

No. 09-102554-A

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CLERK OF APPELLATE COURTS

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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Jeffrey O. Heeb, Special Administrator of the Estate of  
Jane M. Hergenreter, Deceased  
Plaintiff-Appellant

v.

Lois M. Birt  
Defendant-Appellee

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BRIEF OF APPELLANT

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Appeal from the District Court of Shawnee County, Kansas  
Honorable Frank J. Yeoman, Jr.  
District Court Case No. 08 C 1

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## **NATURE OF THE CASE**

Appeal is taken from the District Court's decision in favor of defendant Lois Birt as to a purported deed that was not recorded until after the death of the grantor of the deed as to which the undisputed evidence indicates it was not to be effective during the grantor's lifetime.

## **ISSUE ON APPEAL**

Is the purported deed an invalid testamentary instrument because the grantor (Jane M. Hergenreter) and the grantee (Lois M. Birt) did not intend it to be effective during Jane M. Hergenreter's lifetime?

## **STATEMENT OF FACTS**

1. Jane M. Hergenreter died August 25, 2005. (R. IV, 21).
2. At the time of Jane M. Hergenreter's death, Lois M. Birt claimed to have possession of an unrecorded deed dated May 6, 1998, from Jane M. Hergenreter. (R. IV, 44-46). A copy of this deed is attached as Appendix A.
3. The legal description on the May 6, 1998 deed is:  
  
The East One Half of the Southwest Quarter of Section 26, Township 12 South, Range 14 East of the 6<sup>TH</sup> P.M., Shawnee County, Kansas (containing 80 acres more or less)  
  
Lot One and Lot Three of the Northwest Quarter and the South Half of the Northwest Quarter of Section 26, Township 12 South, Range 14 East of the 6<sup>TH</sup> P.M., in Shawnee County, Kansas (containing 160 acres more or less)

The East One Half of the Southeast Quarter of the Northwest Quarter of Section 13, Township 12 South, Range 14 East of the 6<sup>TH</sup> P.M., Shawnee County, Kansas (containing 40 acres more or less) (sic - should really be 20 acres)

The East One Half of Government Lot 2 and the Southeast Quarter of the Northeast Quarter of Section 27, Township 12 South, Range 14 East of the 6<sup>TH</sup> P.M., Shawnee County, Kansas (containing 80 acres more or less).

(R. I, 86, 97-98; R. V, 3).

4. The deed was not recorded until after the death of Jane M. Hergenreter. (R. III, 250). Lois M. Birt testified that after hearing of Jane M. Hergenreter's death at about 7:00 or 7:30 a.m. on August 25, 2005, Lois M. Birt took the deed to the Shawnee County Register of Deeds shortly thereafter at about 8:00 a.m. the same day. (R. IV, 25-26, 88-89). The deed was officially recorded at noon that same day (August 25, 2005). (R. IV, 26; R. V, 3).

5. On August 24, 2005, the day before Jane M. Hergenreter's death, Lois M. Birt withdrew the entire amount of \$10,155.40 from Jane M. Hergenreter's Columbian Bank account no. 10156043. (R. IV, 17-18, 21; R. V, 21).

6. Lois M. Birt was named as the "agent" on Columbian Bank account no. 10156043. (R. IV, 16-17; R. V, 20). Lois M. Birt was not an owner (in joint tenancy or otherwise) or a payable on death beneficiary on Columbian Bank account no. 10156043. (R. II, 90, 102; R. IV, 16, 18).

7. The Columbian Bank account was set up for Lois M. Birt to write checks for Jane M. Hergenreter while Ms. Hergenreter was on trips. (R. IV, 16).

8. Lois M. Birt testified that Jane Hergenreter told her to “close the account.” (R. IV, 18-19, 81, 87). Jane Hergenreter was then 89 years old (R. IV, 17) and in the hospital. (R. IV, 18). Nothing was put in writing by Jane Hergenreter and there were no other witnesses to their conversation. (R. IV, 19).

9. Lois M. Birt testified that she “considered it as a gift from Jane” and that she kept the money. (R. IV, 19).

10. Lois M. Birt indicated that she used some of the Columbian Bank funds to pay for Jane M. Hergenreter’s funeral and to make a \$500 gift to St. David’s Episcopal Church. (R. IV, 23).

11. Lois M. Birt had no legal obligation and did not obtain court approval to pay for the funeral expenses or to make the gift to St. David’s. (R. IV, 23-24).

12. Lois M. Birt maintains that the money was hers, not the estate’s, even though she reported it on Schedule C of the amended Kansas estate tax return as an asset and deducted the payments on the amended Kansas estate tax return. (R. IV, 24).

13. Lois M. Birt acknowledged that the Inventory (R. V, 17-19) should be corrected to reflect the \$10,155.40 Columbian Bank account. (R. IV, 24-25).

14. Lois M. Birt also claims title to the Shawnee County real estate owned by Jane M. Hergenreter pursuant to the deed recorded after Jane M. Hergenreter's death. (R. IV, 25-26; R. V, 3).

15. The Shawnee County real estate on the purported deed to Lois M. Birt (R. V, 3) is not shown on the Inventory (R. V, 17-19) for Jane M. Hergenreter's estate, that is signed by Lois M. Birt as executor. (R. IV, 26). The Shawnee County real estate is not even listed under "Transfers" on the estate Inventory. (R. IV, 26; R. V, 18).

16. Lois M. Birt was named as executrix (to serve without bond) in Jane M. Hergenreter's will (R. IV, 35-36; R. V, 13-14) and was appointed as such in Shawnee County probate case no. 05P380 on December 9, 2005 (Court file 05P380 of which judicial notice was taken at R. IV, 33-34). Jeffrey O. Heeb was issued letters of special administration on June 4, 2007 to investigate and take action regarding the matters at issue in this case. (Court file 05P380 of which judicial notice was taken at R. IV, 33-34; R. I, 86, 97). Jeffrey O. Heeb filed this action as special administrator of the estate of Jane M. Hergenreter, deceased, to recover the Shawnee County real property on January 2, 2008 and subsequently amended the petition to also seek recovery of the Columbian Bank money market account (R. I, 97-114).

17. Between the May 6, 1998 date on the deed and Jane M. Hergenreter's death on August 25, 2005, Lois M. Birt did not ever:

- a. Reside in the house on the property.
- b. Request Jane M. Hergenreter to move off of the property.
- c. Ask Jane M. Hergenreter for rent.
- d. Put up any no trespassing signs.
- e. Mow the property.
- f. Pay for any utilities to the property.
- g. Pay for any insurance on the property.
- h. Pay for any real estate taxes on the property.
- i. Receive any of the Conservation Reserve Program (CRP) income from the property that Jane Hergenreter got.
- j. Tell anyone that she owned the property.
- k. Write to anyone that she owned the property.
- l. Try to mortgage the property.
- m. List it on any financial statement as being owned by Lois M. Birt.
- n. Try to sell any part of it. (R. IV, 46-48).

Lois M. Birt did not exercise dominion over the real property during Jane M. Hergenreter's lifetime. (R. I, 87, 98).

18. Less than six (6) months after the May 6, 1998 date on the purported deed to Lois M. Birt, Jane M. Hergenreter sold the following

described twenty (20) acres to Dargal Clark Builders, Inc.:

The East half of the Southeast Quarter of the Northwest Quarter of Section 13, Township 12 South, Range 14 East of the 6<sup>th</sup> P.M., Shawnee County, Kansas.

(R. I, 87, 98-99; R. IV, 48-49, 142; R. V, 4, 5). The deed for this 20 acres was signed by Jane M. Hergenreter on October 20, 1998, and was recorded on October 21, 1998. (R. IV, 48; R. V, 4). A copy is attached as Appendix B.

19. Lois M. Birt did not sign the October 20, 1998 deed for the 20 acres as an owner. She did sign it as the notary. (R. IV, 49, 94-95; R. V, 4). She did not object to Jane M. Hergenreter's sale of the 20 acres. (R. IV, 49, 93-94).

20. Lois M. Birt received none of the proceeds from Jane M. Hergenreter's sale of the 20 acres. (R. IV, 50). In fact, Jane M. Hergenreter gave the proceeds of the sale to William Hergenreter's nieces and nephews (her nieces and nephews by marriage). (R. I, 89, 101; R. IV, 50-53; R. V, 5). Jane M. Hergenreter noted on the January 5, 1999 letter signed by her and sent to her nieces and nephews (by marriage) that there was "\$9,000 each" for each niece and nephew resulting from the 20 acre sale and some matured CD's and government bonds. (R. IV, 53; R. V, 5). Lois M. Birt wrote on the letter that this totalled \$117,000.00. (R. IV, 52). Lois M. Birt did not consider the 20 acres to be part of the property purportedly transferred to her, although

she acknowledged that nothing in the purported deed to her (R. V, 3) distinguished that 20 acres. (R. IV, 53).

21. On March 27, 2002, Jane M. Hergenreter wrote a letter to the editor of the Topeka Capital-Journal stating, "I live on a farm, which I own, in Mission Township, Shawnee County." (R. IV, 55; R. V, 6).

22. Lois M. Birt never told Jane M. Hergenreter to stop telling people that it was Jane M. Hergenreter's property. (R. IV, 59).

23. Lois M. Birt testified that she was treating the May 6, 1998 deed as though Jane M. Hergenreter had a life estate and Lois M. Birt had the remainder. (R. IV, 60, 80). She claims to quote what Jane M. Hergenreter orally stated to her about being able to live on the property when handing her the deed on May 6, 1998. (R. IV, 79-80). She also claimed to quote Jane M. Hergenreter as stating, "Put this in safekeeping and I would like you to hold it until I die, at which time you can record it." (R. IV, 44).

24. On October 16, 2006, John Hamilton (as Lois Birt's attorney) wrote to John Terry Moore (attorney for the nieces and nephews of William Hergenreter and Jane M. Hergenreter) and stated at paragraph number 3 that, "Prior to filing the deed Mrs. Hergenreter and Lois Birt treated the property as Jane having retained a life estate. Prior to delivery of the deed, Mrs. Hergenreter could have destroyed the deed had

that been her choice.” (R. V, 22). When read this statement, Ms. Birt stated, “That would be true.” (R. IV, 62).

25. For at least eight or nine years, Jane M. Hergenreter examined abstracts for the Shaw, Hergenreter & Quarnstrom law firm and drafted legal opinions that one of the attorneys would sign. (R. IV, 59, 199-200).

26. Despite Jane M. Hergenreter’s familiarity with deeds and title, there is no mention in the May 6, 1998 deed of a life estate. (R. V, 3). This was acknowledged by Lois M. Birt. (R. IV, 28). Carl Quarnstrom testified that Jane Hergenreter would have known the difference between a life estate and a remainder. (R. IV, 209).

27. Lois M. Birt did not ever tell the man she lives with about the May 6, 1998, deed because if she “had died first, the deed would not have been recorded and Jane would have been free to do with it whatever she wanted.” When asked if that was still her position she responded, “Exactly, yes.” (R. IV, 62).

28. Lois M. Birt testified that Jane M. Hergenreter was a “careful and precise” certified public accountant and that she believed that Jane M. Hergenreter filed all of the tax returns required for Bill and Jane Hergenreter. (R. IV, 63).

29. Lois M. Birt also acknowledged that, as executor, she had personal responsibility to see that Jane M. Hergenreter’s tax returns had

been properly filed. (R. IV, 63). Lois M. Birt also testified that she was satisfied that all necessary tax returns had been filed for Jane M. Hergenreter. (R. IV, 63). She was not aware of a gift tax return having been filed by or on behalf of Jane M. Hergenreter for the alleged May 6, 1998 deed as to which Lois M. Birt acknowledges she paid no consideration and for which the real estate value far exceeded the annual gift tax exclusion. (R. IV, 63-65).

### **STANDARD OF APPELLATE REVIEW**

This is an unusual case in that an important admission was overlooked by the trial court. The general standard of review where material facts are not disputed and the legal conclusions of the trial court are at issue is unlimited. As recognized in *Nicholas v. Nicholas*, 277 Kan. 171, 177, 83 P.3d 214, 220 (2004) the application of law to facts provides for unlimited review by the Court of Appeals.

Appellant has been unable to find a published case where there was appellate review of facts that needed to include an undisputed fact that was overlooked by the trial court. This appeal necessarily must consider a written statement by defendant's attorney that was admitted by defendant, at trial. It sets forth defendant's understanding of the intent and effect of the deed at issue. Where such a fact is not included among the district court's findings, this Court is "equally able to consider the undisputed testimony", as stated below in the unpublished Court of

Appeals opinion in *In the Matter of the Application to Adopt M.R.G.*, 196 P.3d 451, No. 99,892, 2008 WL 4966493 \*6 (Kan. Ct. App. Nov. 21, 2008):

Ordinarily this lack of specific findings would require us to remand the case for findings of fact by the district court. The trial court is in the best position to weigh conflicting evidence and make determinations of credibility; we are not. Here, however, the evidence is essentially undisputed as to the support father provided in the relevant 2-year time period. Thus, we need not remand the case to the district court for factual findings since we are equally able to consider the undisputed testimony on the extent of father's support for his child.

Although unpublished opinions are not favored for citation, Rule 7.04 (f)(2) of the Rules Relating to Supreme Court, Court of Appeals and Appellate Practice allow citation "if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition." That is the case here; and as required by the rule a copy of the unpublished *M.R.G.* opinion is attached as Appendix E.

The issue raised in this appeal was initially raised in plaintiff's Amended Petition and most particularly at paragraphs 1-3, 5 and 6 (R. I, 97-99) and 3. a. and 3. b. of the Pretrial Order (R. II, 120), and ruled upon in the district court's Memorandum Decision and Order at pages 1, 2, 6, 7 and 14-28 (R. III, 245, 246, 250, 251, 258-272). So that there is no misunderstanding, plaintiff is not asserting undue influence or suspicious circumstances on appeal (as those issues involve factual determinations

as to which the district court weighed the evidence in such a manner that it is highly unlikely that the district's court's conclusions would be overturned on appeal). Plaintiff's contentions are based upon undisputed documents and defendant's admissions (a critical one having been overlooked by the trial court) and the application of well established case law to those particular facts.

### **ARGUMENTS AND AUTHORITIES**

#### **I. A DEED THAT IS NOT TO BE EFFECTIVE UNTIL AFTER DEATH IS TESTAMENTARY IN CHARACTER**

"The passing of an executed deed into the hands of a grantee named therein does not constitute a delivery, where it is the understanding and intention that the instrument shall not then become effective as a conveyance." *Bremyer v. School Ass'n of Swedish Evangelical Mission Conference of Kansas*, 86 Kan. 644, Syl. ¶1, 122 P. 104 (1912).

"In a transfer of real property by deed, it is essential that grantor and grantee shall understand that the conveyance is complete and that the title is to pass in order to have the mere placing of it in the hands of a grantee, his attorney or agent, construed as a complete delivery." *Id.* Syl. ¶2. (Emphasis added.)

At common law, a transfer where the grantor retains control during the grantor's lifetime, that is to take effect at grantor's death, is

testamentary in character and void if not executed as a will. *Truax v. Southwestern College*, 214 Kan. 873, Syl. ¶4, 522 P.2d 412, 413 (1974). See also the comprehensive discussion of deeds as will substitutes at Deines and McMahon, *Will Substitutes in Kansas*, 23 Washburn L.J. 132, 133-140 (1983). Lois M. Birt acknowledged that she was to do nothing with the purported deed until after Jane M. Hergenreter's death.

The best indication of what was intended with the deed held by defendant Lois M. Birt is found in her own words and those of her attorney. Her attorney wrote to the attorney for the relatives of Jane M. Hergenreter's deceased husband as follows: "Prior to filing the deed Mrs. Hergenreter and Lois Birt treated the property as Jane having retained a life estate. Prior to delivery of the deed, Mrs. Hergenreter could have destroyed the deed had that been her choice." (R. V, 22). When read this statement, Ms. Birt stated, "That would be true." (R. IV, 62). Copies of the attorney's letter and Ms. Birt's transcribed testimony are attached as Appendices C and D respectively. The district court's Memorandum Decision and Order makes no reference to either of these important statements.

Defendant Lois M. Birt also testified that she did not tell the man she lives with about the deed because if Ms. Birt "had died first, the deed would not have been recorded and Jane would have been free to do with it whatever she wanted." (R. IV, 62; copy attached as Appendix D).

This case is actually much like that of *Bruce v. Mathewson*, 97 Kan. 466, 155 P. 787 (1916). In that case title was claimed based upon a deed by a husband to his wife that was “not to be recorded nor to take effect unless he was killed.” 97 Kan. at 468. In the *Bruce* case the trial court concluded that “the deed never became effective as a conveyance.” *Id.* The trial court was affirmed on appeal with the Kansas Supreme Court stating:

Before it could operate as a transfer of title there must have been an intention of the grantor that it should become effective as a present conveyance. Such intention is to be derived from the testimony as to the acts and words of the grantor relating to the execution and delivery of the deed and may be shown by parol.

*Id.* at 470.

Whether a deed is considered testamentary in character “depends upon whether the interest [it] conveyed . . . was intended to vest presently or only after the death of the grantor.” If the former was intended, the instrument is a deed. If, on the other hand, the latter was intended, the instrument is a will substitute. *Lowry v. Lowry*, 160 Kan. 11, 14, 159 P.2d 411, 413 (1945).

This case is similar to *Powers v. Scharling*, 64 Kan. 339, 343, 67 P. 820, 821 (1902) where the Kansas Supreme Court stated that,

In determining whether an instrument be a deed or will, the question is, did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper? Or, on the other hand, did he intend that all the interest

and estate should take effect only after his death? If the former, it is a deed; if the latter, a will.

Jane M. Hergenreter, who was a brilliant long time certified public accountant, did not file a gift tax return evidencing treatment of the deed as a presently intended gift. The district court recognized this problem but could not explain it (R. III, 271). Lois M. Birt did not report it that way on any post-death gift tax return (R. IV, 63-65). Jane M. Hergenreter remained in full control of the real property during her lifetime. Such subsequent conduct asserting ownership of property is competent evidence as to whether a deed is to be considered effective when executed or is effective only at death. *White v. White*, 99 Kan. 133, 160 P. 993 (1916). See also 23 Am. Jur. 2d *Deeds* §§ 111, 146 (2002).

The trial court relies heavily upon one sentence in the 1951 case of *In re Estate of Hulteen*, 170 Kan. 515, 227 P.2d 112 (1951). The trial court twice quoted and underlined the following language from the *Hulteen* opinion: “the test is not whether the grantor has retained possession or control of the property, but rather, whether he has retained possession or control of the deed.” *Id.* at 519. The *Hulteen* case (as have many others) actually involved delivery of a deed to a third person. It is easy to confuse the principles from those cases with those where a third party was not involved. Ignoring that context, however, leads to using the above quoted language that sets forth a rule for the third person

delivery situation to a wholly different situation where there was a clear understanding between the grantor (Ms. Hergenreter) and the grantee (Ms. Birt) as acknowledged by both Ms. Birt's counsel and Ms. Birt.

The trial court also cites *Wuester v. Folin*, 60 Kan. 334, 56 P. 390 (1899), which is another case of delivery to a third person. In this case the third person (grantor's attorney) was directed to and did record the deed shortly after it was executed. This is an entirely different case because the grantee never knew of the deed until after the grantor's death. As indicated at the top of page 337, "The testimony tends to show that at the time of the conveyance he desired and intended to vest title in his niece . . ." That is wholly different from Ms. Birt's own testimony in this case.

In *Wuester* the Kansas Supreme Court states the more general test as follows: "What constitutes a sufficient delivery is largely a matter of intention, and the usual test is, Did the grantor by his acts or words or both, manifest an intention to make the instrument his deed, and thereby divest himself of title?" *Id.* at 337. In the instant case the answer is clearly "no" as made evident by Ms. Birt's own testimony.

The trial court apparently confused manual delivery with legal delivery. "A manual delivery is an evidentiary fact, but the delivery necessary to make an instrument valid is an ultimate fact and involves the legal question of intent as well as manual delivery. It is first a question of

fact and then a question of law.” *Madden v. Glathart*, 125 Kan. 466, 470, 265 P. 42, 44 (1928). Ms. Birt has admitted what was intended. This court can determine the legal effect of the admitted intention, without placing undue emphasis on mere physical possession of the deed.

As the *Bremyer* opinion indicated, both the grantor and the grantee must intend that the conveyance is complete, but this conjunctive requirement is not even met disjunctively here as neither the grantor (Ms. Hergenreter) nor the grantee (Ms. Birt) understood the conveyance to be complete or treated it as complete.

This is further evidenced by Ms. Hergenreter’s treatment of it as her own (R. IV, 46-48), reference to it as her own (R. IV, 55; R. V, 6) and failure to file a gift tax return (R. IV, 63-65). Jane M. Hergenreter’s October 20, 1998 deeding away of 20 acres, and Lois M. Birt’s acknowledgment thereof, (R. I., 87, 98-99; R. IV, 48-49, 93-95, 142; R. V, 4) signify that the May 6, 1998 deed was not intended to be complete.

The May 6, 1998 deed to Lois M. Birt was not witnessed and does not comply with K.S.A. 59-606 and therefore fails as a will. See *Truax v. Southwestern College*, 214 Kan. 873, 879, 522 P.2d 412, 417 (1974) regarding similar attempted transfers that were neither sufficient as gifts nor sufficient as testamentary dispositions.

II. RESERVATION OF ARGUMENT REGARDING CROSS-APPEAL

While the facts regarding Lois M. Birt's taking of \$10,155.40 from Jane M. Hergenreter's account on the day before Ms. Hergenreter's death are set forth above, arguments are reserved until the basis for Lois M. Birt's cross-appeal is set forth in her brief.

III. CONCLUSION

The undisputed evidence (as established by defendant's admissions) makes clear that the May 6, 1998 deed was not intended to be effective during Jane M. Hergenreter's lifetime. The district court's decision should be reversed.

Respectfully submitted,

BARBER EMERSON, L.C.

By 

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Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I certify that two copies of the foregoing Brief of Appellant, were mailed this 15<sup>th</sup> day of July, 2009, to John R. Hamilton, Hamilton, Laughlin, Barker, Johnson & Watson, 3649 S.W. Burlingame Road, Suite 200, Topeka, Kansas 66611-2155, attorney for appellee, by depositing such copies in the United States mail, first class postage prepaid, properly addressed to said attorney.

  
\_\_\_\_\_  
Calvin J. Karlin

WARRANTY DEED (Kansas Statutory Form)

Jane M. Hergenreter, a single person

23656

CONVEY AND WARRANT TO Lois M. Birt, a single person

Entered in Transfer Record in my office this day of August 1998  
Cynthia C. [Signature]  
County Clerk.

all the following described REAL ESTATE in the County of SHAWNEE and the State of Kansas, to-wit:

THE EAST ONE HALF OF THE SOUTHWEST QUARTER OF SECTION 26, TOWNSHIP 12 SOUTH, RANGE 14 EAST OF THE 6TH P.M., SHAWNEE COUNTY, KANSAS (CONTAINING 80 ACRES MORE OR LESS); AND

LOT ONE AND LOT THREE OF THE NORTHWEST QUARTER AND THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 26, TOWNSHIP 12 SOUTH, RANGE 14 EAST OF THE 6TH P.M., IN SHAWNEE COUNTY, KANSAS (CONTAINING 160 ACRES, MORE OR LESS)

THE EAST ONE HALF OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 13, TOWNSHIP 12 SOUTH, RANGE 14 EAST OF THE 6TH P.M., SHAWNEE COUNTY, KANSAS (CONTAINING 40 ACRES MORE OR LESS)

THE EAST ONE HALF OF GOVERNMENT LOT 2 AND THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 37, TOWNSHIP 12 SOUTH, RANGE 14 EAST OF THE 6TH P.M., SHAWNEE COUNTY, KANSAS (CONTAINING 80 ACRES MORE OR LESS)

0172685

THIS DEED IS GIVEN PURSUANT TO K.S.A.79-1437a(4) ET SEQ.

EXCEPT AND SUBJECT TO EASEMENTS AND RESTRICTIONS OF RECORD.

RECEIVED FOR RECORD

AUG 28 P 2:00

REGISTER OF DEEDS  
MARILYN L. NICHOLS

Dated MAY 6, 1998

STATE OF KANSAS, SHAWNEE COUNTY, KS

BE IT REMEMBERED, That on this 6TH day of MAY A.D. 1998, before me, the undersigned, a NOTARY PUBLIC

In and for the County and State aforesaid, came

JANE M. HERGENRETER, A SINGLE PERSON

STATE OF \_\_\_\_\_ County, \_\_\_\_\_ st.

This instrument was filed for record on the

\_\_\_\_\_ day of \_\_\_\_\_, A. D., 19\_\_\_\_

at \_\_\_\_\_ o'clock \_\_\_\_\_ M., and duly recorded

in book \_\_\_\_\_ of

at page \_\_\_\_\_

Register of Deeds.

Deputy.

Fees \$ \_\_\_\_\_

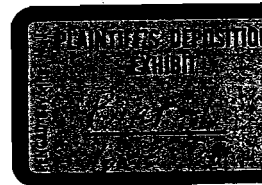
who is personally known to me to be the same person who executed the within instrument of writing and such person duly acknowledged the execution of the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.



CARL W. QUARMSTROM Notary Public.

AUGUST 8, 1998



KANSAS SECURED TITLE AND ABSTRACT CO., INC. 19th SW Topeka, Kansas 66614-1774  
GENERAL WARRANTY DEED (Shawnee County) of Kansas Secured Title and Abstract Co., Inc.

30248

986313  
Entered in Transfer Record in my office this  
day of OCT 21 1998  
[Signature]  
107872 COUNTY CLERK

Register of Deeds  
STATE OF KANSAS) SS  
RECEIVED RECORD  
OCT 21 11 32 AM '98  
REGISTER OF DEEDS  
MARILYN [Signature]

Mail Tax Statement to:  
Dargal Clark Builders, Inc.  
7828 SW 33rd St. Topeka KS 66614  
Property address: SW33rd St.

THE GRANTOR Jane M. Hergenreter, a single person,

CONVEYS AND WARRANTS TO  
Dargal Clark Builders, Inc.

all the following REAL ESTATE in the County of Shawnee,  
and the State of Kansas, to-wit:

The East half of the Southeast Quarter of the Northwest Quarter  
of Section 13, Township 12 South, Range 14, East of the 6th  
P.M., Shawnee County, Kansas.

for the sum of one dollar and other good and valuable consideration.  
EXCEPT AND SUBJECT TO: Easements, restrictions and assessments of record, and all the taxes and assessments that may be  
levied, imposed or become payable hereafter.

Dated this 20<sup>th</sup> day of October A.D. 1998

[Signature]  
Jane M. Hergenreter

STATE OF KANSAS, SHAWNEE COUNTY, SS:

00095

BE IT REMEMBERED, that on this 20<sup>th</sup> day of October A. D. 1998  
before me the undersigned a Notary Public in and for the County and State aforesaid, came  
Jane M. Hergenreter, a single person,

who is personally known to me to be the same person [Signature] who executed the within instrument of  
writing and such person [Signature] duly acknowledged the execution of the same.  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, the day and year last above written.

LOIS M. BIRT  
Notary Public - State of Kansas  
My Appl. Expires August 3, 2000

[Signature]  
NOTARY PUBLIC  
Appointment expires August 3, 2000

12-14-13-NW (SEAL)

VOL 3267 PAGE 884

NOTICE OF DEPOSITION  
EXHIBIT  
[Signature]

EXHIBIT  
tabbies  
2

HAMILTON, LAUGHLIN, BARKER, JOHNSON & WATSON

ATTORNEYS AT LAW

3649 S.W. BURLINGAME ROAD

SUITE 200

TOPEKA, KANSAS 66611-2155

TEL (785) 267-2410; FAX (785) 267-2942

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JOHN R. HAMILTON  
GARY E. LAUGHLIN  
WILLIAM B. BARKER  
ERIC K. JOHNSON  
DAVID E. WATSON\*

DUSTIN J. CURRY  
\*LICENSED IN KS & MO

\*OF COUNSEL  
BOB W. STOREY

LARRY E. GREGG  
(1948-1999)

October 16, 2006

**FAXED**  
@ 2:00 PM

John Terry Moore  
Moore Martin, L.C.  
622 East Douglas Avenue  
Wichita, KS 67202-3504

RE: Gail Hergenreter Niemann, et al. v. Lois M. Birt, et al.

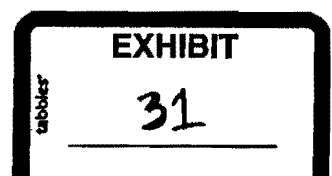
Dear Mr. Moore:

I received a letter from Charles Hammond who also purports to represent Gail Hergenreter Niemann. Mr. Hammond has been suggesting the same types of claims, which I believe to be frivolous. I will respond to your allegations in order as presented.

1. We deny that there was any fiduciary relationship between Mrs. Hergenreter and Lois Birt. However, there was a friendship between Lois Birt and Mrs. Hergenreter, who did not have any heirs at law.
2. The real estate described in the deed attached to your letter of October 10, 2006, was not intended to be sold by Mrs. Birt and the proceeds given to your clients and is not a part of Mrs. Hergenreter's estate. The real estate was intended to be the sole and separate property of Lois Birt as evidenced by the deed to Lois Birt.
3. Prior to filing the deed, Mrs. Hergenreter and Lois Birt treated the property as Jane having retained a life estate. Prior to delivery of the deed, Mrs. Hergenreter could have destroyed the deed had that been her choice. We are aware of the fact that Mrs. Hergenreter conveyed a portion of the property to Dargal Clark Builders, Inc., and retained the proceeds. Lois Birt was aware of the sale to Dargal Clark Builders, Inc., and the proceeds later became part of the residuary estate which passes to Lois Birt under the Will.
4. This claim is absolutely false. Lois Birt did not tell any of Bill Hergenreter's relatives that she is holding the deed signed by Mrs. Hergenreter for the benefit of

00071

Appendix C

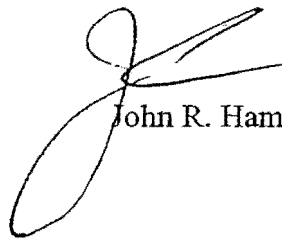


Mrs. Hergenreter's relatives. In fact after Mr. Hergenreter died, Mrs. Hergenreter wrote a letter to his nieces and nephews and told them that Lois Birt would be the executor under her Will.

5. Your client and her relatives have not suffered any damage in the way of taxes as a result of Mrs. Birt receiving the real estate as a gift from Mrs. Hergenreter.
6. Mrs. Hergenreter's intentions are best reflected in the fact that she made a gift of the real estate described in the deed attached to your letter of October 10<sup>th</sup> to Lois Birt. Therefore, the property described in the deed was not part of Mrs. Hergenreter's estate.

It appears that your client and all of the named beneficiaries in the Will are working in concert attempting to defeat the intention of the Decedent and are challenging the Will. Therefore, the *in terrorem* clause recited on Page 4 of the Will will be invoked. Lois Birt does not have a conflict of interest in carrying out her duties as the named executor of the Hergenreter Estate, and you can initiate whatever action in the probate court that you feel appropriate. You can rest assured that we will oppose any action to have Lois Birt removed as executor. I trust that you are aware of the fact that the petition for final settlement is set for October 26, 2006, at 9 a.m. Your client's notice of hearing was sent to Charles Hammond who is the attorney of record for Gail Hergenreter Niemann.

Sincerely,



John R. Hamilton

JRH:mmg

pc: Lois Birt

00072

1 tractor out and bladed it and whatever. Jane's  
2 living style was very simple.

3 Q. Did you tell her she had to do that because  
4 you had a remainder interest and you wanted --

5 A. No, No.

6 Q. Okay. Let's look at the second sentence of  
7 Exhibit 31, paragraph three. Prior to delivery of  
8 the deed, Mrs. Hergenreter could have destroyed the  
9 deed had that been her choice.

10 A. That would be true.

11 Q. Okay. At your deposition, you told me  
12 that-- what's the fellow you live with? I'm drawing  
13 a blank.

14 A. Ray Stuart.

15 Q. Ray Stuart. That Ray Stuart--that you  
16 hadn't told Ray Stuart about the deed, because if you  
17 had died first, the deed would not have been recorded  
18 and Jane would have been free to do with it whatever  
19 she wanted. Is that still your position?

20 A. Exactly, yes.

21 Q. We talked about Jane Hergenreter reviewing  
22 abstracts. Was she a certified public accountant?

23 A. Yes, she was.

24 Q. Was she the first female certified public  
25 accountant practicing in Kansas?

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.  
In the Matter of the Application to Adopt M.R.G.  
No. 99,892.

Nov. 21, 2008.

Appeal from Harvey District Court; Theodore B. Ice, Judge.

Keith E. Martin, of Smith, Shay, Farmer & Wetta, LLC, of Wichita, for appellant natural father.

Marilyn M. Wilder, of Adrian & Pankratz, P.A., of Newton, for appellee stepfather.

Before McANANY, P.J., GREEN and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

\*1 This appeal arises from proceedings in which B.R. seeks to adopt his stepdaughter, M.R.G. A.G. is M.R.G.'s natural father. E.R. is M.R.G.'s mother. Father appeals the district court's termination of his parental rights, the determination that father's consent was not needed to permit stepfather to adopt father's child, and the granting of the adoption petition to stepfather.

2003

The child was born to mother and father in Texas in December 2003. Mother and father were never married, but they lived together when the child was born. Father had overdosed on drugs 2 years earlier. He was convicted of possession of a controlled substance in August

2003. He was convicted of DUI in November 2003. He had struggled with alcohol abuse and marijuana use since high school. His first conviction on a drug charge was in August 2000. Mother and father separated twice before 2003 due to father's drug use. As a result of his ongoing substance abuse, mother again left father and moved to Kansas shortly after her daughter's birth in December.

2004

Father followed mother to Kansas a short time later, and they reconciled in about March 2004. Father took a job as a waiter in a restaurant in Newton, and the following month, he changed jobs and began working at a restaurant in Wichita. When father first arrived in Kansas, mother and her family held an intervention with father to address his drug and alcohol use. Mother's parents encouraged father to attend AA and NA meetings, and attempted to direct him to treatment services in Wichita. Father entered, but failed to complete, a drug treatment program.

In May 2004, father was convicted of driving on a suspended license. When father's drug problems continued, mother and father separated again in the summer of 2004. Father moved to Wichita, and he continued to work at the restaurant. In November 2004, father was arrested for driving with a suspended license and for possession of marijuana and paraphernalia. He was placed on probation.

2005

Father had about four overnight visits with his daughter in the summer of 2005, and approximately four 1-day visits. Stepfather and mother initiated these visits. The child was taken to the Wichita restaurant where father worked for brief visits with her father every 4 to 6 weeks that year. Mother or the maternal grandfather initiated these restaurant visits.

Father testified that at some point he and mother agreed

on child support of \$350 per month during the period before the district court ordered him to pay support. Mother testified that the agreement was for father to pay \$300 per month.

There was testimony at the final hearing that father made three child support payments totaling \$1,100 in March 2005; and additional payments of \$350 in May, \$350 in June, and \$350 in December. There was testimony that father also paid \$300 for half of a medical check-up for his child, and that from April 2004 until February 2006, he provided a prepaid medical debit card and health insurance for his daughter through his Wichita employment. Mother testified that she used this insurance "in '05 quite a bit."

2006

\*2 Father had no contact with his daughter during 2006.

In December 2005, the Kansas Department of Social and Rehabilitative Services (SRS) brought an action against father for child support. Father responded, claiming visitation rights. The case was set for mediation, but mother refused to cooperate because she and stepfather were already planning to pursue a stepparent adoption. Mother also refused to allow father to have phone contact with his daughter in 2006 on a "few" occasions. She testified that father "probably would have seen [his daughter] as much as he could have had he had a valid driver's license and could get there."

Father worked at the Wichita restaurant until February 2006 when he left to return to Texas to work on an oil rig. Father was still on probation when he went to Texas. When he failed to report as required by the court, a warrant was issued for his arrest and, at some point, he was apprehended in Texas.

In March 2006, mother married stepfather. Stepfather has a daughter from a previous relationship whom he supports, but with whom he has no contact. Mother and stepfather have one child born of their union. Stepfather has the means and desire to support and care for his stepdaughter in addition to his other two children.

In April 2006, father offered to provide health insurance for his daughter through his Texas employment. Mother refused this offer because the child was already covered by stepfather's health insurance plan.

In July 2006, the district court ordered father to pay child support of \$131 per month. The journal entry memorializing this order was not filed until October 3, 2006, but the order stated it was to be effective July 1, 2006. For the purpose of this adoption, the trial court determined that the support order bound father beginning October 2006. There was testimony that father made \$500 child support payments in July and August 2006, and that these payments went directly to mother since the order for child support had not yet been memorialized in the later-filed journal entry of support.

In October 2006, father filed a motion for visitation. There is no indication in the record that father took any action to pursue resolution of this motion.

Father testified to additional payments of \$131 in October and \$65.50 in November. He claimed he made other payments in April, May, and June, but provided no evidence to support this claim.

2007

In January 2007, stepfather petitioned to adopt the child. He alleged that father had failed or refused to assume his parental duties and last had contact with his daughter in November 2005. Accordingly, stepfather claimed that father's consent was not required for the adoption.

In February 2007, father was extradited to Kansas from Texas. In March 2007, there was evidence that he made a final child support payment of \$229.58. In April 2007, the court revoked father's probation and he was sent to the Labette Correctional Conservation Camp.

\*3 The final hearing on stepfather's adoption petition was held in June 2007. Father was transported from Labette in order to participate in this hearing. Following the presentation of evidence, the court granted the adoption petition. It found that father's consent to the adop-

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(Table, Text in WESTLAW), Unpublished Disposition  
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tion was not necessary because (1) he is an unfit parent by reason of his continuing drug and alcohol problems, (2) he made no effort to see his daughter in 2006, (3) he failed to make required support payments, (4) he has been convicted of a felony and is currently confined, and (5) it is in the child's best interest to allow the adoption.

Father moved to alter or amend the judgment. Following a hearing the court denied the motion, noting that father last saw his daughter in November 2005. The court also noted that after father moved to Kansas in 2004, father's visits with his daughter were initiated by others. The court further found that within the critical 2-year period before these adoption proceedings, father did not see his daughter on any regular basis, did not otherwise communicate with her, and he did not send her cards or gifts. The court concluded that father's infrequent and incidental contacts were insufficient "to meet the ... test of love and affection."

As we will discuss later, on the matter of support, the court's findings are unclear.

On the matter of father's fitness, the court recounted his history of substance abuse and run-ins with the law. The court concluded that "[t]his is illustrative of the fact that the father has a continuing substance abuse problem and a lack of respect for the law, which makes him unfit as a parent." The court concluded that "it appears to be in the best interest of the child to allow the adoption to proceed without the consent [of] the father in order to have the child raised in a more stable environment."

Father appeals. He raises issues regarding his emotional and financial support for his child, the court's reliance on the best interests of the child and parental unfitness, and the court permitting an amendment to stepfather's petition on the day of the final hearing. We will first consider the issue of the extent of father's financial support of his child.

#### *The Statute*

K.S.A.2007 Supp. 59-2136(d) provides in relevant part:

[A natural father's consent to an adoption is required] unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption.... In determining whether a father's consent is required ... the court may disregard incidental visitations, contacts, communications or contributions.... [T]here shall be a rebuttable presumption that if the father ... has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent. The court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted."

\*4 In *In re Adoption of G.L.V.*, 286 Kan. 1034, 190 P.3d 245 (2008), decided after the proceedings in this case, our Supreme Court examined the cases relating to K.S.A.2007 Supp. 59-2136(d). The court held that "all surrounding circumstances are to be considered when determining whether a natural parent must consent to a stepparent adoption—that is, whether the natural parent has 'assume[d] the duties of a parent for two consecutive years next preceding the filing of the petition.'" 190 P.3d at 259.

The courts use a "two-column ledger" approach in analyzing the requirements of K.S.A.2007 Supp. 59-2136(d). In *re Adoption of B.M.W.*, 268 Kan. 871, 882, 2 P.3d 159 (2000). First, the adoption petitioner must show that the natural parent failed for the 2 years preceding the filing of the adoption petition to demonstrate love and affection toward the child by failing to visit, contact, communicate with, or make contributions to the child. *G.L.V.*, 190 P.3d at 259. Second, the adoption petitioner must show that the natural parent failed to substantially support the child by failing to provide child support "as required by judicial decree" for the 2 years preceding the filing of the petition. 190 P.3d at 259. *G.L.V.* reaffirmed that these two elements are the *sine qua non* of a K.S.A.2007 Supp. 59-2136(d) analysis because these duties are specifically contemplated by

the statute. 190 P.3d at 259.

The “best interests of the child” (BIC) and the “parental unfitness” factors were added to K.S.A.2007 Supp. 59-2136(d) in 2006. L.2006, ch. 22, seC 1. The effect of the 2006 amendment’s inclusion of the BIC standard, according to the Supreme Court, was to provide a trial court

“with additional discretionary powers to consider the best interests of the child in *denying* the adoption—even where a natural parent has not assumed the duties of a parent as articulated by this court—for unique reasons. For example, a court may determine, based upon testimony of the child or other evidence, that the child desires to remain the son or daughter of the natural parent based upon the parent’s promise of commitment to the child, based upon friction in the step-parent family, or a pattern of instability in the step-parent history.”(Emphasis added.) 190 P.3d at 265.

Therefore, the BIC standard does not “permit a court to override the requirement in K.S.A.2007 Supp. 59-2136(d) of mandatory consent when a natural parent has assumed his or her parental responsibilities.” 190 P.3d at 265.

The Supreme Court did not discuss the significance of the “parental unfitness” provision. 190 P.3d at 265.The Court of Appeals majority in *G.L.V.*, however, noted:

“Simply put, the court may consider the best interests of the child and the fitness of the nonconsenting parent in a stepparent adoption case, but it can only grant the adoption without the natural parent’s consent if the natural parent has failed to fulfill his or her parental duties under the statute.” *In re Adoption of G.L.K.*, 38 Kan.App.2d 144, 152, 163 P.3d 334 (2007).

#### *Father’s Child Support*

\*5 *G.L.V.* makes clear that stepfather must demonstrate father’s failure to provide both love and affection and support in order to proceed with the adoption without father’s consent. If stepfather does not establish father’s failure on both sides of the ledger, the adoption must be

denied. 190 P.3d at 259.

The district court found that father failed to pay a substantial amount of support for his child. Father argues that the court erroneously calculated the child support he paid during 2005 and 2006, and erroneously concluded that his support was insubstantial.

The amount of father’s child support payments pursuant to the court’s order is a finding of fact which we review using the substantial competent evidence standard, considering the evidence in the light most favoring the stepfather. *In re Adoption of D.R.B.*, 21 Kan.App.2d 790, 794, 908 P.2d 198, *rev. denied* 259 Kan. 927 (1995). Whether the amounts paid constituted a “substantial amount” of the support owed is a legal conclusion which we review *de novo*. 21 Kan.App.2d at 794.

Substantial support is support that is “[o]f real worth and importance; of considerable value; valuable.” *In re Adoption of C.R.D.*, 21 Kan.App.2d 94, 99, 897 P.2d 181 (1995)*reversed on other grounds by In re Adoption of G.L.V.*, 190 P.3d at 263-64.It “assumes something more than nominal or casual efforts.” *C.R.D.*, 21 Kan.App.2d at 100.Payment of 64% of a support obligation, even when made involuntarily, will preserve a father’s parental rights. *B.M.W.*, 268 Kan. at 883-84.Also, payment of 23% of child support due plus provision of medical insurance has been found to be sufficient to maintain a father’s parental rights. *In re Adoption of R.W.B.*, 27 Kan.App.2d 549, 553, 7 P.3d 306,*rev. denied* 270 Kan. 898 (2000) (citing *C.R.D.*, 21 Kan.App.2d at 99). But, paying 31% of child support due and failing to provide court-ordered medical insurance was found to be insufficient in *R.W.B.*, 27 Kan.App.2d at 555.

We are hampered in our consideration of this issue because the record discloses no specific findings of fact on the issue of support. At the conclusion of the final adoption hearing on June 22, 2007, the court addressed the support issue as follows: “[W]hile there were monies paid, the payments certainly did not reach the financial obligation, by any means, that he had for the support of this child.”Here, the court was referring to father’s financial obligation to pay the full amount of court-ordered

(Table, Text in WESTLAW), Unpublished Disposition  
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support. Father clearly did not pay the full amount he owed, but the test is substantial compliance, not full compliance. K.S.A.2007 Supp. 59-2136(d). The court made no other mention of the support element of the statute. In its decree of adoption the court's only reference to the issue of support was its finding that father's "payments of support did not reach his financial obligations as set out in Sedgwick County District Court Case...."

\*6 In Father's post-trial motion he challenged the court's finding that he failed to provide substantial financial support. When the motion was argued to the district court on November 15, 2007, the court took the matter under advisement. In a letter dated December 6, 2007, the court made the following ruling on the support is- sue:

"Regarding the issue of support there was no support ordered by the Court until October, 2006 which ordered support of \$ 131.00 per month. After the order was entered, approximately 25% of...."

This concluded page 2 of the letter. Page 3 begins in mid-sentence with a discussion of the child's best interests. The court did not return to the issue of support. We do not know what facts the district court relied upon to support its conclusion that father failed to provide substantial support.

Ordinarily this lack of specific findings would require us to remand the case for findings of fact by the district court. The trial court is in the best position to weigh conflicting evidence and make determinations of credibility; we are not. Here, however, the evidence is essentially undisputed as to the support father provided in the relevant 2-year time period. Thus, we need not remand the case to the district court for factual findings since we are equally able to consider the undisputed testimony on the extent of father's support for his child.

There was conflict in the testimony on one issue regarding support. Mother and father testified differently regarding their informal agreement for child support before the district court's order of support in July 2006. Ironically, father testified to a higher amount of

monthly support for the child (\$350) than did mother, who testified to an agreement for father to pay \$300 per month. We will view the facts in the light most favoring the stepfather. Thus, we will conduct our analysis based upon a pre-court-ordered support of \$350 per month. If father provided substantial support by that measure, he clearly provided substantial support by the lesser \$300 per month measure.

Further, there arose a dispute regarding father's support payments made directly to mother after the July effective date of the court's order but before the order was filed in October. The district court treated these payments as gifts and did not recognize them as support payments. Since this is a conclusion of law rather than a finding of fact, we review this conclusion de novo.

At trial, there was a colloquy between father's counsel and the court regarding these support payments made directly to mother after the court ruled on the issue of support but before the journal entry was filed memorializing the court's support order. Father's point was that until the journal entry was on file, there was no mechanism in place for him to make payments through the Kansas Payment Center. The trial court treated these payments as gifts instead of support for the child because the support order was effective July 1, 2006.

\*7 K.S.A.2007 Supp. 59-2136(d) creates a *rebuttable* presumption that father failed in his duties as a parent when father does not pay a substantial portion of court ordered support when able to do so. It seems to us that in considering this most severe of sanctions on a parent-termination of parental rights, as opposed to contempt for failing to pay court ordered child support-the Supreme Court requires the court to take into account all payments made by father for support of his child as part of the surrounding circumstances of a case, not merely payments made through the Kansas Payment Center. 190 P.3d at 259.

Including father's payments from July 1, 2006, when the court ordered support, to October 2006 when the journal entry was filed, we arrive at the following calculations of support owed and support paid. Commencing January 16, 2005 (2 years before commencement of this action),

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father owed child support as follows:

1/16/05 to 7/1/06 (17.5 months x \$350)	\$6,125
7/1/06 to 1/16/07 (5.5 months x \$131)	\$720.50
<hr/>	
Total:	\$6,845.50

During this period father paid support as follows:

1/16/05 to 7/1/06	\$2,450
7/1/06 to 1/16/07	\$1,196.49
<hr/>	
Total:	\$3,646.49

Father claimed other payments which he could not document to the district court and which the district court disregarded. We do likewise. Thus, during the relevant 2-year period father paid 53% of his child support obligation (\$3,646.49 / \$6,845.50).

In addition, father provided mother with a prepaid medical debit card for his daughter in 2005 which mother used "quite a bit." He also maintained his daughter on his health insurance plan through his place of employment until February 2006 when he left to return to Texas. Two months later he offered to place his daughter on his health insurance plan in Texas, but mother refused because the child had been included in stepfather's insurance plan.

Hewing closely to our case law and taking into account the constitutional presumption in favor of maintaining father's parental rights, *In re Adoption of K.J.B.*, 265 Kan. 90, 95, 959 P.2d 853 (1998), we conclude that father's support was "substantial" during the 2 years before the petition was filed.

Father's history of support (53% of child support paid plus health insurance for more than half of the 2-year period) is more like the situations in *B.M. W.*, 268 Kan. at 884 (64% paid, no health insurance), and *C.R.D.*, 21 Kan.App.2d at 99 (23% paid plus health insurance), cases in which the natural fathers' parental rights were preserved, rather than like *R.W.B.*, 27 Kan.App.2d at 555 (31% paid, no health insurance), in which father's parental rights were terminated. Whatever his other failures, it cannot be said that father paid an insubstantial

amount of support during the relevant time period. Therefore, stepfather failed to meet his burden of proof with regard to the support side of the adoption ledger. Since K.S.A.2007 Supp. 59-2136(d) and *G.L.V.* require parental failure on both sides of the ledger before a stepparent adoption may proceed without the consent of such parent, the trial court's order granting the adoption without father's consent must be reversed. 190 P.3d at 259.

\*8 This renders moot father's remaining issues.

Reversed.

Kan.App.,2008.  
 In re M.R.G.  
 196 P.3d 451, 2008 WL 4966493 (Kan.App.)

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