense of laches presents a mixed question of law and fact. Two essential elements of fact are negligence and unexcused delay by the plaintiff in asserting his alleged claim, which, in combination, result in an injury (i.e., prejudice) to the party pleading laches. The dispositive question of whether, in view of the established facts, it would be inequitable to the defendant to allow a recovery to the plaintiff, is a question of law.

Id., § 95 at 90-91.

The undisputed facts establish that Ruth did not bring her action challenging her divorce until approximately 24 years after she learned of the divorce; some 23 years after she learned of Robert's remarriage; and at least, giving her the benefit of the doubt, a dozen years after her daughter reported to her regarding the former's search at the Anderson County Courthouse. More significantly, she waited until Robert was dead and could not explain or defend his actions. In her brief, Ruth does not argue that she was not guilty of negligence and unreasonable delay under these facts. Rather, the thrust of her argument appears to be that a defense of laches always raises a genuine issue of material fact, and that summary judgment is therefore never proper when that defense is asserted. We disagree.

Ruth's brief cites a single case in support of this proposition, ***Frye v. Postal Employees Credit Union,*** 713 S.W.2d 324 (Tenn. App. 1986). The ***Frye*** case involved very different facts, and presented a dissimilar issue, from the case at bar. The issue in ***Frye*** was whether the plaintiff had unreasonably delayed in presenting a bank account passbook which had been opened by his father many years earlier. *Id.* at 325. The proposition upon which Ruth relies was stated by the ***Frye*** court as follows:

> The reasonableness of the plaintiff's actions in making the demand is a factual determination for the trial court to make at trial, not on summary judgment.

Id. at 326-27. This statement was not intended as a general or universal proposition regarding laches, but rather was simply a recognition that in that case, there existed a genuine factual issue, as the court had previously noted:

> Viewing the facts in the light most favorable to plaintiff, his lack of knowledge or lack of means of knowledge of the account could excuse his delay in demanding the funds.

Id. at 326. There is no such issue regarding knowledge of the facts in the present case. Ruth knew that Robert had sought and obtained an *ex parte* divorce, and further that he had sworn she was living in Mississippi when, according to her, she had no connection with that state. She knew the totality of these facts as early as the late 1970s or early 1980s, and her deposition suggests that when she first learned of the divorce in 1971, she suspected that something was amiss:

> [S]ee, I never did understand how you could get a divorce unless you were both there and signed it and went through the stuff you go through to get a divorce.

Frye is of little aid to Ruth's position in the instant litigation.

We are of the opinion that a line of Tennessee cases, all of which affirm a summary dismissal based on a finding of

laches, is persuasive in this case, and effectively refutes the notion that summary judgment is never appropriate when laches is raised. The first of these is ***Cagle v. Cagle,*** 229 S.W.2d 514 (Tenn. 1950). In ***Cagle,*** the plaintiff filed suit seeking to have a decree of divorce, which had been entered against her some five years earlier, set aside on the ground of insufficient process. In rejecting this attempt, the Supreme Court stated the following:

> The Chancellor held that while the alleged errors and irregularities in the Houston County case in 1944 might have been possible grounds for a reversal of the divorce decree in that court, in a proper proceeding for such purpose, said decree could not be successfully attacked in a proceeding of this kind and at this late date. We agree with the Chancellor's conclusions.
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> The present suit was not filed until March 21, 1949, almost five years after the litigation in the divorce decree here challenged. No good cause is shown for complainant's delay in making her application to have said divorce decree set aside, although she had known of the existence of said decree for about four years before bringing this suit. This delay is unreasonable and constitutes laches.

Cagle, 229 S.W.2d at 515-16.

In ***Hill v. Hill,*** 326 S.W.2d 851 (Tenn. App. 1958), the plaintiff husband sought to have a divorce decree set aside because of fraud in procuring the divorce. He claimed that his spouse falsely stated that his residence was unknown and that he

could not be located with due diligence. *Id.* at 852. The ***Hill*** court stated that the plaintiff had "failed to show good cause for waiting a full year before filing suit to attack the decree," and affirmed the Chancellor's dismissal of the plaintiff's case. *Id.* at 855.

The facts of ***Coleman v. Coleman,*** 369 S.W.2d 557 (Tenn. 1963) are remarkably similar to those of the present case. In ***Coleman,*** the plaintiff sought to have a divorce decree, which had been entered against her some 16 years earlier, set aside on the grounds of fraud and improper service of process. The Supreme Court stated the following:

> The most serious allegation made by George Coleman in the *ex parte* divorce hearing in 1945 was that the defendant, Gertrude Coleman, the complainant herein, was guilty of willful and malicious desertion for two years and proceeded against her by publication when in fact she was a resident of Hamilton County, Tennessee, and was out of State only temporarily. Now if Gertrude Coleman had attacked this decree within a reasonable length of time and during the life of her husband, George Coleman, she would have been entitled to a hearing. . .The main question before this Court is whether or not the Complainant acted soon enough and in good faith.

Coleman, 369 S.W.2d at 561. The ***Coleman*** court stated that "the case at bar is very much on all fours with the ***Hill*** case," and reached the following conclusion:

> We do not believe that the Complainant has shown good cause for failing to make further inquiry upon her return from Milwaukee in 1946 as to her husband's marital status. She had about sixteen years in which to file a bill wherein her husband then living would certainly have been a material party. We believe she waited too long.

Id. at 562.

The cases discussed above demonstrate that where the undisputed facts clearly show negligence and unexcusable delay in bringing a claim by a party who has knowledge of the operative facts giving rise to the potential claim, summary dismissal can be appropriate, assuming the other necessary elements are also present.

There is one further element which must be present for an effective defense of laches, and that is prejudice to the defendant resulting from the delay. Lapse of time alone will not suffice. ***Frye,*** 713 S.W.2d at 326; ***In re Darwin's Estate,*** 503 S.W.2d 511, 514 (Tenn. 1973); ***Archer v. Archer,*** 907 S.W.2d 412, 416 (Tenn. App. 1995).

We believe that Nelle has demonstrated prejudice resulting from the long delay in at least two regards. First, both Robert and his attorney in the divorce action are now dead. *See* ***Archer,*** 907 S.W.2d at 416 ("Prejudice includes the loss of evidence. . ."); ***Hoffman v. Tual***, 1991 WL 78235 (Tenn. App.,

W.S., filed May 16, 1991, Tomlin, P.J.) (Discussing laches under similar facts; stating "[a]s far as resulting prejudice to the defendants,. . .[o]ne of the parties to this affair, the decedent, and a material witness, the attorney, are now dead. Both of them had personal knowledge of facts material to this suit.") *Id.* at *5; ***Hamm v. Hamm***, 614 S.W.2d 366, 371 (Tenn. App. 1980) ("if appellant was unwilling to seek to preserve her marriage while her husband was alive. . .after the termination of her marital duties by his death, she is estopped to try to resurrect the bones of the marriage for her financial benefit free of any corresponding duty or obligation on her part.").

Secondly, if Ruth had successfully challenged the validity of her divorce from Robert when he was alive, then Robert would have had the ability, should he have chosen to do so, to seek a valid divorce. If necessary, Robert and Nelle could then have remarried. As it stands, Ruth is asking the court to rule that Nelle's marriage of more than 35 years is null and void in the eyes of the law, after there is no opportunity for Robert and Nelle to rectify that situation. We believe she waited too long and was guilty of laches, and affirm the Chancellor's ruling on this issue.

IV

Ruth argues, in the alternative, that during the period between the divorce decree of September 29, 1958, and Robert's

marriage to Nelle on February 17, 1959, Robert and Ruth entered into a common law marriage, which continued without divorce until Robert's death in 1994. Although a common law marriage cannot be established by conduct within the State of Tennessee, it can be proved by a showing of the required elements in a jurisdiction where such a marriage is sanctioned. ***In re Estate of Glover,*** 882 S.W.2d 789, 789-90 (Tenn.App. 1994). South Carolina allows common law marriages. ***Kirby v. Kirby,*** 241 S.E.2d 415 (S.C. 1978).

In order to enter into a valid common law marriage in South Carolina, there must be *mutual* intent to assume the relationship of husband and wife. ***Prevatte v. Prevatte,*** 377 S.E.2d 114, 117 (S.C. App. 1989) ("In order for a common law marriage to arise, the parties must agree to enter into a common law marriage. . .though such agreement may be gathered from the conduct of the parties."). As noted by the ***Kirby*** court, central to this agreement requirement is that both parties have the intent to contract a common law marriage:

> The difference between marriage and concubinage in the circumstances stated rests in the intent of the cohabitating parties . . . . The intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary; the intent may exist though never public and formally declared; *nevertheless the intent must exist* . . .It is true that when the intent has not been formally and publicly declared, . . . it may yet rest in circumstances.

Kirby, 241 S.E.2d at 416 (emphasis added).

Ruth concedes that she and Robert never discussed or considered a common law marriage during the period at issue. In fact, Ruth testified that she was not even aware of the possibility of a common law marriage until she consulted with an attorney after Robert's death. Nevertheless, she argues a common law marriage arose from the conduct of the parties during that period of fewer than five months between Robert's divorce and his marriage to Nelle.

Ruth's own testimony demonstrates that she did not have the intent required by South Carolina for a common law marriage. She testified that when the parties cohabitated in South Carolina she thought she was legally married to Robert by virtue of their Tennessee marriage ceremony. Since Ruth thought she was married as a result of the ceremonial marriage in 1941, it is clear beyond any doubt that she could not have intended to contract a common law marriage. From her standpoint, she did not have the capacity to contract a marriage, common law or otherwise; she was already married.

Since it is clear that Ruth did not intend to contract a common law marriage, we do not need to address Robert's intent. South Carolina requires *mutual* intent. Without Ruth's intent to contract a common law marriage, there can be no such marriage.

The Chancellor did not err in finding for the appellees on the common law marriage issue.

For the aforementioned reasons, we affirm the Chancellor's judgment dismissing Ruth's petition. This case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed and assessed to appellant.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.