NOT DESIGNATED FOR PUBLICATION

No. 105,869

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

U.S. BANK NATIONAL ASSOCIATION,
as Trustee under Securitization Agreement dated 8-1-, 2005,
Mortgage Pass Through Certificates, 2005-HE3,
Appellee,

v.

THE ESTATE OF SALLY M. DOWTY, *et. al.*,
Defendants,

(ANTHONY HULL)
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed May 4, 2012. Affirmed.

Dan S. Spencer IV, of Spencer Law Firm, LLC, of Olathe, for appellant.

Sarah E. Warner and *Todd N. Thompson*, of Thompson Ramsdell & Qualseth, P.A., of Lawrence, and *Brandon T. Pittenger*, of Overland Park, for appellee.

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

Per Curiam: Anthony Hull claims he had a common-law marriage to Sally M. Dowty. Hull appeals the judgment of the district court that no common-law marriage existed at the time Dowty granted a mortgage to U.S. Bank National Association (Bank). As a result, the district court allowed foreclosure proceedings to continue against the

Estate of Sally M. Dowty and ultimately permitted the Bank to foreclose on the mortgaged property. Hull argues the district court should have held that a common-law marriage existed, the property was their marital homestead, and the mortgage was void. We affirm.

In 1997, Dowty purchased a house at 2805 W. 77th Street in Prairie Village. She purchased it on her own as a single person giving a mortgage to the Bank. She refinanced the mortgage in 1999, 2003, and again in 2005, each time as a single person and without any mention of Hull or her alleged common-law marriage to Hull.

Hull and Dowty met in Florida in 1983. At the time, Dowty was married to but separated from Forrest Dowty, who resided in Louisiana. Hull said he proposed to Dowty in 1983, she accepted, and they began living together as a married couple. They referred to each other as husband and wife. They had two children together. However, Dowty remained legally married to Forrest Dowty until 2001, when Forrest sought a divorce to clean up his estate. He died shortly thereafter.

In October 2007, Dowty passed away. She previously had executed a transfer on death of all her property to Hull. Hull continued to live in the Prairie Village property after Dowty's death, but he stopped making the mortgage payments in September 2008.

On December 2, 2008, the Bank filed a petition to foreclose Dowty's mortgage. Hull filed an answer stating that he occupied the property and he and Dowty had a common-law marriage. Hull argued the mortgage was void because it concerned marital property and had been entered into without his consent. The court conducted an evidentiary hearing on the issue of whether there was a common-law marriage.

The district court concluded that Hull and Dowty were not in a common-law marriage at the time Dowty refinanced the mortgage in 2005. The court stated:

"The way in which Hull and Dowty represented their marital status to the public from 2001 to 2007 ebbed and flowed. When it was convenient to be married, they held themselves out to the public as husband and wife. When it was convenient to be single, they held themselves out as single.

"The Court finds that Hull and Dowty were in a marriage-like situation at the time of Dowty's death in 2007. However, based on the evidence presented at the hearing, under Kansas law, when Dowty granted the mortgage in 2005, Hull and Dowty's relationship was during an "ebbing" period, and therefore they were not in a common law marriage. Consequently, Hull has no standing to assert that the mortgage between Dowty and the plaintiff is void. The plaintiff may continue the foreclosure proceedings on the subject real property, which will be set forth in a separate journal entry."

The Bank foreclosed the mortgaged property and was granted judgment against the estate. Hull appeals the finding of no common-law marriage and the foreclosure of the property.

Hull argues that he and Dowty lived in a marriage-like relationship beginning at least in 1989. He contends that the three requirements for a common-law marriage may not have existed before 2001, but upon Dowty's divorce in 2001, all the elements of a common-law marriage came to fruition. Hull maintains that since a common-law marriage can only be terminated by legal divorce, annulment, or death of a spouse, their marriage existed in 2001 and the evidence of the relationship "ebbing and flowing" since then was irrelevant.

Our Supreme Court has previously treated a district court's finding that a common-law marriage does or does not exist as a factual finding. See *In re Adoption of X.J.A.*, 284 Kan. 853, 877-78, 166 P.3d 396 (2007). An appellate court reviews the district court's findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. *Hodges v.*

Johnson, 288 Kan. 56, 65, 199 P.3d 1251 (2009). Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. 288 Kan. at 65. In reviewing findings of fact, an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010).

In Kansas, there are three elements required to establish a common-law marriage: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) the parties holding themselves out to the public as being husband and wife. *Anguiano v. Larry's Electrical Contracting*, 44 Kan. App. 2d 811, 814, 241 P.3d 175 (2010). The party asserting a common-law marriage bears the burden of proving it. 44 Kan. App. 2d at 814. For the most part, the parties do not challenge the resolution of the first two elements cited above, and those elements need only limited treatment.

Because of Dowty's prior marriage, the first element—the capacity of the parties to marry—is critical to the commencement of any common-law marriage in this case. Hull does not contest the district court's legal determination that he and Dowty lacked the capacity to marry until Forrest terminated his marriage to Dowty 2001. Under the second element, neither party takes issue with the arguable existence of a present agreement to be married. As demonstrated by the court's findings and holdings, the real question is whether Hull and Dowty held themselves out to the public as being husband and wife.

The Bank cites two cases in support of the district court's finding of no common-law marriage. In *In Re Malthia*, No. 06-4116, 2008 WL 320327, at *7 (Bankr. D. Kan. 2008) (unpublished opinion), the bankruptcy court commented on the inconsistent positions of a possible common-law marriage, "where a debtor is claiming a common-law marriage for the purpose of avoiding a significant tax liability, there is obviously a significant opportunity for fraud." In *Beat v. United States*, 742 F. Supp. 2d 1227, 1247-48 (D. Kan. 2010), the federal court found no common-law marriage despite the party's

testimony that she believed she was in a common-law marriage but consistently indicated the couple was not married in their business and economic activities.

The district court's finding is supported by sufficient evidence that at the time Dowty executed the mortgage in 2005, the parties had not yet established a common-law marriage. In *State v. Stewart*, No. 98,376, 2008 WL 4291523 (Kan. App. 2008) (unpublished opinion), *rev. denied* 288 Kan. 835 (2009), Stewart argued the district court abused its discretion by denying his postsentencing motion to withdraw his plea. Specifically, Stewart asserted that he and the victim were married under the common law and, thus, the State failed to provide a factual basis for his plea to unlawful sex with her. The court focused on the specific point in time when Stewart committed the crimes in resolving the common-law marriage question:

> "Here, Stewart cites evidence that supports the victim's belief she was married by common law to Stewart. However, by Stewart's own admission, Stewart did not similarly hold himself out to the public as her husband. First, in his interview about the crimes, Stewart testified that he told the detective he was "going to get married" to the victim. Second, in his financial affidavit that he filed on the same day as the charging document, Stewart claimed he was engaged to the victim and that his victim was his fiancée, not wife. Therefore, despite the fact that Stewart later filed documentation to show that he was married by common law to the victim on August 24, 2001, sufficient evidence exists in the record on appeal to support the State's factual basis for Stewart's plea that Stewart was not married to the victim at the time he committed the crimes of aggravated indecent liberties with a child." 2008 WL 4291523, at *5.

The description of the parties' actions in this case as "ebbing and flowing" depending on the circumstances of the day is accurate. We, along with the district court, are looking for consistency in how the parties hold themselves out to the public in their domestic, societal, and financial affairs. The court relied on the inconsistency of how Hull and Dowty portrayed their relationship, and we cannot reweigh the evidence if there

is substantial competent evidence to support the court's decision. In *State v. Johnson*, 216 Kan. 445, 532 P.2d 1325 (1975), the court discussed Johnson's claim that a witness was his common-law wife and marital privilege could be used to exclude her testimony. In discussing the third element of holding out to the public as married, the court stated:

> "Here, Miss Williams testified that she never signed her name as Mrs. Earl Johnson. The parties held themselves out as husband and wife only to the defendant's employer and their landlady. As to the public in general, there was some substantial question as to the relationship between the parties. Moreover, when the appellant was questioned by a Wichita Police Officer he stated he had registered under a fictitious name because he was staying there with his girl friend whom he identified as Joann Williams. *It thus appears Joann Williams and the appellant held themselves out to be man and wife only when it was advantageous to assume a marriage posture.* Lacking the requirement of a holding out of each other as husband and wife to the public, there was no common-law marriage, and the claim of marital privilege is without merit." (Emphasis added.) 216 Kan. at 449.

Many years ago in *Butler v. Butler*, 130 Kan. 186, 190, 285 P. 627 (1930), the Kansas Supreme Court discussed the concept of persons holding themselves out to the public as husband and wife and cited the following authority:

> "Our own decisions take it for granted that some measure of publicity is a distinguishing feature, if not an essential attribute of, a common-law marriage. (*State v. Hughes*, 35 Kan. 626, 12 Pac. 28; *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534.) In *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, the parties concerned in a common-law marriage declared
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> "'We are man and wife, and will continue to be man and wife"; and it appears that thereafter they cohabited and otherwise lived together as such. They publicly acknowledged each other as husband and wife, assumed marriage rights, duties, and obligations, and have generally been reputed to be husband and wife in the community.' (p. 599.)"

> "In *Meister v. Moore*, 96 U. S. 76, 82, 96 L. Ed. 826, the supreme court quoted approvingly from an opinion by Judge Cooley in *Hutchins v. Kimmell*, 31 Mich. 126, 130, in part, thus:
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> "'Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations.'" (p. 82.)'
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> "In 1 Bishop on Marriage and Divorce (6th ed.), 222, 223, it is said:
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> 'Habit and repute do not create the marriage. But it exists where, on the parties cohabiting as husband and wife, and being accepted in society and reputed as such, they are presumed, *prima facie*, to be married. . . . It is a holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and, when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise, and attend upon the cohabitation.'"

This is certainly a close case. The district court heard conflicting evidence from both parties in support of their respective positions. Hull and Dowty enrolled for health insurance in 1998 listed as husband and wife. In a 1989 lawsuit, Dowty accepted service as Hull's wife in a lawsuit involving Hull. An automobile insurance application in 2002 listed the two as married. Car insurance in 2004 listed the policyholders as Sally and Anthony Hull. The parties' children were told Hull and Dowty were married. The certificate of death in 2007 listed Dowty as married and surviving spouse was Hull. Yet, all documents associated with the Bank's mortgage and refinancing listed Dowty as single. In a 2004 credit card lawsuit, Hull stated he was as a single person. Hall's 2005 and 2006 tax documents showed him as single. A credit report in 2005 listed Dowty without a spouse. It was not until 2007 that Hull claimed in his tax documents that he was married.

In this case, the district court acknowledged the existence of evidence supporting Hull's assertion, but ultimately determined Hull had failed to prove that he and Dowty consistently held themselves out to the public as being married. In *Anguiano*, 44 Kan. App. 2d 811, the question of a common-law marriage came up in a death benefits question under the workers compensation laws. The administrative decisions below, and affirmed by this court, held that the parties did not have a present intent to be married. However, the court recognized "there is some evidence that detracts from the Board's factual findings." 44 Kan. App. at 816. The court cited the evidence of witnesses testifying that the parties referred to themselves as husband and wife and also that documents with the Social Security Administration indicated the parties "lived together like husband [and] wife." 44 Kan. App. at 816. However, this court still affirmed the lower decision because substantial evidence supported the Board's finding that the parties failed to establish a present marriage agreement. 44 Kan. App. at 816; see also *In re Estate of Mazlo*, 211 Kan. 217, 218, 505 P.2d 762 (1973) ("The evidence [of a common-law marriage] at the trial was conflicting but the trial court resolved the conflict in favor of the appellee Henrietta. We hold that the court's findings were supported by substantial competent evidence.").

Similar to *Johnson*, the district court in the present case considered the relationship to ebb and flow and there was a holding out to the public as "man and wife only when it was advantageous to assume a marriage posture." See 216 Kan. at 449. Thus, the court concluded Hull had not met his burden of proof, which was a negative factual finding. We will not disturb such a finding absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008); *Eaton v. Johnston*, 235 Kan. 323, 324-25, 681 P.2d 606 (1984) (applying a negative finding standard of review to the district court's determination that a party failed to prove all of the elements of common law-marriage).

Hull does not suggest that the district court arbitrarily disregarded undisputed evidence, nor does our review of the record reveal that the court did so. While the court did give greater weight to the fact that Dowty repeatedly applied for the mortgage in this case as a "single person" in 1997, 1999, 2003, and 2005, it did so only in an effort to resolve conflicting evidence. Further, we find no evidence the court acted out of bias, passion, or prejudice. On the contrary, the district court demonstrated a lack of bias, passion, or prejudice when it weighed all the evidence in the case.

Accordingly, we affirm the district court's determination that Hull and Dowty did not have a common-law marriage.

Affirmed.