

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.