

No. 09-103374-A

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IN THE COURT OF APPEALS OF  
THE STATE OF KANSAS

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**Anthony Anguiano, deceased  
And Tasha Anguiano, Appellant**

**Vs.**

**Larry's Electric Contracting, LLC**

**And**

**Continental Western Ins. Co.  
Respondent and Insurance Carrier/Appellee**

**FILED**  
MAR 24 2010  
CAROL G. GREEN  
CLERK OF APPELLATE COURTS

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**BRIEF OF APPELLEE**

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**Appeal from  
The Appeals Board for the Kansas  
Division of Workers Compensation  
Docket Number 1,036,237**

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**Oral Argument - 15 minutes**

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**No. 09-103374-A**

**BEFORE THE COURT OF APPEALS OF THE STATE OF KANSAS**

**ANTHONY R. ANGUIANO (deceased),  
And TASHA BURNS, Appellant**

**VS.**

**LARRY'S ELECTRIC, LLC  
And  
CONTINENTAL WESTERN INSURANCE CO, et. al. Appellees**

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**BRIEF OF APPELLEES  
ACARIO ANGUIANO AND ANTONIA ANGUIANO**

COME NOW, Claimants Acario Anguiano and Antonia Anguiano, through counsel, and submit their Brief of Appellees.

**NATURE OF THE CASE**

Decedent Anthony Anguiano (“decedent”) died during his employment with respondent Larry’s Electrical, the date of death occurring on August 22, 2007. At the time of his death, decedent supported 4 wholly dependent children, to wit: Angelica Anguiano, DOB: 3-11-93; Anthony Anguiano Jr, DOB- 7-15-94; Acario Anguiano, DOB: 8-23-06; and Antonia Anguiano, DOB: 9-11-07. In addition to the 4 wholly dependent children, decedent was, had been for several years and was at the time of death, residing with Tasha Burns (“Appellant”), mother of Acario and Antonia Anguiano.

Though a formal marriage ceremony never occurred between decedent and appellant, she alleges to be the common law spouse of decedent. Appellant filed for death benefits as a widowed dependent of the decedent under the Workers Compensation Act, claiming to be the common law wife of the decedent.

After a full hearing before Administrative Law Judge Brad Avery (“ALJ”), it was determined that no common law marriage existed, due in large part to the fact that the ALJ could find no present intent to be married between appellant and the decedent. The Workers Compensation Board (“Board”) concurred with the ALJ that no present agreement to be married was evident and denied compensation to the appellant.

## **ISSUES**

**1. THE ALJ AND THE BOARD DECISION WAS BASED UPON SUBSTANTIAL EVIDENCE TO CONCLUDE THAT NO COMMON LAW MARRIAGE EXISTED BETWEEN APPELLANT AND THE DECEDENT, AS TESTIMONY OF THE APPELLANT FAILED TO ESTABLISH A PRESENT INTENT TO BE MARRIED.**

**2. THE ALJ AND BOARD CONSIDERED ALL EVIDENCE, INCLUDING EVIDENCE THAT DETRACTS FROM THE AGENCY’S FINDING, IN DETERMINING THAT NO COMMON LAW MARRIAGE EXISTED AND DID NOT IGNORE UNDISPUTED EVIDENCE**

**3. WAS APPELLANT DEPRIVED OF EQUAL PROTECTION OF LAW BY BEING UNDULY BURDENED IN HER ATTEMPT TO DEMONSTRATE THE EXISTENCE OF A COMMON LAW MARRIAGE?**

## **STATEMENT OF THE FACTS**

Anthony Anguiano was killed in the course of his employment with respondent Larry’s Electric, on 8/22/2007. (Vol. I p. 100).

Appellant first began a relationship with decedent in March or April of 2003 (Vol. III, p. 18-19).

At the time the relationship began, decedent was still married to Ms. Patti Noriega. (Vol. III, p. 19-20).

Within a few months, Appellant and decedent began residing together, first in a trailer park on Highway 40, and later on a house on Lime Street. (Vol. III, pp. 23-24).

Ms. Burns testified that decedent did not want to get married in a church, and said it (a marriage certificate) was just a piece of paper anyways. (Vol. III, p. 90-91).

In numerous instances during her relationship with decedent, appellant has signed her name as Tasha Burns, on her tax returns (filed as “single”), (Vol. III p. 91), on an employment application (Vol. III. pp. 68-69), her drivers license (Vol. III p.38-40).

Appellant testified, she could only recall writing her name as Tasha Anguiano in doodling on a piece of paper. (Vol. III p. 104).

As a relator providing information for decedent’s death certificate, appellant told the funeral director that she was decedent’s companion, not his wife. (Vol. VI p. 26 ).

Appellant identified several people who believed the couple was married, including her brother, Jesse Burns, his girlfriend Monique Henderson, and various patrons of TJ’s bar and grill. (Vol. III pp. 81-83).

Decedent’s father claimed the decedent referred to appellant as “his wife” or “your wife” at times when speaking with decedent. (Vol. III p. 87)

The ALJ alluded to the testimony of Ms. Burns, citing testimony that “He (decedent) would say I’m going to marry this girl or this is my baby and I’m going to marry her”. (Vol. I p. 102 ALJ Award).

The ALJ further cited deposition testimony of appellant, alluding to the fact that she believed her and decedent “were going to get married.” (Vol. I p. 103, ALJ Award).

In making his decision, the ALJ found that there “may have been a future intent, but the agreement to marry never occurred...the court finds there was no present agreement of marriage between Tony and Appellant and consequently Appellant was not the common law wife of the deceased claimant.” (Vol. I p. 103, ALJ Award).

The ALJ cited testimony of the appellant referring to an exchange of rings between appellant and decedent, but further alluded to appellant’s testimony that the rings were referred to as “engagement rings”, and never referred to as “wedding rings” (Vol. I pp. 104-5, ALJ Award and Vol. VI p. 31).

The Board referred to testimony of appellant regarding her belief that she and the decedent were going to get married, and referred to appellant’s testimony of decedent’s reason for not going through a ceremony, i.e. “that it (a marriage certificate) was just a piece of paper.” (Vol. I p. 181, Board’s Order)

The Board referred to a photograph, admitted into evidence, of appellant standing in front of the residence she shared with decedent, with a stone sign saying “the Anguiano’s”. (Vol. I p. 182, Board’s Order).

On the issue of a present marriage agreement, the ALJ stated: “However, when asked about their intent to marry, ‘whether was something done after the rings were exchanged’, Tasha replied, ‘I believe me and Tony *were* going to get married. We didn’t know Tony was going to die’...

...However, it is also true that there never was a time when Tasha and Tony entered into a specific agreement to become husband and wife. There may have been a future intent, but the agreement to marry never occurred. It is also true the Tasha’s desire to be identified as Ms. Anguiano surfaced primarily after Tony’s death. The Court finds there

was no present agreement of marriage between Tony and Tasha and consequently Tasha was not the common law wife of the deceased claimant.” (Vol. I. p. 103, ALJ Award).

The Board ultimately agreed with the ALJ on the ultimate conclusions in this case. “The Board agrees with and adopts the findings and conclusions of the ALJ. There is no need to repeat those findings and conclusions herein. Tasha obviously had a loving and stable relationship with Anthony, but there was never a present agreement between them to be husband and wife. As such, there was no common law marriage and Tasha is not entitled to receive any death benefits under the Workers Compensation Act.” (Vol. I p. 183, Board’s Order).

## **STANDARD OF REVIEW**

Appellees concur with Appellant’s Standard of Review insofar as *Tracy-Gallegos v. H & H Services Inc. and Commerce & Industry Insurance Co.* 42 Kan. App. 2d 360, 212 P. 3<sup>rd</sup> 239 (Kan. App. 2009) is the correct standard for a reviewing court.

## **ARGUMENTS AND AUTHORITIES**

### **1. THE ALJ AND THE BOARD DECISION WAS BASED UPON SUBSTANTIAL EVIDENCE TO CONCLUDE THAT NO COMMON LAW MARRIAGE EXISTED BETWEEN APPELLANT AND THE DECEDENT, AS TESTIMONY OF THE APPELLANT FAILED TO ESTABLISH A PRESENT INTENT TO BE MARRIED**

Kansas Appellate Court cases have repeatedly stated the requirements of a common law marriage. “The basic elements essential to establish the existence of a common law marriage are: capacity of the parties to marry, **a present marriage agreement**, and a holding out of each other as husband and wife to the public.” *Sullivan v. Sullivan* 196 Kan. 705, 413 P.2d 988, (Kan. 1966). (Emphasis added.).

“Although the marriage agreement need not be in any particular form, it is essential there be a present mutual consent to the marriage between the parties. The burden of proving a common-law or consensual marriage rests upon the party asserting it.” *Driscoll v. Driscoll*, 220 Kan. 225, 227, 552 P.2d 629 (1976).

"To constitute a valid marriage per verba de praesenti there must be an agreement to become husband and wife immediately from the time when the mutual consent is given. An express future condition is absolutely fatal to a claim of marriage, and cannot be explained away by circumstances.” *Pitney v. Pitney*, 151 Kan. 848, 852, 101 P.2d 933, 935 (1940). The 3 items cited by Kansas law are not merely factors to be considered, but each is an independent prerequisite for a positive finding of a common law marriage.

The testimony of Ms. Burns, recalling statements that “He (decedent) would say I’m going to marry this girl or this is my baby and I’m going to marry her”. (Vol. I p. 102 ALJ Award). “I’m going to marry her” expresses a future intent, not a present intent. As does appellant’s statement that, “I believe me and Tony *were* going to get married. We didn’t know Tony was going to pass away”. (Vol. VI p. 31). These statements seem to profess an express future condition, and are fatal to a claim of common law marriage.

An analogous case may be *Sullivan v. Sullivan*, 196 Kan. 705, 413 P.2d 988 (1966). In that case, the parties had cohabitated 16 years, with Henry Sullivan referring openly to Ms. Sullivan as “my Mrs.” “Ma” and “Mom”, staying at hotels and motels, where they registered as “Mr. and Mrs. W. H. Sullivan of W. H. Sullivan and wife”. *Id.* at 706.

However, Ms. Sullivan also testified:

'He asked me if I would marry him and I said yes. That was before I went out there. I said at that hearing (before the Social Security examiner) that he

put off getting married two or three times and kept putting it off. It was discussed pretty often and most of the time we were talking about getting married in the future. Prior to April 5, 1963, we never set a date to get married. \* \* \* Henry said we were not married but that we were going to get married.' (Emphasis added.)

Id. At 710.

The court found that this was supported by substantial, competent evidence and cannot be disturbed on appeal. Though the couple in *Sullivan* held themselves out as husband and wife, and many people saw them as husband and wife, their plans to be married in the *future* were sufficient to find a present agreement lacking.

With the present marital agreement being a prerequisite to a finding of a common law marriage, the issue is determinative. It becomes irrelevant that the parties had a capacity to be married, or even that they may have held themselves out as husband and wife, if the present agreement to be married is lacking. All 3 items must be present.

There is no doubt that Ms. Burns suffered a tragic loss by decedent's death. She lost a companion, a companion she had spent years with, and someone she planned on raising 2 young children with. She is now forced to raise 2 children alone.

But with little evidence demonstrating a present intent on the decedent's part to be married, and with reliable evidence contrary to this position, the Administrative Law Judge did, at the least, have a factual basis for his decision.

**2. THE WORKERS COMPENSATION BOARD CONSIDERED ALL EVIDENCE, INCLUDING EVIDENCE THAT DETRACTS FROM THE AGENCY'S FINDING, IN DETERMINING THAT NO COMMON LAW MARRIAGE EXISTED AND DID NOT IGNORE UNDISPUTED EVIDENCE**

"The Board agrees with and adopts the findings and conclusions of the ALJ.

There is no need to repeat those findings and conclusions herein. Tasha obviously had a loving and stable relationship with Anthony, but there was never a present agreement

between them to be husband and wife. As such, there was no common law marriage and Tasha is not entitled to receive any death benefits under the Workers Compensation Act.” (Vol. p. 8). Though the Board did not provide much analysis in giving their reasons for their decision, it did defer to the analysis provided by the ALJ in reaching his decision, i.e. that no *present* agreement to be married was evident.

Neither the Board nor the ALJ ignored evidence of the appellant. In fact, both cite numerous items of evidence in appellant’s favor in their decisions. For instance, The ALJ cited testimony of the appellant referring to an exchange of rings between appellant and decedent, that the rings were referred to as “engagement rings”, and never referred to as “wedding rings”. In other words, it is undisputed and uncontradicted that an exchange of rings took place, but appellant’s own testimony disputes that they were considered “wedding rings”.

Appellant is correct that K.S.A. 77-621 has modified the definition of substantial evidence. Appellant is also correct in that this Court, as a reviewing court, must look at all evidence, including evidence that detracts from the agency decision, to determine whether the Board’s findings are substantial evidence. *Tracy-Gallegos v. H & H Services Inc. and Commerce & Industry Insurance Co.* 42 Kan. App. 2d 360, 212 P. 3<sup>rd</sup> 239 (Kan. App. 2009). However, the basic statutory rule remains the same in that the Court will not reweigh the evidence or engage in de novo review, in which it would give no deference to the administrative agencies factual findings. 42 Kan. App. 2d at 363. In this case, evidence of appellant was not ignored, as much as it was outweighed by other evidence, much of it coming from the appellant herself.

**3. WAS APPELLANT DEPRIVED OF EQUAL PROTECTION OF LAW BY BEING UNDULY BURDENED IN HER ATTEMPT TO DEMONSTRATE THE EXISTENCE OF A COMMON LAW MARRIAGE?**

This issue was not raised before either the hearing officer or the Board. A new legal theory may not be asserted for the first time on appeal or raised in a reply brief.

*Jarboe v. Board of Sedgwick County Comm'rs*, 262 Kan. 615, 622, 938 P.2d 1293 (1997).

Only 11 states, plus the District of Columbia, recognize a common law marriage. *Common Law Marriage, a Proposal for Revival of a Dying Doctrine*, 40 New Eng. L. Rev. 541, 541 (2005-2006). In most states, there are *no* factual circumstances to become married other than by the requirements of the respective statutes of those states.

Though the right to marriage may be a fundamental right, the right to be recognized in a marital relationship without following state prerequisites, i.e. a marriage ceremony may not be. Appellant has cited no authority to determine the right to be recognized as married under the doctrine of common law marriage is a fundamental right,

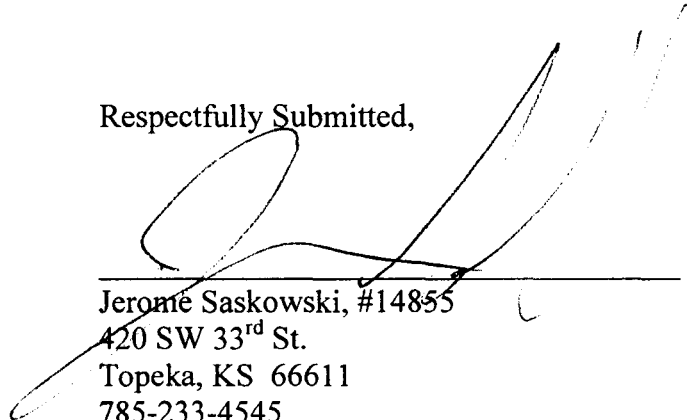
The State of Kansas has certain requirements for individuals to be married, none of which apply here. For instance, the 2 married participants must be of the opposite sex, (K.S.A. 23-101) and not in an incestuous relationship, (K.S.A. 23-102). Though there is a prohibition on entering into a bigamous relationship, after decedent's divorce became final in 2004, there was no further impediment for him and appellant to become husband and wife. In this regard, appellant was not treated different than anyone else.

The Workers Compensation act does not refer to "common law marriage", it merely follows state law in determining whether or not two people are married. The burden of proof to establish a common law marriage is the same as in civil courts.

**CONCLUSION**

The decision of the Administrative Law Judge should be affirmed, in that the ALJ had substantial evidence to form the basis of his decision. There is more than substantial evidence for the ALJ and the Board to conclude that appellant and decedent did not enter into a common law marriage, with much of the evidence coming from the testimony of the appellant. As such, the appellant does not qualify as a dependent under the Workers Compensation Act. Finally, appellant's Equal Protection argument must fail, as she has not demonstrated an inability to become married while decedent was alive.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was hand delivered, placed in the United States Mail, postage prepaid, or was delivered by fax to following, on this 24th day of March, 2010.

Clerk of the Appellate Court  
Kansas Judicial Center  
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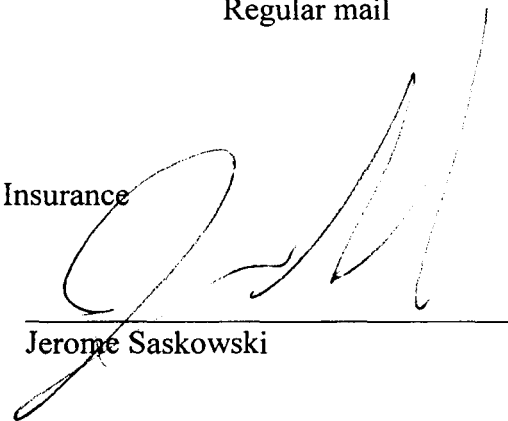
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