

No. 09-102554-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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 APPELLEE

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

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BRIEF OF APPELLEE

**Appeal from the District Court of Shawnee County, Kansas
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The Honorable Frank J. Yeoman, Jr.**

NATURE OF THE CASE

Defendant/Appellee/Cross-Appellant, Lois M. Birt (hereinafter, "Defendant" and/or "Birt"), is the duly appointed Executor of the Estate of Jane M. Hergenreter, deceased (hereinafter "Jane" or "Mrs. Hergenreter"). That probate matter is still pending in the District Court of Shawnee County as Case No. 05 P 380. In the course of that probate proceeding, allegations were made by certain beneficiaries under the late Mrs. Hergenreter's Will that Defendant Birt was wrongfully claiming ownership of certain property which they alleged should be part of the Estate. The District Court in Case No. 05 P 380 appointed a

Special Administrator, that being Plaintiff/Appellant/Cross-Appellee Jeffrey O. Heeb (hereinafter "Plaintiff") to investigate those allegations. Plaintiff eventually brought this civil lawsuit to recover certain property for the benefit of the Hergenreter Estate. Specifically, the subject property consisted of certain realty located in Shawnee County, Kansas (330 acres more or less), and the proceeds of a bank account (approximately \$10,155.00). Defendant Birt claims she was the legal and rightful owner of both of these properties at the time of Mrs. Hergenreter's death, based on valid inter vivos gifts of same to her by Mrs. Hergenreter. Plaintiff sought to invalidate those claimed gifts on the grounds that the gifts were not valid or completed prior to Mrs. Hergenreter's death. Following a one-day bench trial, the District Court made findings of fact, and based upon those findings of fact, entered judgment in favor of Plaintiff with respect to the funds from the bank account, but in favor of Defendant Birt with respect to the land. Each party timely perfected its respective appeal from that portion of the judgment which was contrary to it.

ISSUES ON APPEAL

ISSUE: The Trial Court's Finding of Fact, that a Valid and Binding Transfer of Legal Title to Real Estate By Deed Occurred on May 6, 1998, is Supported by Substantial, Competent Evidence; and the Trial Court's Conclusion of Law that Defendant Birt is the Rightful Owner of the Subject Realty is Correct in Light of that Finding of Fact.

STATEMENT OF FACTS

Defendant Birt will begin by noting that the factual statement in Plaintiff's Brief of Appellant is generally correct, though it contains several statements which are irrelevant to the narrow legal issue presented on appeal. For the purposes of this appeal, this Court should disregard all but paragraphs 1-16, 23-4 and 27 of Plaintiff's Statement of Facts, as the remaining paragraphs are irrelevant to the issue presented here.

Defendant Birt would also note that the Trial Court made extensive findings of fact, comprising 47 separate paragraphs. While many of those facts are also not technically relevant to the limited scope of the precise issue presented here, Defendant would offer her observation that the Trial Court's findings of fact are all supported by substantial, competent evidence, and the inferences the Trial Court drew from the evidence presented to it at trial were all reasonable.

Defendant Birt presents the following Statement of Facts, which she believes are all of the facts essential to the resolution of the precise issue here presented.

1. Defendant Lois M. Birt is designated as the Executrix under the Will of Jane M. Hergenreter, who died on August 25, 2005. (Exhibit 7, ROA, Vol. V, pp. 9-16.)
2. After Jane's Will was offered for probate by Defendant Birt, an objection was filed by certain beneficiaries under the Will. The matter was set for trial, but before reaching trial, the objecting parties (Jane's niece, nephews, great nieces and great nephews by marriage) withdrew their objection to the admission of the Will, retaining only their objection to appointing Defendant Birt as Executrix. Before the matter reached trial on that remaining objection, it too was withdrawn. The Will was admitted to probate and Defendant Birt was appointed as Executrix on December 9, 2005. No appeal was taken

from those orders, and the time to appeal has long expired. (Court file in Case No. 05-P-380, Judicial Notice of which was taken at ROA, Vol. IV, pp. 33-34.)

3. After Jane's Estate had been substantially administered, but before final settlement, a dispute arose over approximately 310 acres of Shawnee County real estate. Mrs. Hergenreter's nieces, nephews, great nieces and great nephews by marriage claimed that real property should be included in the probate estate. Defendant Birt claimed that the property had been gifted to her by Jane during her lifetime, as evidenced by an executed deed from Jane which had been in Defendant Birt's possession since May 6, 1998. Defendant Birt had filed the deed with the Register of Deeds on August 25, 2005, the date of Jane's death, in keeping with her promise to Jane that she would not file the deed until after Jane had died. (Exhibit 1, ROA, Vol. V, p. 3; ROA, Vol. IV, p. 81.)

4. On May 25, 2007, the District Court, in Case No. 05-P-380, appointed Jeffrey O. Heeb as Special Administrator of the Estate of Jane Hergenreter, Deceased. The Court directed that the Special Administrator should have authority to fully investigate all of the facts of the disputed matter, and should be free to make such conclusions, and to take such actions, as he believed the facts would support. Mr. Heeb engaged the services of attorney Calvin J. Karlin, who ultimately filed this action against Defendant Birt on January 2, 2008, it being docketed as Case No. 08-C-1. (ROA, Vol. I, pp. 5-19; Court file in Case No. 05-P-380, ROA, Vol. IV, pp. 33-34.)

5. Jane was the wife of William Hergenreter (hereinafter referred to as "Bill"); Bill died on March 5, 1998. During his lifetime, Bill was the law partner of Carl Quarnstrom. Defendant Birt worked as a secretary for the law firm of Shaw, Hergenreter & Quarnstrom for over 41 years. She first met Jane on July 3, 1967, and through the years,

developed a very close friendship which continued up to the time of Jane's death. (ROA, Vol. IV, p. 74.) Jane was one of the first women to be licensed as a certified public accountant in Kansas. Jane was a very smart and strong-willed woman. (ROA, Vol. IV, p. 168.) In addition to being a certified public accountant, Jane examined abstracts for the law firm of Shaw, Hergenreter & Quarnstrom and maintained the plat abstract book for the firm. As a result of examining abstracts, Jane was very familiar with deeds and wills. Jane typically came to the law office of Shaw, Hergenreter & Quarnstrom several times during the week to make copies and type documents; she would occasionally have Defendant Birt type things for her. (ROA, Vol. IV, p. 198.) Defendant Birt was a frequent guest in Bill and Jane's home and shared many meals with them, as well as holidays. After Bill died in 1998, Jane continued to share holidays with Defendant Birt and her family. (ROA, Vol. IV, pp. 91-92.)

6. On May 6, 1998, Jane came to the law office and asked Defendant Birt for a warranty deed form. She then instructed Defendant Birt to type the legal description for her Shawnee County property on the deed. Defendant Birt obtained a legal description for that property from the file pertaining to Bill Hergenreter's estate and typed it on the warranty deed form as Jane had requested. Jane then took the deed form from Defendant Birt, went into the copy room and finished filling out the rest of the deed herself. Jane then asked if Mr. Quarnstrom could notarize her signature. Defendant Birt offered to notarize it, but Jane said, "No, you can't this time." Carl Quarnstrom notarized the deed and Jane brought it back to Defendant Birt. She handed the deed to Defendant Birt and said, "I have one request, that you hold this until I die before you record it, and that I be allowed to live on the property until I die." Defendant Birt asked Jane if this was really what she wanted to do,

and she said, “Yes, and it’s what Bill wanted to do.” The deed remained in Defendant Birt’s possession until it was recorded. (ROA, Vol. IV, pp. 79-80.)

7. Plaintiff did not come forward with any evidence to challenge Defendant Birt’s testimony concerning the circumstances surrounding the preparation, execution and delivery of the deed by Jane Hergenreter to Defendant Birt on May 6, 1998. (See the entire Record on Appeal.)

8. The Trial Court found from the totality of the evidence that Jane’s intent on delivering the deed to Defendant Birt on May 6, 1998, was to immediately vest Defendant Birt with legal title to her home place in Shawnee County, subject only to Defendant Birt’s agreement not to record the deed, and to allow Jane to live on that property, until Jane’s death. The Trial Court therefore concluded that Defendant Birt was the legal and rightful owner of that real property. (ROA, Vol. III, p. 271.)

9. On April 29, 1998, Jane opened an account at Columbian Bank with an initial deposit of \$10,000. She named Defendant Birt as an agent with authority to write checks on the account. (Exhibit 28, ROA, Vol. V, p. 20.) The account was established for the purpose of allowing Defendant Birt to pay Jane’s bills while Jane traveled. Each time Jane left town and Defendant Birt wrote checks on the account to pay Jane’s bills, the account would be replenished back to \$10,000 and accrued interest upon Jane’s return. (ROA, Vol. IV, pp. 16-17.)

10. On or about September 28, 2004, Jane prepared a new Will by using handwritten notes and dictating parts to Defendant Birt to type. Jane had a previous Will, which she removed from the files of Shaw, Hergenreter & Quarnstrom, as was her custom any time she executed a new Will. (ROA, Vol. IV, p. 151.) The new Will nominated

Defendant Birt to be the Executrix of Jane's Estate. Jane decided to put an *in terrorem* clause in the Will, and she told Defendant Birt this was because she believed that Bill's nieces and nephews would oppose Defendant Birt as Executrix at every turn, and Jane wanted them to suffer the consequences if that occurred.(ROA, Vol. IV, p. 117; Exhibit 7, ROA Vol. V, pp. 8-16.)

11. On Tuesday, August 23, 2005, Jane was admitted to the hospital for her final illness. Jane told Defendant Birt that she should file the deed, and Jane also advised her to close out the bank account at Columbian Bank because "you are going to need the money." Jane was transferred to hospice on Wednesday, August 24, 2005, and died the next morning. Defendant Birt considered Jane's direction to close out the Columbian Bank account because "you are going to need the money", to be a gift to her of the proceeds of that account. (ROA, Vol. IV, pp.80-81.) However, the Trial Court disagreed with Defendant Birt's interpretation of Jane's instructions. The Trial Court concluded that the most reasonable inference from that testimony was that Jane meant that Defendant Birt was "going to need" the funds in her capacity as Executrix of Jane's estate. The Trial Court concluded that Defendant Birt had not established that Jane gifted the proceeds of the Columbian Bank account to her on the day before her death, and thus, ordered those funds, plus interest, returned to the Estate by Defendant Birt. (ROA, Vol. III, pp.200, 271.)

STANDARD OF APPELLATE REVIEW

Plaintiff takes the rather extraordinary position that this Court's standard of review over the judgment of the Trial Court, rendered following a bench trial, is de novo. Plaintiff reaches this unprecedented conclusion based on the assertion that certain "material facts" are

not in dispute, and that this Court is therefore free to draw its own legal conclusions from those supposedly “undisputed material facts”. Specifically, Plaintiff argues that Defendant Birt made certain statements in her trial testimony that constitute admissions against interest, but that the Trial Court failed to appreciate the legal significance of those statements. In a later section of this Brief, Defendant Birt will examine in detail the purported “admissions” which Plaintiff contends the Trial Court “overlooked”, and will demonstrate that the testimony cited by Plaintiff does not amount to “admissions”, nor was that testimony “overlooked” by the Trial Court. In this section of her Brief, Defendant Birt will limit her discussions to the issue of the proper standard of appellate review to be applied to this case.

The most powerful indicator that Plaintiff’s proposed standard of review is not the one this Court should apply lies in Plaintiff’s admission that he could locate no published appellate decision where such a standard has been articulated, and he therefore has cited instead an unpublished decision of this Court, which, he claims, provides support for his position. The fact is, the unpublished decision Plaintiff cites, *In the Matter of the Application to Adopt M.R.G.*, 196 P.3rd 451, No. 99,892, 2008 WL 4966493 (Kan.Ct.App. Nov. 21, 2008), bears no resemblance whatsoever to the case-at-bar, nor does it stand for the peculiar standard of review which Plaintiff urges this Court to apply.

In re M.R.G. was an appeal by the natural father of a minor child who was the subject of an application for adoption by her stepfather. The statute which governs such adoptions is K.S.A. 59-2136. The district court had granted the application over the natural father’s objections. The district court’s decision was based on its legal conclusion that the natural father had “failed to provide a substantial portion of the child support as required by judicial decree” for the preceding two years, which is one prong of the two-part test

mandated by subsection (d) of the governing statute. The issue on appeal was whether the facts found by the district court supported that legal conclusion. However, it was difficult (if not impossible) to tell exactly what facts the district court's legal conclusion was based upon, because it appears from this Court's description of the district court's letter-decision in that case that an entire page of that letter-decision had somehow been omitted. See 2008 WL 4966493*6.

Actually, in *In re M.R.G.*, this Court identified two legal deficiencies in the district court's decision. The first one was the district court's legal conclusion that financial support provided by the natural father before the entry of a judicial decree of support but within the two-year window mandated by K.S.A. 59-2136(d) were mere gifts, and thus, were not to be considered in the court's assessment of the substantiality of the natural father's child support. This Court disagreed with that legal conclusion, and held that all of the payments made by the natural father during the two years preceding the filing of the petition for adoption had to be considered. See 2008 WL 4966493 *6-7.

The portion of this Court's unpublished decision in *In re M.R.G.* which Plaintiff cites as support for his proposed de novo standard of review does not really support the arguments Plaintiff is making here in favor of his novel proposition. There is no suggestion by this Court in its decision in *In re M.R.G.* that the district court in that case "overlooked" any undisputed evidence. Rather, as noted before, this Court was unable to discern what facts the district court had relied upon in reaching its legal conclusion, owing, again, to the obvious disconnect between the last sentence on page 2 and the first sentence on page 3 of the district court's letter-decision, which made it appear that the salient portion of the district court's letter-decision had somehow gone missing. As this Court noted, an absence of

specific factual findings would normally render meaningful appellate review impossible, and would therefore ordinarily necessitate a remand to the lower court for the purpose of making such findings. However, under the unique facts of *In re M.R.G.*, this Court held such a remand to be unnecessary. The reason for this ruling was simple: the amount of support the natural father should have paid (i.e., “as required by judicial decree”) and the amount of support he actually paid, during the two-year window mandated by K.S.A. 59-2136(d), were both mathematically quantifiable in dollars and cents, and the evidence upon which those two mathematical quantifications would be based was not in dispute. Thus, this Court held, the issue of whether the natural father’s actual support was “substantial” in relation to his required support presented a question of law, not one of fact.

As Defendant Birt will discuss further below, the testimony in this case which Plaintiff labels as “undisputed” and as “admissions” is not by its nature something which is quantifiable, like the evidence of dollars and cents was in *In re M.R.G.* Rather, the evidence in this case pertains to the state of mind of Defendant Birt and/or Jane Hergenreter. In addition, that testimony is susceptible to various inferences, and thus, it cannot be properly characterized as undisputed, either. Thus, the approach taken by this Court in *In re M.R.G.* is not translatable to this case.

The correct standard of appellate review which should be applied in this case is a very familiar one; and while it has been expressed in many different ways, those expressions all flow from a single central theme: an appellate court should not second-guess the fact-finder’s evaluation of the evidence presented at trial. Some of the various ways this central theme has been expressed by our Appellate Courts are as follows:

“Where a trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are

supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law...It is not the function of an appellate court to weigh conflicting evidence, pass on the credibility of witnesses,...or redetermine questions of fact. Where a trial judge, sitting as a trier of facts, makes a specific finding of fact on apparently conflicting or actually conflicting evidence, an appellate court is concerned only with evidence that supports the trial court's findings and not with evidence that might have supported contrary findings....In other words, an appellate court searches the record for the purpose of determining whether there is any substantial competent evidence to support the findings and verdict. If so, the appellate court will not weigh the evidence. Findings of fact determined on conflicting evidence are conclusive..." *Bell v. Tilton*, 234 Kan. 461, 468, 674 P.2d 468 (1983), citations omitted.

"When a case is tried to the court and the evidence is heard orally, the trial court's findings in the case have the force and effect of a jury's verdict and if supported by substantial competent evidence the findings will not be disturbed on appellate review." *Landrum v. Taylor*, 217 Kan. 113, 117-118, 535 P.2d 406 (1975).

"When a verdict is challenged for insufficiency of the evidence or as being contrary to the evidence, it is not the function of this court to weigh the evidence or pass on the credibility of the witnesses. If the evidence with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, will support the verdict, the verdict will not be disturbed on appeal." *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 461, 738 P.2d 1210 (1987).

"When a trial is to the court, a trial judge's findings of fact will not be set aside unless they are clearly erroneous, and due regard shall be given to the trial court's opportunity to judge the credibility of the witnesses." *Broadway Nat'l Bank v. G&L Athletic Supplies, Inc.*, 10 Kan.App.2d 43, 45, 691 P.2d 400, (1984), rev. denied 236 Kan. 875 (1985).

"Where findings are attacked for insufficiency of evidence, or as being contrary to the evidence, this court's power begins and ends with determining whether there is evidence to support such findings. Where the findings are so supported, they will not be disturbed on appeal." *In Re Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984).

The tried-and-true standard exemplified in these various iterations has served the Appellate Courts of Kansas well for literally the entire 148 years of their existence. Plaintiff would have this Court depart from this familiar standard, and apply instead an entirely different, de novo standard of review which has, apparently, never before been applied by our Appellate Courts. Even assuming that some rare case could conceivably exist where that novel standard of review might apply, (and by Plaintiff's own admission, he could locate no such case in the annals of published Kansas Appellate Court decisions), the instant case clearly is not that vehicle of change.

ARGUMENTS AND AUTHORITIES

ISSUE: The Trial Court's Finding of Fact, that a Valid and Binding Transfer of Legal Title to Real Estate By Deed Occurred on May 6, 1998, is Supported by Substantial, Competent Evidence; and the Trial Court's Conclusion of Law that Defendant Birt is the Rightful Owner of the Subject Realty is Correct in Light of that Finding of Fact.

A good way to begin the discussion of the issues and arguments which Plaintiff is raising in this appeal would be to review those aspects of the Trial Court's decision which Plaintiff specifically states in his brief that he is not challenging on appeal. The Trial Court found the deed to be genuine, and Plaintiff does not challenge that finding. The Trial Court also found Jane to be legally competent to execute the deed, and Plaintiff does not challenge that finding. And, the Trial Court also found no competent evidence to suggest that Defendant Birt exercised undue influence over Jane, or that Defendant Birt occupied a fiduciary position with respect to Jane. Plaintiff does not challenge those findings on appeal, either. As Plaintiff wisely concedes at pp. 10-11 of his Brief, the Trial Court made specific factual findings against those claims, and thus, in Plaintiff's own words, "it is highly

unlikely that the district court's conclusions would be overturned on appeal." (Appellant's Brief, p. 11.)

The sole issue raised here by Plaintiff concerns whether the deed which Jane Hergenreter prepared and gave to Defendant Birt on May 6, 1998, was effective to pass legal title to the subject property immediately to Defendant Birt at the time Jane delivered that deed to her. The focus of Plaintiff's attack on the legal effectiveness of the deed is actually quite narrow. It all boils down to whether there was a present intent on the part of Jane and Defendant Birt that legal title to the land would pass to Defendant at the same moment Jane gave her the deed. Issues of intent are normally ones of fact, and Plaintiff certainly treated the issue of intent in this case as one of fact at trial, for he presented every manner of circumstantial evidence at his disposal in an effort to convince the Trial Court those circumstances indicated a lack of present intent by Jane to convey legal title to Defendant Birt at the time of the deed's delivery. Plaintiff failed to convince the Trial Court on that issue, however, and the Trial Court made a specific finding of fact that the present intent of both Jane and Defendant Birt at the time the deed changed hands was for legal title to the land to immediately change hands as well.

Now that this case is on appeal, Plaintiff has changed his tune. He now contends that the issue of intent is one of law, over which this Court may exercise unlimited de novo review. As mentioned above, Plaintiff urges this Court to apply a revolutionary standard of review, and he bases this request on the assertion that the Trial Court "overlooked" two items of testimony by Defendant which Plaintiff claims constituted "indisputable proof" that no present intent to pass legal title existed at the time the deed was delivered to Defendant. As Defendant has already shown above, there is no legal support or precedent for the

unconventional standard of review Plaintiff would have this Court apply. As Defendant will further show below, the testimony upon which Plaintiff now relies was neither “overlooked” by the Trial Court, nor does it constitute “indisputable proof” of a lack of present intent. First, though, a brief review of the law of gifts in general, and the law of gifts by deed in particular, would seem to be in order.

The essential elements of a valid inter vivos gift are intent, delivery and acceptance. The intent must be that the gift be absolute, irrevocable and immediate. *Heiman v. Parrish*, 262 Kan. 926, 928, 942 P.2d 631 (1997).

Where the gift is of real estate, and the mechanism for making the gift is by deed, the same basic elements apply. In order for the gift to be valid, the intent of the grantor must be that the deed effect a present, operative and binding conveyance of title to the grantee. *Winsor v. Powell*, 209 Kan. 292, 497 P.2d 292 (1972).

Plaintiff challenges the validity of the delivery of the deed from Jane Hergenreter to Defendant. For starters, one thing is clear: the uncontroverted evidence in this case is that Jane physically transferred the deed to Defendant on the day it was executed, (May 6, 1998), and that the deed remained in Defendant’s possession continually until Defendant recorded it shortly after Jane’s death on August 25, 2005, just as Jane had requested and Defendant had promised to do. Plaintiff may not like that uncontroverted testimony, but he presented absolutely no evidence at trial to the contrary. Because Jane Hergenreter unquestionably parted with control of the deed, the only question remaining is whether her intent was to make a present, operative and binding conveyance of the title to the property to Defendant when she delivered the deed to her.

As Plaintiff correctly observes, physical delivery of the deed does not in and of itself always denote the intent to make a present transfer of title. However, one thing is clear in Kansas law: when a deed is in the possession of the grantee at the time of the grantor's death, there arises a presumption that the grantor's intent was to pass immediate title to the grantee as of the date the deed was placed in her possession. Once that presumption arises, anyone challenging the validity of the deed's delivery bears the burden of overcoming that presumption, and that burden must be satisfied by the presentation of clear and convincing evidence of a contrary intent on the part of the grantor. *Hinchliffe v. Fischer*, 198 Kan. 365, 424 P.2d 581 (1967); *Hoard v. Jones*, 119 Kan. 138, 237 Kan. 888 (1925). Because Defendant Birt had possession of the deed at the time of Jane's death (and, in fact, for over seven years prior to that), this presumption operates here.

At trial, Plaintiff presented what could colloquially be termed a "laundry list" of circumstances which he argued were sufficient to overcome the presumption of an intent on Jane's part to pass title to Defendant Birt at the same time Jane gave the deed to her. The Trial Court obviously did not agree with Plaintiff on the vitality of these numerous points, and it made findings of fact and drew inferences directly contrary to Plaintiff's arguments. On appeal, Plaintiff has conceded that this was the prerogative of the Trial Court, and he has expressly abandoned all of those circumstantial arguments. Thus, in accordance with the appropriate standard of review, this Court should not concern itself with the myriad of circumstances which were the centerpiece of Plaintiff's case in the lower court.

On appeal, Plaintiff's arguments and theories have totally changed course. Here, he cites what he says are two pieces of evidence which were "overlooked" by the Trial Court, and he contends these two pieces of evidence are "indisputable proof" that there was an

absence of the requisite intent to make a present transfer of title. These two supposedly “overlooked” and “indisputable” pieces of evidence involve a letter written by Defendant Birt’s counsel in 2006, and certain testimony by Defendant Birt concerning what she would have wanted to happen with the subject property in the event she had died before Jane did.

First off, it is unlikely the Trial Court “overlooked” these two points, since Plaintiff specifically mentioned both of them in his “Suggested Findings of Fact and Conclusions of Law”, at paragraphs 33 and 37, pages 9 and 10 of that pleading, which was filed shortly after the bench trial was held. (ROA, Vol. II, pp. 164-165.) Presumably, it is the fact that the Trial Court chose not to mention either of these two points in its Memorandum Decision and Order which makes Plaintiff believe that the Trial Court must have “overlooked” them. Defendant Birt suggests that the real reason why these two points were not mentioned in the decision of the Trial Court is probably because that Court didn’t deem them worthy of mention.

The first point raised here by Plaintiff concerns a letter dated October 16, 2006, from Defendant Birt’s counsel to attorney John Terry Moore, who represented the various legatees under the Will, (i.e., Bill’s nephews and nieces), whose allegations against Defendant Birt were the genesis of this lawsuit. A copy of that letter is appended to Plaintiff’s Brief, so Defendant Birt will not append a copy to hers. The portion of the letter which Plaintiff considers significant reads 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.

When asked if she agreed with these statements, Defendant Birt testified at trial that she did. (ROA, Vol. IV, pp.61-62.)

Plaintiff seems to think this amounts to an admission against interest. Plaintiff obviously hasn't analyzed the precise language very carefully, or perhaps he hopes this Court won't do so. Let's look closely at these statements.

1. "Prior to filing the deed...": As Jane and Defendant Birt had agreed at the time the deed was delivered, the deed was not filed until after Jane's death; thus, the rest of this first sentence should be analyzed as if it began, "Prior to Jane's death".

2. "...Mrs. Hergenreter and Lois Birt treated the property as Jane having retained a life estate": At the time Jane gave her the deed, Defendant Birt promised to let Jane live on the property for the rest of her life, even though the deed from Jane gave her fee simple title to the land. Defendant Birt kept that promise. Thus, the two of them did in fact treat the property as if Jane had reserved a life estate, even though the deed did not expressly so provide.

3. "Prior to delivery of the deed, Mrs. Hergenreter could have destroyed the deed had that been her choice": This statement is entirely true. Prior to the delivery of any deed, the grantor can do anything she wants with it. However, once the deed has been delivered to the grantee, it is no longer in the grantor's possession nor under her control, so she can no longer do anything she wants with it. That is exactly what the situation was in this case: once Jane delivered the deed to Defendant Birt on the same day she signed it, which was roughly seven years before she died, Jane no longer had possession or control over the deed. Defendant Birt had possession of the deed from that moment on. Thus the converse of the above-quoted statement is also true: after delivery of the deed, Jane could not have destroyed it.

Plainly, the statements in Mr. Hamilton's letter to Mr. Moore are not only correct statements of the law generally, but they actually support Defendant Birt's claims and legal theories in this case. Plaintiff's suggestion that these statements can somehow be construed as "admissions against interest", and thereby used to defeat Defendant Birt's claims, is pure fancy. It should not be surprising, then, that the Trial Court probably didn't deem these matters worthy of discussion in its Memorandum Decision.

The second piece of evidence which Plaintiff asserts is "indisputable proof" of a lack of intent for the deed to be effective upon delivery concerns a question posed to Defendant Birt which envisions a hypothetical scenario where Defendant Birt dies before Mrs. Hergenreter. In her response to this question, Defendant Birt indicated that she would have wanted the real estate to go back to Jane had she died before Jane did.

The entire exchange on this subject between Plaintiff's counsel and Defendant Birt is confined to a mere six lines on one page of a two-hundred fifteen page transcript. Obviously, in such a short exchange, Defendant Birt was not able to fully express all of her understanding and intentions. Basically, she was asked why she didn't tell anyone about the deed Jane gave her, and she answered that she kept the deed secret because she would have wanted the land to go back to Jane if she died first. This testimony is not an "admission against interest" because it is subject to reasonable inferences in Defendant Birt's favor. One such reasonable inference which can be drawn from this testimony is that Defendant Birt believed that she had title to the land; that she would have wanted that title to go back to Jane as part of her own estate plan were she to be the first to die; and that she believed that keeping the deed a secret from everyone else other than Jane and herself would accomplish that desired goal, because presumably no one else would find the deed and record it in her

name, posthumously. Defendant Birt may have been mistaken about whether her ad hoc and hypothetical method of “estate planning” was the legally correct way to accomplish her desired goal, but she must be forgiven for any misunderstandings in that regard, for she is not a lawyer. For our purposes here, it is enough to say that no matter what might have been Defendant Birt’s belief about the best or proper way for her to have returned title to the realty back to Jane had she died first, her hypothetical “estate plan” does not negate her unequivocal testimony that she had valid legal title to the land as of May 6, 1998, by virtue of the deed Jane had given her on that date.

The existence of reasonable inferences from Defendant Birt’s answers to this hypothetical scenario which are totally consistent with Defendant Birt’s unequivocal testimony that the delivery of the deed to her was intended by both her and Jane to effect an immediate transfer of legal title to her defeats Plaintiff’s second argument. There is no way to know for certain what inferences the Trial Court may have drawn from this testimony, because no mention of this testimony is found in that Court’s decision. However, it is entirely reasonable to assume that any such “unspoken” inferences were drawn in favor of the Trial Court’s ultimate findings and conclusions. That is the approach this Court should adopt in its rejection of Plaintiff’s arguments on this point.

Finally, Plaintiff criticizes the Trial Court in its application of the general law governing the validity of deeds. Considering that the Trial Court made specific findings of fact which were fatal to Plaintiff’s claims, Plaintiff’s criticisms of that Court’s legal analysis are essentially moot. What Plaintiff is really criticizing here is the fact that the Trial Court considered this case more akin to a line of cases where legal title was found to have passed immediately upon delivery of the deed, rather than to the line of cases Plaintiff cited to it,

where the courts held to the contrary. In actuality, then, Plaintiff's criticism of the Trial Court's legal analysis is really just another incarnation of his dissatisfaction with the Trial Court's findings of fact. The truth is, though, this case does bear much greater factual similarity to the line of cases the Trial Court relied upon than it does to the cases Plaintiff relies upon.

It seems relatively clear from Plaintiff's brief that he recognizes that in any case where a deed has been manually delivered to the grantee (or to a third party to hold on behalf of the grantee) during the life of the grantor, the legal effect of that deed is dependent upon the mental intent of the grantor.

"As has been repeatedly decided, delivery is largely a matter of intention, and the test is: Did the grantor by her words and acts evidence an intention to part with control of the instrument, and regard it as a present, operative, and binding conveyance?" *Donaldson v. Brewer*, 103 Kan. 690, 692, 175 Pac. 968 (1918).

What Plaintiff doesn't seem to recognize is that the question of the grantor's mental intent is almost always an issue of fact. Here, after hearing all of the evidence on both sides of the question, the Trial Court resolved that issue of fact in Defendant Birt's favor.

Plaintiff argues to this Court that the case-at-bar is analogous to prior decisions such as *Bruce v. Mathewson*, 97 Kan. 466, 155 Pac. 787 (1916), *Bremyer v. School Ass'n of Swedish Evangelical Mission Conf. Of Kansas*, 86 Kan. 644, 122 Pac. 104 (1912), *Truax v. Southwestern College*, 214 Kan. 873, 522 P.2d 412 (1974), *Lowry v. Lowry*, 160 Kan. 11, 159 P.2d 411 (1945), and *Madden v. Glathart*, 125 Kan. 466, 265 Pac. 42 (1928). Needless to say, in each of those prior decisions, the findings of the courts were that the grantor lacked the present intent to pass legal title to the grantee at the time the deed was delivered.

Plaintiff also criticizes the Trial Court's reliance upon *In Re Hulteen*, 170 Kan. 515, 227 P.2d 112 (1951) and *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490 (1899), where the courts found that a present intent by the grantor to pass legal title to the grantee did exist at the time the deed was delivered. The principal basis for Plaintiff's criticisms of *Hulteen* and *Wuester* in particular is that they involved delivery of the deed to a third-party, to hold in escrow, and not delivery to the grantee directly. Plaintiff cautions this Court not to "confuse the principles from those cases with those where a third party was not involved." (Brief of Appellant, page 14.) Plaintiff cites no authority, though, for the proposition that "the principles" which govern the question of the grantor's intent should vary depending on whether the delivery is to the grantee or to a third party. Defendant Birt submits that the rule which made delivery to a third party equally effective to pass title as does delivery to the grantee herself, actually grew out of the original rule that a grantor must divest herself of possession and control of the deed by delivery thereof to the grantee during her lifetime in order for the deed to effect valid inter vivos transfer of legal title. See, e.g., *Yaple v. Morris*, 194 Kan. 149, 398 P.2d 320 (1965), where the Supreme Court held that delivery to a third party was "constructive delivery" to the grantee, and on that ground rejected the argument that there was no proof that the grantee had "accepted" the gift where delivery was made to a third party. There simply is no merit to Plaintiff's argument that some legal distinction exists between "third-party" and "first-party" delivery cases, which requires a different method of analysis of the issue of the grantor's intent depending upon who accepts delivery.

The fact that it is immaterial whether the delivery is made to a third party or to the grantee personally is readily apparent from the decision in *Richard v. Leinbach*, 146 Kan. 210, 69 P.2d 674 (1936). There, the deed was executed by the grantor and delivered to the

grantee a little over six months before the grantor's death. During that six months, the grantor retained possession and control of the land, and derived income from it; and the grantee did not attempt to interfere with the grantor's possession, nor did he inform anyone of the deed he held until after the grantor's death. The Supreme Court upheld the trial court's finding of fact that a present transfer of legal title took place upon delivery of the deed by the grantor to the grantee. Interestingly enough, the Supreme Court also quoted from *Small v. Small*, 99 Kan. 321, 322, 161 Pac. 598 (1916), where it had voiced the following observation:

“The belief is quite common that a deed delivered before death, but accompanied by some arrangement reserving beneficial use until death, is a better way of disposing of property than by will.” 146 Kan. at 216.

The fact is, *Hulteen*, *Wuester* and the other cases cited by the Trial Court stand for the proposition that where the grantor parts with possession and control of a deed during his lifetime, title is deemed to vest immediately in the grantee, even though the grantor retains actual possession and enjoyment of the real property itself during the remainder of his lifetime. This is exactly what the Trial Court found and concluded in this case: Jane gifted fee simple ownership of the Shawnee County realty to Defendant Birt by deed delivered on May 6, 1998, subject to Defendant Birt's promise to let Jane continue to live on the property until she died, and not to record the deed until then either. In view of the evidence in this case, these findings and conclusions make perfect sense, because Jane would have had no need to ask Defendant Birt to promise to let her live on the property for the rest of her life if she didn't intend for the deed to pass legal title to the property to Defendant Birt immediately upon its delivery to her.

If all of the cases on this subject teach us anything, it is that the grantor's intent is an issue of fact to be determined by the trier-of-fact from all of the evidence. Thus, each case turns on its own unique facts. In the cases cited by Plaintiff, the trial courts had determined that the facts negated the existence of a present intent to transfer title by deed, and these findings of fact were universally upheld on appeal. In the cases advanced by Defendant Birt, the trial courts' findings have been in favor of a present intent to transfer title by deed, and those findings of fact were likewise universally upheld on appeal.

In this case, the evidence which was presented to the Trial Court on the issue of Jane and Defendant Birt's intent to make a present transfer of legal title to the Shawnee County property was conflicting. Neither party presented any evidence which could be termed "conclusive", in the sense of entitling either party to a judgment in its favor as a matter of law, (which is what Plaintiff is really seeking from this Court in this appeal). The weighing of evidence, and the drawing of inferences from that evidence, were the province of the Trial Court. Frankly, had the Trial Court found that Jane did not intend to pass title to Defendant Birt at the time she delivered the deed to her, Defendant Birt would be faced with the same standard of review on appeal that Plaintiff faces here. Defendant Birt would no doubt lose her appeal in that hypothetical situation, just as Plaintiff should lose his appeal here. The fact is, though, the Trial Court chose to accept Defendant Birt's evidence, and her theory of the case, as being more forceful, probative and credible than Plaintiff's when it rendered the following findings and conclusions with respect to the land:

"In the present case, the evidence is that the deed was prepared, executed, acknowledge and delivered on May 6, 1998, at which time Jane Hergenreter, grantor/donor, said to Lois Birt, grantee/donee (*so far as pertinent here*):

"I have one request, that you hold this until I die before you record it, and that I be allowed to live on the property until I die."...

“Lois Birt did not take possession of any of the property identified in the deed and received no benefit from it until after Jane Hergenreter died. As was said in the Hulteen case, “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.” *In re Hulteen, supra*. The deed is shown to have been continuously in the possession of Lois Birt since the date of its delivery to her on May 6, 1998.”

“Even though Jane Hergenreter maintained possession of land she did not ever have possession of the deed after it had been delivered to Birt.”...

“For the reasons discussed herein it is my conclusion that on May 6, 1998, Jane Hergenreter made a gift to Lois Birt of the property described in the deed which was prepared on that date and which she delivered to Lois Birt on that date. The deed has remained continuously in Lois Birt’s possession until August 25, 2005, when, upon being told of Jane’s death, Ms. Birt delivered the deed to the Register of Deeds office where it was then recorded. At no time did Jane Hergenreter act to cancel or invalidate the deed. The fact that she remained in the property and received its benefit until she died was consistent with her wishes and the agreement of Birt who was willing to accept the gift on those terms, recognizing, in effect, a life estate interest in the property retained by Jane Hergenreter.” (Memorandum Decision, pp. 23-24, 25, 27, ROA Vol. III, pp. 267-268, 269, 271).

These findings are based on substantial, competent evidence, and these conclusions are based on a correct application of the governing law to the facts properly found. Thus, the judgment of the Trial Court declaring Defendant Birt to be the fee simple owner of the Shawnee County property should be affirmed.

CONCLUSION

This case involves title to and ownership of certain property, both real and personal. Plaintiff claims certain property was owned by Jane M. Hergenreter at the time of her death, and therefore it should be part of her Decedent’s Estate. Defendant Birt asserts a claim of

ownership over the same property, based upon gifts of the property made to her by Mrs. Hergenreter while she was still alive.

The competing claims in this case were tried to the District Court. The evidence presented by the parties was conflicting on many points, and, in some instances, even where the evidence was not conflicting; it was possible to derive more than one reasonable inference from such evidence. After hearing all the evidence, and considering the suggested findings of fact and conclusions of law submitted by each party, the Trial Court issued its decision. That decision comprises twenty-eight (28) pages. In its decision, the Trial Court exhaustively reviewed the evidence, and from that evidence, made findings of fact. In that decision, the Trial Court also reviewed the pertinent law in detail, and it properly applied that law to the facts it had found. Finally, based on those legal conclusions, the Trial Court rendered judgment.

The weighing of evidence and the drawing of inferences from the evidence is the province of the finder of fact. Here, that finder of fact was the Trial Court. Based upon a standard of review which is as old as the Appellate Courts of this State themselves, a reviewing court should not substitute its judgment for that of the finder of facts on such matters of fact. Instead, that reviewing court should consider only the evidence which supports the lower court's findings of fact, and the reviewing court's sole inquiry should be whether there is substantial, competent evidence to support those findings of fact. If so, the reviewing court should affirm those findings of fact.

There can be no doubt that when this traditional standard of review is applied to the Trial Court's decision in this case, that decision must be affirmed with respect to the realty. Even though he may not be willing to come right out and say it, the approach Plaintiff has

taken in his appeal clearly shows that he too recognizes this plain fact. Plaintiff has asked this Court to discard the traditional standard of review and to apply instead a standard which would permit this Court to substitute its judgment for that of the Trial Court on matters relating to the resolution of disputed facts and competing inferences. There is only one reason why Plaintiff would take this approach: he knows that if this Court applies the traditional standard of review to this appeal, he loses.

The standard of review which plaintiff urges this Court to apply is so unconventional that Plaintiff cannot cite a single, solitary published decision by any appellate court where such a standard was articulated. Rather, Plaintiff has cited an unpublished decision of this Court, where he contends his novel standard of review was applied. Upon careful analysis, however, even the unpublished decision Plaintiff has cited does not support the standard of review he wants this Court to apply to this case.

This Court should apply to this case the same standard of review which has historically been applied in the countless number of cases which have come before it. Under that proper standard of review, the lower court's findings of fact are inviolate so long as there is any substantial competent evidence to support them; and the inferences drawn by the lower court are likewise conclusive on this Court so long as any reasonable person could draw the same inferences from the evidence as did the lower court. Under that proper standard, the only area over which this Court should exercise de novo review is the lower court's application of the law to the facts it found.

In the case-at-bar, the Trial Court correctly identified the requisite legal elements of an inter vivos gift. The Trial Court then evaluated the evidence presented to it at trial, and from that evidence it made findings of fact and drew inferences. All of those findings of

fact are supported by substantial, competent evidence, and all of those inferences are reasonable. The Trial Court then applied the law to those facts it had found, and it concluded that as to the realty, the elements of a valid inter vivos gift had been met. Those legal conclusions are correct, and they adequately explain and support the Trial Court's decision. In short, there is no reversible error in the decision of the Trial Court with respect to the real property at issue, and that aspect of the Trial Court's decision therefore should be affirmed.

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JEFFREY O. HEEB, Special Administrator of the Estate of
Jane M. Hergenreter, Deceased

Plaintiff/Appellant,

v.

LOIS M. BIRT,

Defendant/Appellee.

BRIEF OF CROSS-APPELLANT

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

NATURE OF THE CASE

Defendant Birt hereby adopts and incorporates the “Nature of the Case” from her Brief of Appellant, supra at pp. 1-2.

ISSUES ON CROSS-APPEAL

There are no issues on Cross-Appeal, as Defendant Birt has chosen not to pursue her Cross-Appeal.

STATEMENTS OF FACT

Defendant Birt hereby adopts and incorporates the “Statement of Facts” from her Brief of Appellant, supra, at pp. 3-7.

STANDARD OF APPELLATE REVIEW

Defendant Birt hereby adopts and incorporates the “Standards of Appellate Review” from her Brief of Appellant, supra, at pp. 8-12.

ARGUMENTS AND AUTHORITIES

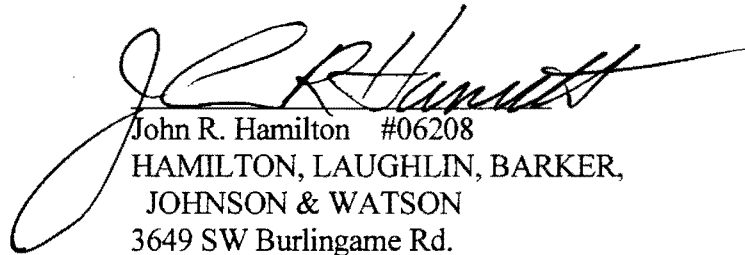
Following the entry of judgment by the Trial Court, and the filing of Plaintiff’s Notice of Appeal, Defendant filed her Notice of Cross-Appeal for the purpose of preserving her right to challenge that portion of the Trial Court’s judgment which was adverse to her, (i.e., the portion relating to the proceeds to the bank account). Thereafter, Defendant docketed her Cross-Appeal in this Court in a timely manner. Defendant Birt stands by her interpretation of the statements made to her by Mrs. Hergenreter concerning the bank account: that Jane’s intention was to gift that account to Defendant Birt personally. However, in the course of reviewing the record and preparing her Appellate Brief, Defendant came to the determination that the inference drawn by the Trial Court from that evidence, which is contrary to Defendant Birt’s own personal interpretation, is nevertheless a reasonable one under all the circumstances. Thus, applying the traditional standard of review to the Trial Court’s findings and conclusions with respect to the bank account, Defendant Birt determined there is no basis for reversal of that portion of the Trial Court’s decision, any more than there is for the Trial Court’s decision in her favor with respect to the realty. Based upon that determination, Defendant concluded that she could not in good faith continue to pursue her Cross-Appeal on the merits. Thus, Defendant is hereby formally

withdrawing her Cross-Appeal. Defendant is therefore requesting this Court to affirm the Trial Court's findings, conclusions and judgment with respect to the bank account, along with that Court's findings, conclusions and judgment with respect to the land.

CONCLUSION

Defendant Birt has chosen not to pursue her Cross-Appeal. Therefore, this Court should affirm the Trial Court's findings of fact and conclusions of law with regard to the bank account, and the judgment entered by that Court on the basis thereof, in its entirety, for the reasons expressed above.

Respectfully submitted,

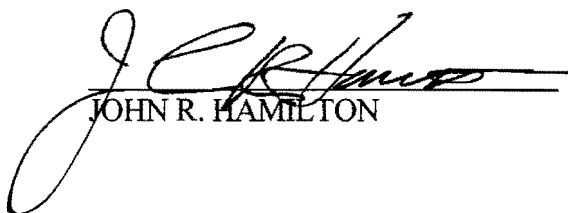


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CERTIFICATE OF SERVICE

I do hereby certify that I have served two true and correct copies of the above and foregoing document on counsel of record by () placing the same in the U.S. mail, postage prepaid, () facsimile to the phone number(s) listed below, and that the transmission was reported as complete and without error and that the facsimile machine complied with Supreme Court Rule 119(b)(3), or () hand delivery, on this, the 16th day of October, 2009, to:

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