COURT OF APPEALS
DECISION
DATED AND RELEASED

July 6, 1995

No. 94-1247

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LORENZA D. THOMPSON,

Petitioner-Appellant,

v.

LENNORE BIGGERS THOMPSON,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Lorenza D. Thompson appeals from an order by which the circuit court denied his action to affirm his marriage with Lennore Biggers Thompson. Lorenza alleges that the trial court failed to give full faith and credit to Georgia law, and that under Georgia law, he and Lennore are common-law husband and wife. For the reasons set forth below, we affirm.

BACKGROUND

During the mid 1980's, Lorenza and Lennore cohabited in Georgia. During this time, it is undisputed that Lennore did not object when Lorenza introduced her to people as his wife. In addition, Lennore signed leases and other legal papers as Lorenza's wife, both in Georgia, and in other states where the couple moved later. Citing Georgia case law, Lorenza argues these circumstances suffice to create a common-law marriage.

Lennore testified that she signed papers and accepted the appellation of "wife" under duress. She testified that she did not consider herself married. She introduced evidence that Lorenza also knew that they were not married. Specifically, in a letter to Lennore's mother, Lorenza wrote:

> As to marriage, I have asked her to marry me many times but they were wrong times, because she said no. When she wanted me to propose I didn't know and failed to ask.

Based on Lennore's testimony and especially upon Lorenza's letter, the circuit court determined that Lorenza and Lennore were not married. It therefore refused to affirm the marriage.

STANDARD OF REVIEW

Where there is a mixed question of law and fact, we determine whether the factual finding is clearly erroneous, and whether the legal holding is correct. *Compare* ***Department of Revenue v. Exxon*** 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979), *aff'd* 447 U.S. 207 (1980) (reviewing court examines factual and legal holdings separately) *with* § 805.17(2), STATS. (findings of fact shall not be set aside unless clearly erroneous) *and* ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984) (appellate court determines questions of law without deference to the trial court). We address fact and law in turn.

ANALYSIS

Fact

The circuit court found as a matter of fact that Lennore was unwilling to be married, and that Lorenza did not think the parties were married. This finding is not "clearly erroneous." Rather, the record supports this finding (Lennore's testimony and Lorenza's letter).

Law

Lorenza claims that ***Brown v. State***, 208 Ga. 304, 66 S.E.2d 745 (1951), stands for the proposition that cohabitation and a subsequent holding out as husband and wife suffice to create a common-law marriage in Georgia. However, ***Brown*** is inapposite. In ***Brown***, the issue was whether a common-law wife could testify against her common-law husband. In holding the wife not competent to testify, the court determined that the status of common-law marriage could be deduced from a cohabiting couple holding itself out as married, and living together for some time. ***Brown*** is distinguishable because neither party to the marriage sought to challenge it. ***Brown*** does not control where, as here, one of the parties to the alleged marriage claims that she did not intend to become married.

Similarly misplaced is Lorenza's reliance upon ***Fanning v. State***, 46 Ga. App. 716, 169 S.E. 60 (1933). Lorenza argues that under ***Fanning***, the burden of disproving the married state is upon the person challenging the validity of the marriage. He claims that the burden was therefore on Lennore to show they were not married, a burden he claims Lennore failed to discharge. Lorenza misunderstands the "burden" involved.

In ***Fanning***, the issue was whether Eddie Fanning had committed bigamy. In holding that he had, the court noted that the burden is on one who seeks to challenge the validity of the marriage. However, this remark was made in the context of a larger statement that marriages between persons unable or unwilling to contract are void as are marriages procured by fraud. ***Id.***, 169 S.E. at 62. Therefore, held the court, in order to show unwillingness to contract, the

party opposing the marriage had to introduce proof to overcome a prima facie presumption of regularity. Lennore's testimony of unwillingness, coupled with Lorenza's admission by letter that there was no marriage, certainly overcome any presumption. Having overcome the presumption, Lennore discharged any "burden" under Georgia law.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.