



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

February 22, 2019

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Re: *Leslie Marie Wallington v. Clinton James Wallington III*, CL-2018-12239

Dear Counsel:

This matter is before the Court on Clinton James Wallington, III's ("Husband" or "parties" collectively) Plea in Bar. Husband contests Leslie Marie Wallington's ("Wife" or "parties" collectively) Complaint for Divorce, because he asserts that the parties were never legally married. The Court is called upon to decide three central issues:

1. Whether the parties' marriage was valid under Texas law?
2. If the marriage was valid under Texas law, whether it is repugnant to Virginia law, such that the Commonwealth of Virginia should not recognize it as valid?
3. In the alternative, whether the marriage constituted a valid common law marriage in Texas that will be recognized in the Commonwealth of Virginia?

After considering the pleadings, evidence presented at the hearing on January 3, 2019, and oral arguments presented by Counsel, the Court finds that the marriage was valid under

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Texas law pursuant to Texas Family Code § 6.202. The Court additionally finds that the marriage is not repugnant to Virginia's public policy on the ground of bigamy, since the marriage became valid under Texas law only after the bigamy was eradicated. In the alternative, the Court finds that the union between the parties constituted a common law marriage under Texas law that Virginia will recognize as valid.

I. BACKGROUND

The present Plea in Bar challenges Wife's divorce action on the premise that no valid marriage ever existed between the parties. The parties participated in a marriage ceremony and received a marriage certificate on December 27, 1989 in Bell County, Texas. At the time of the ceremony, Wife was already married to Joseph Anthony Comisky ("Comisky") and Husband conceded that he was aware of Wife's marital status. Approximately five months later, Wife obtained a divorce from Comisky on May 23, 1990, in the District Court of Bell County, Texas. Husband and Wife continued living together in Texas until June of 1993, when they moved to Oklahoma. They returned to Wichita, Texas from June 1998 to June 1999. Throughout these moves, the parties continued to live together, hold each other out to their communities and employers as husband and wife, and even file joint tax returns. Husband, a now retired officer in the U.S. Army, represented to the U.S. Government that he was married in numerous official documents.

Wife filed a Complaint for divorce on fault-based grounds on August 17, 2018. After twenty-eight years of marriage, three children, and over a dozen moves, Husband for the first time argues in his Answer that he was not legally married as a result of bigamy. This Court is called upon to decide whether the parties' marriage was valid under Texas law, and if so, whether Virginia will recognize their marriage.

II. STANDARD OF REVIEW

A plea in bar is a defensive pleading which "shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party carries the burden of proof on that issue of fact." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996) (citation omitted). "[A] plea, whether at law or equity, is a discrete form of defensive pleading. As distinguished from an answer or grounds of defense, it does not address the merits of the issues raised by the bill or complaint or the motion for judgment. Yet, a plea is a pleading which alleges a single state of facts or circumstances which, if proven, constitutes an absolute defense to the claim." *Nelms v. Nelms*, 236 Va. 281, 289 (1988).

III. ARGUMENTS

A. Defendant's Argument

Husband states that the Court cannot grant Wife's Complaint for Divorce because no valid marriage exists between the parties. He asserts that Wife's marriage to Comisky made her

marriage to Husband void on the ground of bigamy. Husband declares that because the marriage was void at the time of the marriage celebration, it cannot later be legitimized the way a voidable marriage can be. He argues that even if the marriage became valid under Texas Family Code § 6.202 after Wife's divorce, it would not be recognized under Virginia law. Virginia law will recognize marriages formed in other states only when they are not contrary to Virginia's public policy. Therefore, he states that since Virginia does not recognize bigamous marriages and has no laws validating them, the marriage cannot be legitimized under Virginia law.

Husband additionally disputes the validity of the parties' union as a common law marriage. Although he acknowledges that Texas law recognizes common law marriage, he states that the parties' actions did not meet the state's two requirements: the agreement to be married and the holding out to others as husband and wife. Any agreement between them, he argues, was based on bigamy and was therefore illegal. Since an illegal agreement cannot constitute the formation of a contract, their commitment to create a bigamous marriage cannot be the basis for the formation of a valid common law marriage under Texas law.

B. Plaintiff's Response

Wife first argues that the parties' marriage was validated under Texas Family Code § 6.202(B). The code section states "The later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married" in reference to marriages that are originally considered bigamous. Texas Family Code § 6.202(B). Wife states that under this code section, the parties' marriage became valid in Texas when she divorced Comisky, since the parties continued to live together and hold themselves out as husband and wife.

In the alternative, Wife states that following her divorce to Comisky, the parties' actions constituted a valid common law marriage under Texas law. Wife points out that their actions of going through the marriage ceremony and signing the marriage license exhibit their agreement to be married. Additionally, by holding each other out to the community as husband and wife, they fulfilled Texas' second requirement for common law marriage. Since Virginia recognizes common law marriages that are valid in other states, she argues that their common law marriage should be accepted by this Court.

IV. ANALYSIS

A. The Parties' Marriage was Valid under Texas Law

At the outset of the hearing, both parties stipulated that Texas law governs the validity of the marriage in dispute. Although the parties' original marriage was void on the grounds of bigamy under Texas law, the savings clause in Texas Family Code § 6.202, provided a mechanism to validate their marriage. The clause reads:

- (a) A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse.
- (b) The later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married. Texas Family Code § 6.202.

The Court acknowledges (and both parties stipulated) that the parties' marriage was originally void on the grounds of bigamy under Texas law. The analysis of their marriage does not end there, as the Court is compelled to apply the savings clause in Texas Family Code § 6.202(B). The savings clause breathes life into a void marriage if the prior marriage is dissolved and several conditions are met. In this case, Wife divorced Comisky and the parties continued living together and holding each other out as husband and wife, as the code section requires. Although the code section does not set forth a specific requirement for the amount of time the parties must live as husband and wife to validate their marriage, the parties here continued their marital life together for over 27 years. Such an extensive time period certainly fulfills the requirement in §6.202 (B). Furthermore, there is ample evidence that the parties held themselves out as married. Therefore, the parties' marriage became valid in Texas pursuant to §6.202.

B. The Validity of the Marriage is not Repugnant to Virginia Public Policy

“‘The public policy of Virginia ... has been to uphold the validity of the marriage status as for the best interest of society,’ and thus, the presumption of the validity of a marriage ranks as ‘one of the strongest presumptions known to the law.’” *Levick v. MacDougall*, 294 Va. 283, 291, 805 S.E.2d 775, 778 (2017) (quoting *Needam v. Needam*, 183 Va. 681, 686, 33 S.E.2d 288, 290 (1945); *Eldred v. Eldred*, 97 Va. 606, 625, 34 S.E. 477, 484 (1899)). The parties' marriage, saved by the Texas Family Code, is not offensive to Virginia public policy, and thus may be recognized in Virginia.

Virginia will acknowledge marriages that were valid in their place of celebration so long as they are not repugnant to Virginia public policy. *Toler v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 430, 4 S.E.2d 364, 368–69 (1939). Here, Husband states that the marriage is offensive to Virginia public policy because it initially involved bigamy. Virginia, like Texas, does not recognize bigamous marriages, but rather regards them as illegal. *See* Texas Family Code 6.202 (A); Va. Code § 18.2-362. Husband's argument is flawed because the effect of validating this once void marriage is not the recognition of a bigamous marriage, but rather the endorsement of a marriage between only two spouses after the bigamy has been removed. Since the marriage here was no longer bigamous when it became valid under Texas Family Law § 6.202, its existence is not offensive to Virginia public policy, and Virginia will presume the legitimacy of the marriage. Therefore, the Court deems this marriage valid in Virginia.

C. The Union is a Valid Common Law Marriage Recognized by Virginia

Assuming arguendo, that Virginia would not recognize the parties' marriage as valid under Texas Family Code § 6.202, the facts of this case would allow this Court to acknowledge it as a valid common law marriage under Texas law. The Commonwealth of Virginia does recognize those common law marriages that occurred and were deemed valid in other states. *Kleinfield v. Veruki*, 7 Va.App. 183, 186, 372 S.E.2d 407, 409 (1988); *Metropolitan Life Ins. Co. v. Holding*, 293 F.Supp. 854, 857 (E.D.Va.1968). Thus, this Court finds that the parties' marriage would be considered a common law marriage under the laws of Texas that the Commonwealth of Virginia would recognize.

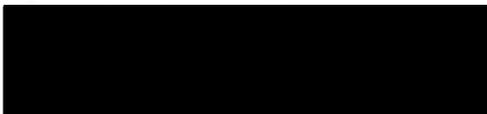
Texas law acknowledges common law marriages when "the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and they represented to others that they were married." Texas Family Code § 2.401 (A)(2). Here, the parties agree that they lived together in Texas as husband and wife and represented to others that they were married. While Wife states that parties exhibited an agreement to be married when they performed their marriage ceremony, Husband disputes that an agreement to be married could have existed when it is demonstrated through the bigamous entry into two marriages.

The parties' actions fulfill the requirements of a valid common law marriage under Texas law. Although the agreement to enter a bigamous marriage was illegal and thus cannot constitute a valid contract, it can evince that the parties intended to be married. The performance of the marriage ceremony and signing the marriage license are exhibitions of a meeting of the minds and of a sincere agreement between the parties to be married. This ceremony met the standard set forth in Texas Family Code § 2.401 (A)(2). Therefore, even if the parties' marriage is not validated by the saving statute under Texas Family Code § 6.202, the parties had a valid common law marriage under Texas law, and Virginia will recognize the legitimacy of that marriage.

V. CONCLUSION

For the foregoing reasons, the Court finds that the marriage was valid under Texas law, and that its validity is consistent with Virginia's public policy. In the alternative, the Court finds that the parties had a valid common law marriage under Texas law, and that Virginia will recognize the validity of that common law marriage. Husband's Plea in Bar is denied.

Sincerely,



Daniel E. Ortiz
Circuit Court Judge