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**CAROL G. GREEN
CLERK OF APPELLATE COURTS**

NO. 09-103374-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ANTHONY ANGUIANO, DECEASED
Appellee,

vs.

LARRY'S ELECTRICAL CONTRACTING, L.L.C. and
CONTINENTAL WESTERN INSURANCE CO.
Appellees,

(TASHA ANGUIANO)
Appellant,

(THE MINOR CHILDREN OF PATRICIA ANGUIANO and ANTHONY ANGUIANO)
Appellees.

**BRIEF OF THE MINOR CHILDREN OF
PATRICIA ANGUIANO AND ANTHONY ANGUIANO**

Appeal from the Kansas Division of Workers' Compensation Appeals Board
Docket No. 1,036,237
Dated October 16, 2009

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ORAL ARGUMENT REQUESTED

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Appellant,

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Appellees.

**BRIEF OF THE MINOR CHILDREN OF
PATRICIA ANGUIANO AND ANTHONY ANGUIANO**

NATURE OF THE CASE

The Administrative Law Judge entered an award in this matter concluding Tasha Burns was not the common law wife of the deceased, Anthony R. Anguiano and therefore, was not entitled to death benefits under the Workers' Compensation Act. Burns appealed the Administrative Law Judge's award to the Workers' Compensation Appeals Board. The Workers' Compensation Appeals Board agreed with the Administrative Law Judge's findings and conclusions and therefore, found a common law marriage did not exist and Tasha Burns was not entitled to receive any death benefits under the Workers' Compensation Act. Burns appealed the Board's decision.

STATEMENT OF THE ISSUES

- I. **THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE ALJ AND BOARD'S FINDING THAT TASHA BURNS WAS NOT COMMON LAW MARRIED TO THE DECEASED.**
- II. **THE ALJ AND BOARD CORRECTLY APPLIED AND INTERPRETED COMMON LAW MARRIAGE.**

STATEMENT OF FACTS

Anthony Anguiano and Patricia Anguiano were married in 2000. (R. II, 10.)

During their marriage, Anthony and Patricia Anguiano had two minor children (R. II, 11-12.)

Anthony Anguiano and Tasha Burns met in early 2003. (R. III, 22.) Within a few months,

Anthony and Burns began living together at Burn's mother's residence. (R. III, 22.) Anthony

Anguiano and Patricia Anguiano obtained a divorce in 2004. (R. II, 10.)

Throughout their relationship, Anthony Anguiano asked Tasha Burns to marry him on several occasions; however, Burns never took him seriously as Anthony Anguiano had always been drinking during these discussions. (R. III, 29-30.) Anthony Anguiano gave Burns an engagement ring during Christmas in 2005. (R. III, 30-31.) Burns always referred to the ring as an engagement ring; never a wedding ring. (R. V, 160.) At various functions, Anthony Anguiano would tell people he was going to marry Burns; but, he never stated they were married. (R. III, 60-61.) Based on Burns testimony, she and Anthony Anguiano did not get the opportunity to get married before he passed away. (R. VI, 30-31.)

During their relationship, Burns identified herself as single on her individual income tax returns and on employment applications. (R. III, 67-68, 101.) In fact, Burns signed her 2005, 2006 and 2007 income tax returns as "Tasha Burns." (R. III, 58, 91.) Burns never used

Anguiano's last name for any benefits, health insurance, in any official capacity, or on any document. (R. III, 103-104.) Tasha and Anthony signed the rental agreement for the house in which they lived together in their individual capacities. (R. III, 38.) Again, Burns signed the rental agreement as "Tasha Burns;" not as Tasha Anguiano. (R. III, 38.) Likewise, Burns and Anthony Anguiano never maintained joint bank accounts. (R. III, 45, 65.)

According to Burns, Anthony Anguiano would sometimes refer to her as his wife to his family and a few friends; however, Burns could not recall when any such statement may have been made. (R. III, 86.) When introducing herself, Burns would use "Burns" as her last name. (R. V, 137-38.) Additionally, Burns and Anthony Anguiano did not call each other husband and wife; rather, their names for each other were "old man," "old lady," and "baby." (R. VI, 11.)

On August 22, 2007, Anthony R. Anguiano died during the course of his employment with Larry McCall Electrical Contractors. (R. I, 100.) After Anthony Anguiano passed away, Burns assisted with providing information for the death certificate and for the obituary; nonetheless, the death certificate and obituary referred to her as Anthony Anguiano's "companion;" not his wife. (R. VI, 26, 29-30.)

On May 7, 2009, the Administrative Law Judge ("ALJ") entered his award, concluding Burns was not the common law wife of the deceased and therefore, was not entitled to death benefits under the Workers' Compensation Act. (R. I, 99-102.) The ALJ further distributed the death benefits to the four dependent children of the deceased. (R. I, 103-04.) Burns appealed the ALJ's award to the Workers' Compensation Appeals Board ("Board"). (R. I, 108-09.)

The Board modified the ALJ's decision to provide payments to continue to any minor child who has not reached the age of 18 years irrespective of the cap of \$250,000.00; however, affirmed all other findings of the ALJ. (R. I, 175-81.) Burns appealed the Board's decision.

ARGUMENTS AND AUTHORITIES

Standard Of Review

Under K.S.A. 44-556(a), the decisions of the Workers' Compensation Board are reviewed under the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* Under the Kansas Judicial Review Act,

"(c) The court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for

judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) For purposes of this section, 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

(e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error." K.S.A. 677-621 (2009 Supp.)

I. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE ALJ AND BOARD'S FINDING THAT TASHA BURNS WAS NOT COMMON LAW MARRIED TO THE DECEASED.

Tasha Burns maintains the Administrative Law Judge and the Appeals Board ignored uncontroverted evidence in determining she was not common law married to the deceased, Anthony Anguiano. Specifically, Burns suggests the ALJ and the Board ignored the following evidence:

1. Tasha Burns and Anthony Anguiano exchanged engagement rings;
2. Tasha Burns and Anthony Anguiano lived together;
3. The Social Security Administration found Tasha Burns and Anthony Anguiano to be a married couple;
4. Tasha Burns stated she was common law married to Anthony Anguiano;

5. Anthony Anguiano's family's testimony regarding the alleged marriage;
6. Anthony Anguiano publicly referred to Tasha Burns as his wife;
7. Anthony Anguiano referred to Tasha Burns as his wife to her brothers, friends and grandmother; and
8. Tasha Burns and Anthony Anguiano placed a stone in the front yard bearing the name "Anguiano."

Initially, one must point out the facts alleged above are not uncontroverted as suggested by Tasha Burns. Not only are these allegations controverted, but as will be discussed herein, they are also contradicted by Burns' own testimony. Indeed, the exhibits attached to Burns' brief do not completely support Burns' alleged facts. More importantly, even if the alleged facts were completely uncontroverted--which they are not--many of them only point towards one element of a common law marriage, *i.e.*, whether Burns and Anthony Anguiano held themselves out to the public as husband and wife. A common law marriage cannot be established if there was no present marriage agreement. *See, Schrader v. Schrader*, 207 Kan. 350, 350-52, 484 P.2d 1007 (1977). Burns offers absolutely no testimony she and Anthony Anguiano had a present agreement to be married; rather, it is clear from her testimony they merely intended to be married sometime in the future.

A. The ALJ and Board's Finding That Tasha Burns and Anthony Anguiano Were Not Common Law Married Was Supported by Substantial Evidence.

A review of the ALJ award and the Board's order reveals both the ALJ and the Board considered all the facts outlined by Tasha Burns above. (R. I, 101-02, 177-82.) Based upon all

the evidence, both the ALJ and the Board concluded Tasha Burns and Anthony Anguiano did not have a present agreement to be married. Without a doubt, when the record is reviewed as a whole, the ALJ and Board's decisions were supported by substantial evidence.

In order to establish a common law marriage, the party must establish the following essential elements:

"(1) Capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public. *In re Estate of Antonopoulos*, 268 Kan. 178, 192, 993 P.2d 637 (1999).

Each element must coexist to establish a common law marriage." *Fleming v. Fleming*, 221 Kan. 290, 291, 559 P.2d 329 (1977).

1. Capacity Of The Parties To Marry

There is no issue as to whether the parties had a capacity to marry.

2. A Present Marriage Agreement Between The Parties

There is absolutely no evidence Tasha Burns and Anthony Anguiano had a present marriage agreement. On the contrary, Burns' testimony supports an agreement to be married in the future. Although a marriage agreement does not need to be in a particular form, "it is essential there be a present and mutual consent to marriage between the parties." *In re Estate of Antonopoulos*, 268 Kan. 178, 192, 993 P.2d 637 (1999). An agreement to be married in the future is insufficient to establish a common law marriage. *See In re Estate of Keimig*, 215 Kan. 869, 872, 528 P.2d 1228 (1974) (quoting, *In re Estate of Freeman*, 171 Kan 211, 213, 231 P.2d 261 (1951)).

Anthony Anguiano asked Tasha Burns on several occasions to marry him; however, Burns never took him seriously as Anthony Anguiano had always been drinking during

these discussions. In 2005, Anthony Anguiano gave Burns an engagement ring. Nonetheless, it is clear the ring was merely a promise to be married in the future. Burns always referred to the ring as an engagement ring; never a wedding ring. By definition, an engagement is an agreement to be married. Webster's Dictionary 432 (2d ed. 1997). An agreement to marry implies a future event; not a present intent.

At the regular hearing, Burns elaborated further regarding the ring and their future intent to marry.

"Q. Now, you testified about some rings that were given?

A. Uh-huh.

Q. Is that correct?

A. Yes.

Q. And do you recall testifying that those were engagement rings?

A. Yeah. To me and Tony, they were.

Q. And you never referred to those as a wedding ring, did you?

A. No.

Q. And so when Mr. Anguiano gave you that ring, it was your opinion that was-- his intention was to be engaged to you?

A. My intention was for him and me to get married.

Q. But you never did get married, did you?

MR. WORKS: Object. It's hearsay.

JUDGE AVERY: Well, I don't think it was a question whether they were actually married before, if that's what you're referring to. Are you referring to a legal marriage in a court of law or a church?

MR. LEMON: Well, what I'm asking about is the intent to marry, if there was something done after the rings were exchanged.

JUDGE AVERY: Well, answer that.

- A. I believe me and Tony were going to get married. We didn't know Tony was going to pass away. I don't know what else to say." (R. VI, 31-31.)

Based on Burns' testimony, Burns and Anthony Anguiano may have intended to get married; however, by Burns' own admission, they did not get that chance because Anthony passed away. As such, the evidence does not support a present agreement to be married.

In addition, during the years Burns alleges to be common law married to Anthony Anguiano, Burns and Anthony Anguiano filed individual income tax returns. Burns never identified herself as married on any tax returns. Not only did Burns and Anthony Anguiano file individual income tax returns, but Burns signed her 2005, 2006 and 2007 income tax returns as "Tasha Burns." Burns further identified herself as single on employment applications. Burns admitted she would use "Burns" as her last name if introduced to a new person. In fact, Burns never used Anguiano's last name for any benefits, health insurance, in any official capacity, or on any document. Even the rental agreement for the house in which they lived in together was signed in their individual capacities. Again, Burns signed the rental agreement as "Tasha Burns;" not as Tasha Anguiano. Finally, Burns and Anthony Anguiano never maintained joint bank accounts.

Even if the evidence overwhelmingly established that Burns and Anthony Anguiano held each other out as husband and wife--which it is not in this case--a common law marriage cannot be established if there was no present marriage agreement. *See, Schrader v. Schrader*, 207 Kan. 349, 350-52, 484 P.2d 1007 (1971). In *Schrader*, there was significant

evidence supporting that the parties held each other out to the public as husband and wife; nonetheless, the evidence did not show a present existing marriage agreement between the parties. *Id.* at 352. As such, the Kansas Supreme Court affirmed the trial court's finding that a common law marriage did not exist. *Id.* at 350-53.

Clearly, Tasha Burns and Anthony Anguiano never entered into a specific agreement to become husband and wife. Indeed, Burns' desire to be identified as Mrs. Anguiano did not surface until after Anthony Anguiano's death. Under the facts of this case, a present marriage agreement does not exist. Because the evidence does not support a present marriage agreement between Burns and Anthony Anguiano, Burns cannot meet her burden of proving the existence of a common law marriage. Accordingly, the ALJ and Board's orders must be affirmed.

3. Holding Out Of Each Other As Husband And Wife To The Public

Even if the facts somehow supported a present agreement to be married, the ALJ and the Board's decisions to the contrary would be harmless error as a review of the record further reveals Tasha Burns and Anthony Anguiano did not hold each other out as husband and wife to the public. Harmless error is error which does not prejudice the substantial rights of a party. It affords no basis for reversal of a judgment and must be disregarded. *Smith v. Printup*, 262 Kan. 587, 603, 930 P.2d 1261 (1997).

The record as a whole further reveals Tasha Burns and Anthony Anguiano did not hold each other out as husband and wife to the public. An important fact in this case is that Burns offered absolutely no testimony she ever introduced Anthony Anguiano as her husband to

her family or friends. Burns offers a document submitted to the Social Security Administration whereby, Burns' brother makes general statements regarding his understanding of Burns and Anthony Anguiano's relationship. At most, this statement merely states Burns' brother believed Burns and Anthony Anguiano took care of each other and their children, not that they held out to the public that they were married.

Burns offered testimony that Anthony Anguiano would sometimes refer to her as his wife to his family and a few friends; however, Burns could not provide any details as to when any such statement may have been made. Furthermore, Burns failed to provide any corroborating testimony from any family members or friends who supposedly heard these statements. More importantly, however, Burns contradicted this testimony:

"Q. I'll ask it a different way. Did you ever have a -- was there ever a -- like just a family function or a family event or a meeting of people where there were people that knew you and Tony where either you or Tony made a declaration to everybody there that you considered each other to be husband and wife?

A. Well, there was many nights like that that Tony would say that.

Q. Would you say -- okay. Well, tell me?

A. **He would say I'm going to marry this girl or this is my baby and I'm going to marry her.**

Q. Okay. What time frame are we talking about when that happened?

A. God, I don't know. Two or three years ago.

Q. Okay.

A. He'd say it all the time.

Q. **Okay. Were you ever at one of these functions where Tony said, instead of saying I'm going to marry her, that we are married?**

A. No.

Q. No?

A. No." (R. III, 60-61.) (Emphasis added.)

The overwhelming evidence in this matter reveals Burns and Anthony Anguiano did not hold each other out as husband and wife to the public. Burns and Anthony Anguiano did not call each other husband and wife; rather, their names for each other were "old man," "old lady," and "baby." Even after Anthony Anguiano passed away, Burns did not refer to herself as his wife. Although Burns assisted with providing information for the death certificate and for the obituary, the death certificate and obituary referred to her as Anthony Anguiano's "companion;" not his wife.

Moreover, as discussed earlier, Burns and Anthony Anguiano filed individual income tax returns; wherein, Burns identify herself as single and signed the returns as "Tasha Burns." In fact, Burns never used Anguiano's last name on any document prior to his death. Finally, Burns and Anthony Anguiano never maintained joint bank accounts.

Controverted testimony as to whether Anthony Anguiano introduced Burns as his wife to his family and friends is clearly insufficient evidence to support a finding the parties held each other out as husband and wife to the public. *See Bahruth v. Jacobus*, No. 94,713, unpublished opinion filed April 6, 2007, slip op. at 9-10, attached hereto in Appendix. Outside of living together, none of Burns and Anthony Anguiano's actions suggest these individuals held each other out to the public as husband and wife. On the contrary, the overwhelming evidence

suggests otherwise. As such, Burns can not meet her burden of proving a common law marriage existed.

As a final argument, Burns maintains Patricia Anguiano has not produced sufficient evidence to refute Tasha Burns' claims. [NOTE: Burns refers to Patricia Anguiano as Patricia Noriega; however, Patricia Anguiano has not used her maiden name since her marriage to Anthony Anguiano in 2000.] Nonetheless, Patricia Anguiano does not have the burden of refuting Tasha's claims. Rather, Tasha Burns has the burden of proving the existence of a common law marriage. *See, In re Estate of Antonopoulos*, 268 Kan. 178, 192-93, 993 P.2d 637 (1999). Tasha Burns did not meet this burden. The overwhelming evidence in this matter conclusively shows Tasha Burns and Anthony Anguiano were not common law married at the time of his death. Accordingly, the ALJ and Board's decision should be affirmed.

II. THE ALJ AND BOARD CORRECTLY APPLIED AND INTERPRETED COMMON LAW MARRIAGE.

Next, Tasha Burns argues the ALJ and Board's application of common law marriage in this matter was unconstitutional. While Tasha Burns' argument is difficult to comprehend, it appears her arguments are twofold: (1) The ALJ and Board's conclusion that Tasha Burns and Anthony Anguiano were not common law married was in error; and (2) the ALJ and Board's conclusion was unconstitutional as it denied Tasha Burns the fundamental right of marriage.

A. Tasha Burns and Anthony Anguiano were not common law married.

In regard to the ALJ and Board's findings that Tasha Burns and Anthony Anguiano were not common law married, these Appellees reassert their arguments and authorities from above. However, Burns further cites *Gillaspie v. Blair*, 192 Kan. 455, 388 P.2d 647 (1964) as support for finding she is the surviving legal spouse by common law marriage to Anthony Anguiano. Indeed, in *Gillaspie*, Pearl Gillaspie was found to be the legal widow entitled to death benefits. However, the facts of *Gillaspie* are extremely different from the facts of this case.

In *Gillaspie*, Pearl Gillaspie provided testimony that Pearl and the decedent were living together; that Pearl and the decedent introduced each other as husband and wife; and that Pearl and the decedent had joint checking accounts in the name of Pearl Gillaspie and Clyde Gillaspie. 192 Kan. at 456. In addition, there was testimony from other witnesses who had known Pearl and Clyde Gillaspie for an extended period of time that the decedent introduced Pearl to them as his wife; that the decedent claimed Pearl as his wife for income tax purposes and on company records; that the decedent and Pearl Gillaspie filed income tax returns using the names Clyde Gillaspie and Pearl Gillaspie; and that the State of Kansas issued Pearl Gillaspie a driver's license and fishing license upon her application in the name of Pearl Gillaspie. 192 Kan. at 456-57.

The only similarities between *Gillaspie* and this matter is that the parties lived together. In this case, there is controverted evidence as to whether Burns and Anthony Anguiano

introduced each other as husband and wife. In addition, Burns and Anthony Anguiano did not maintain joint checking accounts; did not identify themselves as married on any tax returns; filed individual tax returns; and entered their rental agreement for their home in their individual capacities. Finally, Burns never used Anguiano's last name for any benefits, health insurance or in any official capacity, or on any document; nor referred to herself as Anthony Anguiano's wife upon completing the death certificate or the obituary.

The ALJ and the Board appropriately reviewed all the testimony and exhibits admitted by the parties. (R. I, 99, 176-181.) When the record is viewed as a whole, it is clear the ALJ and Board's decisions were supported by substantial evidence. Accordingly, the ALJ and Board's decision must be affirmed.

B. The ALJ and Boards' conclusion did not deny Tasha Burns a fundamental right.

As a preliminary matter, Tasha Burns' claim the ALJ and Board's conclusion was unconstitutional is not an issue properly before this court. Constitutional grounds for reversal asserted for the first time on appeal are not properly before the Appellate Court for review.

U.S.D. No. 233 v. Kansas Ass'n of American Educators, 275 Kan. 313, 325, 64 P.3d 372 (2003).

Accordingly, Tasha Burns claim should be rejected and the Boards order affirmed.

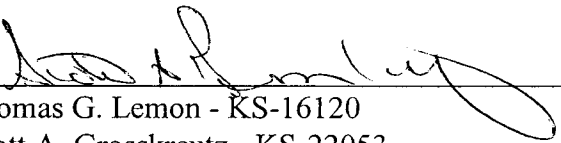
Moreover, while marriage is a fundamental right, ALJ and Board conclusion did not deprive Burns of that right. The ALJ and Board's decision did not prohibit marriage. Rather, Tasha Burns failed to meet her burden of proving the existence of a common law marriage. Under the facts of this case, a common law marriage did not exist between Tasha Burns and Anthony Anguiano. Indeed, Anthony Anguiano and Tasha Burns' actions prevented the

existence of a common law marriage. Accordingly, the ALJ and Board's conclusions did not deny Tasha Burns a fundamental right.

CONCLUSION

When the record is viewed as a whole, there is clearly substantial evidence to support the ALJ and Board's findings that Tasha Burns was not common law married to Anthony Anguiano. Moreover, the Board's findings and conclusions did not deny Tasha Burns the fundamental right of marriage; rather, Tasha Burns and Anthony Anguiano's actions conclusively show a common law marriage did not exist. Accordingly, the minor children of Patricia and Anthony Anguiano respectfully request this Court affirm the ALJ and Board's decision.

CAVANAUGH & LEMON, P.A.

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ANGUIANO AND ANTHONY ANGUIANO, JR.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of March, 2010, he served a true and correct copy of the above and foregoing document by:

- United States mail, first class postage prepaid
 Facsimile transmission in accordance with Kansas Supreme Court Rule 119(b)(3) to the fax number listed below
 E-Mail transmission in accordance with Kansas Supreme Court Rule 122(J) to the e-mail address listed below
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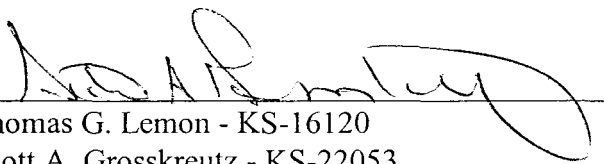
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ANGUIANO AND ANTHONY ANGUIANO, JR.

APPENDIX

NOT DESIGNATED FOR PUBLICATION

No. 94,713

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SCOTT A. BAHRUTH,
Appellant,

v.

JENNIFER M. JACOBUS and ALL PERSONS HOLDING POSSESSION BY AND
THROUGH HER and CENTEX HOME EQUITY COMPANY, L.L.C.,
Appellees.

In the Matter of the Marriage of
JENNIFER M. JACOBUS,
Appellee,

and

SCOTT A. BAHRUTH,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion
filed April 6, 2007. Reversed and remanded with directions.

James T. McIntyre, of Law Office of James T. McIntyre, of Wichita, for the
appellant.

Shannon A. Kelly, of Kelly Law Offices, of Wichita, for the appellee.

Before MARQUARDT, P.J., PIERRON, J., and KNUDSON, S.J.

Per Curiam: Scott A. Bahruth appeals the district court's finding that he and Jennifer M. Jacobus had a common-law marriage and granting the possession and title of the residence to her. We reverse and remand.

Jacobus and Bahruth were married in 1998. In August 1999, they bought a home at 1237 North Brunswick, Wichita, which was the subject of the case.

On April 19, 2000, Jacobus and Bahruth were divorced and, according to the property settlement, Bahruth received the house. Right after the divorce, according to Jacobus, Bahruth told her that he wished to get back together with her, and she broke her lease at her apartment and came back to the house to live with him.

Bahruth recalled that Jacobus moved back to live in the house with him in October or November 2000 and they lived together until January 2001, when he moved out. Bahruth stated the biggest reason that Jacobus moved back was her financial difficulties living in the apartment. Jacobus paid the bills and mortgage while living in the house as agreed with Bahruth, and after he moved out of the house, he made three or four mortgage payments, because Jacobus was trying to save up the money.

Jacobus and Bahruth started attending counseling with Pastor Hollis, who was the pastor of the church which they attended occasionally. According to Jacobus, on September 20, 2000, they read some scriptures from the Bible, and said the marriage vows to each other. Jacobus stated she considered herself to be married at the time. Bahruth admitted that he and Jacobus prayed together but denied that he intended to renew his vows at the counseling session. Jacobus did not call Hollis as a witness, because he was "an elderly man" and would not remember anything.

Jacobus stated that she did not get a wedding ring then but Bahruth bought her a ring, a "rock," before Christmas. According to Bahruth, it was a Christmas gift, without the significance of marriage. Jacobus attended her family Christmas party with Bahruth, telling her mother that they were back together as husband and wife, and showing the ring as a wedding ring. Jacobus' mother stated Bahruth did not say anything; he just stood there smiling and nodding in agreement.

Bahruth's mother, Marguerite Ganer, denied that Jacobus and Bahruth ever told her that they had remarried. Ganer's fiancé, Bill Luster, met Jacobus at Ganer's family Christmas dinner, and Ganer told him that Jacobus was Bahruth's ex-wife. Ganer noticed a ring on Jacobus' left ring finger, so she asked Bahruth what that meant and he said that it was just a gift. Robert Garrett, a friend of Bahruth, testified that Bahruth started

working for him in October 2000, and Bahruth never mentioned that he and Jacobus were remarried.

On February 6, 2001, Jacobus and Bahruth filed a federal income tax return for the 2000 tax year as married, filing jointly. Bahruth thought they could do that since they were married for part of the year, but he had no intention to declare that he was married to Jacobus as of December 31, 2000. For tax year 2001, Jacobus filed as single. For the tax year 2001, Bahruth filed as single, and for 2002 through 2004, Bahruth filed as married with Heather Stephenson Bahruth.

Shortly after the filing of the 2000 joint income tax return, Bahruth and Jacobus started fighting; Bahruth moved out to an apartment close by and Jacobus remained in the house. On March 14, 2001, Jacobus went to Centex Home Equity Company, L.L.C. (Centex), to have the house payments lowered; she signed refinancing documents as a single person, Jennifer M. Jacobus. Jacobus made subsequent house payments on the residence, believing that the taxes were paid from the mortgage.

During the summer of 2001, Jacobus and Bahruth attempted reconciliation efforts. On August 31, 2001, Jacobus filed a protection from abuse order against Bahruth, alleging that Bahruth had molested her son. Apparently Bahruth was convicted of one

count of aggravated solicitation of a child in 2001, and paroled on January 27, 2005. On July 17, 2002, Bahruth married Heather Stephenson in the county jail the day before his transfer to prison.

When Ganer realized the taxes had not been paid on the house, she paid them in the amount of \$2,900 in order to protect Bahruth's interests in the house. Ganer sent an eviction notice to Jacobus. In February 2004, Ganer filed a petition requesting termination of Jacobus' right to occupy the residence based on her failure to pay the rent and taxes due. Jacobus answered, claiming she and Bahruth had a common-law marriage, and she was the rightful owner of the property. Centex was added as a defendant, but the parties subsequently agreed to dismiss it from the action before the trial. Jacobus filed a petition for divorce from her common-law marriage to Bahruth, claiming the house as marital property. These two cases were consolidated.

After the hearing, the district court found that the marriage of Bahruth and Jacobus was "willingly reestablished," their capacity to marry was clear, and there was a present agreement to be married. The court held that the marriage was a "reestablishment of a past marriage by willing parties" and "subsequent buyer's remorse" was not sufficient to negate the reestablishment. The court granted possession and title of the house to Jacobus.

Bahruth argues the district court erred in finding there was a common-law marriage formed between Bahruth and Jacobus, as there was not substantial competent evidence to support that finding.

Common-law marriages are valid in Kansas. To establish a common-law marriage, plaintiff must prove: (1) capacity of the parties to marry, (2) a present marriage agreement between the parties, and (3) a holding out of each other as husband and wife to the public. The burden of proving a common-law or consensual marriage rests upon the party asserting it. *In re Estate of Antonopoulos*, 268 Kan. 178, 192-93, 993 P.2d 637 (1999). Each element must coexist to establish a common-law marriage. *Fleming v. Fleming*, 221 Kan. 290, 291, 559 P.2d 329 (1977). The existence of the necessary requirements for a common-law marriage is a question of fact. *Hawkins v. Weinberger*, 368 F. Supp. 896, 899 (D. Kan. 1973).

If the district court's findings are supported by substantial competent evidence and the court properly applied the rules, the appellate court will affirm the trial court. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated in another way, substantial evidence is such legal and relevant evidence as a

reasonable person might accept as being sufficient to support a conclusion. *In re Estate of Antonopoulos*, 268 Kan. at 193.

Bahruth argues that the district court failed to apply the rules where there was a subsequent marriage after the alleged common-law marriage in *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993). Fred Chandler was killed on the job and two women, Eliza and Mary, sought to receive Fred's workers compensation death benefits as the surviving spouse. Fred married Eliza in 1972, although he was still married to Noletta. Fred and Eliza continued to live together after his divorce from Noletta became final in 1973. Mary and Fred began living together in 1982, married in 1985, and lived together until his death in 1988. The administrative law judge, the director of workers compensation, and the district court found all three elements required of a common-law marriage existed between Fred and Eliza, and found the subsequent marriage of Fred to Mary was void and of no legal effect. 253 Kan. at 52-53.

The Kansas Supreme Court reversed, holding:

"Where an attempt is made to annul a marriage on the ground of a prior subsisting marriage of the other party, the presumption of validity of the subsequent marriage is stronger than and overcomes the presumption of the continuance of the previous marriage, and one who seeks to impeach the

subsequent marriage assumes the burden of proving by evidence "'so cogent as to compel conviction"' that the previous marriage has not been dissolved. *Harper v. Dupree*, 185 Kan. [483, 488, 345 P.2d 644 (1959).]" 253 Kan. at 57-58.

The *Chandler* court remanded the case, instructing:

"[T]o overcome the presumption of validity and to sustain the burden of proving the invalidity of the marriage of Mary and Fred, every reasonable possibility of validity of that marriage must be negated, and Eliza's evidence of a continuing common-law marriage to overcome the presumption of validity of the subsequent marriage must be clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt. Clear and convincing evidence is evidence that is certain, unambiguous, and plain to the understanding and so reasonable and persuasive as to cause the trier of fact to believe it. [Citation omitted.] Clear and convincing evidence is not a quantum of proof, but rather a quality of proof; thus, a party establishes a claim by a preponderance of the evidence, but this evidence must be clear and convincing in nature. [Citation omitted.]" 253 Kan. at 58.

As in *Chandler*, Jacobus is effectively seeking to invalidate Bahruth's subsequent marriage to Heather. Therefore, the *Chandler* presumption applies and must be overcome by Jacobus.

In the instant action, the capacity of the parties to marry is not in dispute; the other two elements must be analyzed. Jacobus argues the evidence of a ring given following an unofficial private ceremony, cohabitation, signing a tax return jointly, and holding out themselves as husband and wife established a valid common-law marriage between she and Bahruth.

No particular form is required to satisfy the element of a mutual present agreement to the marriage; the present agreement may be evidenced by the acts and conduct of the parties. *Dixon v. CertainTeed Corp.*, 915 F. Supp. 1158, 1160 (D. Kan. 1996). Jacobus argues the alleged renewal of their marriage vows before the pastor and receiving a ring from Bahruth were the evidence of mutual agreement to be married. However, the evidence is disputed regarding the ceremony of renewing the marriage vows and the significance of the ring; Bahruth denied that he and Jacobus exchanged the vows and the ring was simply a Christmas gift to her. The pastor was not called to testify, and the ring was not introduced at trial. There is some substantial doubt as to the mutuality of the intent to be married.

To satisfy the third element of a common-law marriage, both parties must have held each other out to the public as husband and wife. 915 F. Supp. at 1161. Jacobus points out the tax return filed for 2000 as joint and married as evidence. Bahruth

admitted he signed the tax return for the year 2000 as joint and married with Jacobus; however, he explained that he did that because he was married to Jacobus part of that year.

There is no testimony that Bahruth actually told anyone that he was remarried to Jacobus. He allegedly told his mother that they were not. The only evidence of Bahruth's holding out to the public that he was Jacobus' husband was when he allegedly smiled and nodded to her statement that they were married at her family's Christmas party. Even in viewing the evidence in the light most favorable to the party prevailing below, it is not evidence that is "clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt."

Under the facts of this case, there is no clear and convincing evidence of a present agreement to marry or holding out to the public of such marriage. The district court did not apply the test in *Chandler* in its rulings. Jacobus' counsel attempted to distinguish the case factually, stating the property rights in this case was a house, and in *Chandler*, it was surviving spouse benefits. This distinction is not enough to ignore the holdings in *Chandler*. The policy reasons for the *Chandler* ruling are also present here.

Under the rationale in *Chandler*, there is not substantial competent evidence of a clear and convincing nature to show there was a valid common-law marriage between Jacobus and Bahruth. The evidence of common-law marriage between them was not sufficient to sustain the burden of proving the invalidity of the marriage of Bahruth and Stephenson.

Additionally, Jacobus argues that the district court properly granted possession and title of the house to her, even though there was not a common-law marriage. Jacobus argued that since Bahruth abandoned the house and she paid the mortgage while he was in prison, the only fair and equitable ruling was for her to be awarded the house. The trial court awarded the house based on the finding that there was a common-law marriage between Bahruth and Jacobus. The issues on the house must be decided in considering the payments made by Jacobus and Bahruth in equity, not based on the common-law marriage.

We, therefore, reverse and remand for further proceedings consistent with this opinion.