22-124904-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN RE THE MARRIAGE OF:

NANCY KARANJA-MEEK,

Petitioner / Appellee,

vs.

AARON MARSHALL MEEK,

Respondent / Appellant.

On Appeal from the District Court of Johnson County
Honorable K. Christopher Jayaram, District Judge
District Court Case No. 17CV06812

SUPPLEMENTAL BRIEF OF THE APPELLEE

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Summary

During Husband's and Wife's marriage, Husband was severely injured in an explosion. The parties sued in Missouri for damages from Husband's personal injury and Wife's loss of consortium. They then entered into a settlement agreement, governed by Missouri law, under which each received separate awards structured like this: (1) a lump-sum payment for Husband paid up front; (2) a separate lump-sum payment for Wife paid up front in a lower amount than Husband's; (3) a monthly annuity for Husband for the rest of his natural life; and (4) a separate monthly lifetime annuity for Wife, thought in a lower periodic amount than Husband's annuity.

Later, in their divorce, Wife argued the annuities were the parties' separate, non-marital property, invoking the "analytical approach" that several prior Court of Appeals decisions had used to determine whether a personal injury settlement is marital or non-marital. A special master agreed the "analytical approach" applied and the annuities were the parties' separate, non-marital property. After trial, the trial court held so, too.

At no time before the trial court did Husband make any argument either how (1) the "analytical approach" would make the annuities marital or (2) the special master's or trial court's reasoning for determining the annuities were non-marital under the "analytical approach" was incorrect. He did not file any post-trial motion at all, but instead just appealed. His argument in the Court of Appeals that the trial court misapplied or erroneously applied the law when dividing the parties' property – either because the trial court had failed to apply the "analytical approach" in its

judgment or had done so erroneously – was made for the first time on appeal. Husband also offered no required Rule 6.02(a)(5) statement in his brief to show where he made his arguments below.

Wife responded that Husband's arguments were not preserved because he never made his arguments on appeal to the trial court, either before judgment or in a post-judgment motion objecting to the court's conclusions.

The Court of Appeals disagreed. It did not hold that Husband actually had made his arguments on appeal anywhere to the trial court. Instead, it held that under this Court's decision in *In re Marriage of Bradley*, 258 Kan. 39, 899 P.2d 471 (1995), a litigant only must preserve issues for appeal in a post-judgment motion if he challenges "the district court's findings," not its legal conclusions. It therefore held Husband's arguments were preserved.

This was error. As this Court and the Court of Appeals have held many times, a party must present arguments – particularly those challenging a court's legal reasoning in a judgment – to the trial court before making them on appeal. And if, as Husband argued here, an alleged error appears for the first time in a trial court's judgment, to preserve it the appellant must raise it in a post-judgment motion. Therefore, Husband's arguments were not preserved. This Court should reverse the Court of Appeals' judgment and either affirm the district court's judgment or dismiss Husband's appeal.

As to the substance of Husband's arguments, the Court of Appeals held the "analytical approach," which came from other states, is not the law of Kansas. Instead, it held that under K.S.A. § 23-2801, Kansas's statutory rubric governing the division of property in divorces, a personal injury award

– in this case annuities – is always marital property and not separate property. It held that when a party files for divorce, all property owned by either spouse – even that falling under the definition of separate property – becomes martial property subject to equitable division by the trial court. It held this did not have to change the outcome here, as the trial court had weighed the equities at issue and divided the property accordingly, but it remanded the issue for the trial court to determine.

If Husband's argument on appeal is somehow preserved, this Court should affirm the Court of Appeals' judgment. While some older prior Court of Appeals decisions applied the "analytical approach" from other states to this issue, the Court of Appeals here was plainly correct that K.S.A. § 23-2801 governs and renders all personal injury awards marital property, subject to the trial court's equitable distribution. As it held, the trial court simply can still award each party their respective annuities – just as it did in its judgment below – just merely classifying them as martial property, based on the equities the trial court already identified.

Alternatively, if the Court holds the Court of Appeals was wrong and the "analytical approach" does apply, it should reverse the Court of Appeals' judgment and affirm the district court's judgment. Under the prior Court of Appeals case law, viewing the record most favorably to the trial court's judgment, which Husband did not, the evidence was more than sufficient for the trial court reasonably to conclude within its discretion that Wife's future annuity is to compensate her for her future losses and therefore is her separate, nonmarital property.

Argument and Authorities

I. The Court of Appeals erred in holding that Husband's sole argument on appeal that the trial court erroneously applied the law in its judgment was preserved, despite his failure to make it at any time before the trial court.

Standard of Appellate Review

Whether an issue is preserved for appeal is a question of law over which this Court exercises unlimited review. *State v. Plummer*, 295 Kan. 156, Syl. ¶1, 283 P.3d 202 (2012).

* * *

A. Summary

The law of Kansas requires that for a party to preserve an argument for appeal that a trial court erroneously applied the law for the first time in its judgment, the party must file a post-judgment motion to alter or amend that judgment in the trial court. And in any case, a party cannot make an argument on appeal that it did not make before the trial court.

Here, Husband never made any argument below as to why the trial court's holding that the "analytical approach" rendered the parties' annuities their separate, non-marital property was wrong. When the trial court held so, he failed to file any post-judgment motion challenging how its application of the law was erroneous. Instead, he argued this for the first time on appeal.

Despite this, the Court of Appeals held Husband's arguments were preserved because a post-judgment motion was only required to challenge the "court's *findings*," not its legal conclusions (Opinion 10) (emphasis added).

This was error. This Court should reverse the Court of Appeals' judgment and either affirm the district court or dismiss Husband's appeal.

B. The law of Kansas is that to be preserved for appeal, a challenge to the trial court's legal reasoning in a judgment in a judge-tried case as inadequate or legally erroneous must be raised in a post-judgment motion or else is waived.

A bedrock principle of appellate review is that "[g]enerally, issues not raised before the district court cannot be raised on appeal." *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009).

This means that challenges to the adequacy or legal propriety of bench-tried judgments require a post-judgment motion to be preserved for appeal. Under K.S.A. § 60-252(a)(4), no post-judgment motion is required to later "question the sufficiency of the evidence supporting the" trial court's factual findings. But this Court has well established that this is not true for an argument that the district court's findings are inadequate *or legally erroneous*, in which case an objection in post-judgment motion *is* required:

> Where the trial court's findings of fact and conclusions of law are inadequate to disclose the controlling facts or the basis of the court's findings, meaningful appellate review is precluded. It is well established, however, that **a litigant must object to inadequate findings of fact *and conclusions of law* in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal.**

Tucker v. Hugoton Energy Corp., 253 Kan. 373, 378, 855 P.2d 929 (1993) (emphasis added); *see also Celo, Inc. of Am. v. Davis Van Lines, Inc.*, 226 Kan. 366, 369, 598 P.2d 188 (1979).

Simply put, "if the findings are objectionable on grounds *other than sufficiency of the evidence*, an objection at the trial court level is required to preserve the issue for appeal." *In re Marriage of Bradley*, 258 Kan. 39, 50,

899 P.2d 471 (1995) (emphasis added). The purpose of this rule is to force parties to bring "alleged deficienc[ies] to the attention of the district court, which can then amend, clarify, or change its decision if necessary, *before* the parties go to the expense and delay of an appeal." *Id.* at 49 (emphasis in the original).

Similarly, this Court's rules require a party to raise legal objections to a judgment before the trial court for the first time, not the appellate court. Supreme Court Rule 165 requires the trial court to state its findings of fact and conclusions of law. *Id.* This

> places on the district court the primary duty to provide adequate findings and conclusions on the record of the court's decision on contested matters. **But a party also has the obligation to object to inadequate findings of fact *and conclusions of law* in order to preserve an issue for appeal because this gives the trial court an opportunity to correct any findings *or conclusions* that are argued to be inadequate.**

Fischer v. State, 296 Kan. 808, 825, 295 P.3d 560 (2013) (emphasis added).

Based on these principles, the Court of Appeals consistently has held that challenges to the legal reasoning or methodology in a trial court's divorce judgment are not preserved when the appellant failed to file a post-judgment motion raising his objections. *See, e.g.*:

- *In re Marriage of Oliver*, No. 109,872, 2014 WL 802464, at *5-6 (Kan. App. Feb. 28, 2014) (unpublished) (argument that trial court improperly considered "fault" in dividing martial estate was waived where appellant did not raise it in a post-judgment motion to alter or amend the judgment);

- *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 940, 381 P.3d 490 (2016) (same re: argument that trial court should have awarded attorney fees);
- *In re Marriage of Fisher*, No. 101,816, 2010 WL 597012, at *3 (Kan. App. Feb. 12, 2010) (unpublished) (same re: argument that trial court used legally improper method of property division); and
- *In re Marriage of Sandhu*, 41 Kan. App. 2d 975, 979-80, 207 P.3d 1067 (2009) (same re: argument that trial court erred in holding circumstances for terminating spousal support were met).

A different panel of the Court of Appeals reaffirmed this as recently as December 2023 in a decision issued after this case was argued below, but before the opinion here was issued. In *In re Marriage of Stewart*, No. 125,850, 2023 WL 8499235, at *7 (Kan. App. Dec. 8, 2023) (unpublished), a wife cross-appealed from a divorce judgment, arguing the trial court erred in permitting the husband to keep rental income from a piece of marital property earned between trial and judgment. At a hearing on the husband's motion to amend or alter the judgment, the wife had orally moved the court for an order compelling the husband to return the funds to her, which the trial court denied in a written order. *Id.* She argued again on appeal that this was error, but the Court of Appeals held she waived the argument because *she* "did not move to alter or amend the order under K.S.A. 60-252, challenging the district court's decision on the matter." *Id.* So, "[b]y not raising the issue below, [the wife] failed to properly preserve this issue for appeal." *Id.*

C. Husband failed to preserve his sole issue on appeal by raising it at any time before the trial court, and certainly not in a post-judgment motion, and the Court of Appeals erred in concluding otherwise.

Under these rules, Husband's sole issue on appeal is not preserved and the Court of Appeals erred in holding otherwise.

On appeal, Husband argued that "[t]he trial court did not apply the analytic approach as it said it would do," that it "announced it would use the required analytical approach, then failed to do so" (Brief of the Appellant ["Aplt.Br."] 16-17), and that the trial court erroneously "focused on the settlement contract" rather than "the basis for the settlement" (Aplt.Br. 23).

At no time did Husband make a single one of these arguments before the trial court. When the special master issued his report recommending that under the "analytical approach" the trial court should treat Wife's annuity as her own separate property, Husband only objected to the form of the report and whether the special master fulfilled his duties as ordered (R6 at 3-5). He offered no objection to the substance of the holding (R6 at 3-5).

After trial, in Husband's proposed judgment, he recited case law about the analytical approach across three pages (R11 at 117-19). But he only offered a single paragraph of argument about how the Court should apply that approach, asserting Wife allegedly "filed her claim for loss of consortium" years before the divorce "to finagle an equal settlement with" Husband, something the trial court should consider in his favor under the analytical approach (R11 at 120). He argued the trial court should "consider the respective settlements as marital property and compensate [him] with a substantial share of the proceeds from [Wife]'s settlement" (R11 at 120).

The trial court agreed with Husband that the analytical approach applied. But it reasoned that under the analytical approach, the annuities were not meant "to replace ... any income stream or lost wages by either party" (R1 at 102-03, 108). Moreover, it noted the parties agreed to treat the annuities as income for the purpose of calculating spousal support, which resulted in the court awarding Husband a significant maintenance amount (R1 at 108). Accordingly, the court concluded, it would be unfair to relitigate the personal injury case to classify the annuities as marital (R1 at 108).

Husband filed no post-judgment motion at all. Instead, he just appealed. Then, for the first time in his brief in the Court of Appeals, he argued that the trial court misapplied the analytical approach in its judgment. He asserted that was so because the trial court improperly "focused on the settlement contract, not the basis for the settlement," and instead it should have applied the doctrine of transmutation – which he never once mentioned in the trial court – and should ahve considered his testimony about his mental incapacity and lack of independent counsel from Wife during the personal injury settlement negotiations (Aplt.Br. 16, 22-24).

The law of Kansas is and long has been that to preserve these challenges to the trial court's legal reasoning in its judgment for appeal, Husband had to make them in a post-judgment motion to alter or amend the judgment. And he certainly had to make them *at some point* before the trial court. He plainly did neither.

The Court of Appeals' decision otherwise was in error. It held Husband's argument was preserved for appellate review because he did "not

claim the district court's [judgment] lack[ed] factual findings or legal conclusions" (Opinion 11). Instead, the Court reasoned, Husband asserted "that the district court improperly applied the stated law to the stated facts," and that a post-judgment motion is not required to preserve such an argument for appeal (Opinion 11).

As this Court explicitly held in *Bradley*, "if the findings are objectionable *on grounds other than sufficiency of the evidence*, an objection at the trial court level is required to preserve the issue for appeal." 258 Kan. at 50 (emphasis added). The Court of Appeals below sought to distinguish that rule of law, explaining that *Bradley* discussed and applied only to factual findings, not a trial court's legal analysis (Opinion 10).

Strangely enough, despite this holding, the Court of Appeals also recognized that "[f]ollowing *Bradley*, panels of this court have held that a party seeking to preserve an argument for appeal that the district court's judgment is based on insufficient or inadequate factual findings *or conclusions of law* must object to the inadequacy or move to alter or amend the judgment" (Opinion 10) (emphasis added). The Court of Appeals failed to reconcile this recognition with its holding just paragraphs earlier interpreting *Bradley*'s holding as limited *solely* to inadequate findings of fact.

In the same paragraph, the Court of Appeals string-cited a select few of the decisions on which Wife relied in her brief, implying – but without actually saying – they are also somehow distinguishable (Opinion 10-11) (citing *In re Marriage of Poggi*, No. 121,012, 2020 WL 5268841, at *3-4 (Kan. App. Sept. 4, 2020) (unpublished); *In re Marriage of Rodrock*, No. 115,078,

2017 WL 2494704, at *4-5 (Kan. App. June 9, 2017) (unpublished); *In re Marriage of Friars*, No. 113,512, 2016 WL 2609622, at *4 (Kan. App. May 6, 2016) (unpublished)). Yet it ignored other decisions Wife cited such as *In re Marriage of Munker*, No. 95,609, 2007 WL 3275894, at *6 (Kan. App. Nov. 2, 2007) (unpublished). In *Munker*, the Court of Appeals held that a wife in a divorce case failed to preserve for appeal her argument that the trial court misapplied the law by dividing the parties' property without regard to the statutory factors because she never objected to it. *Id.* at 5-6.

Similarly, in *In re Marriage of Heideman*, No. 71,789, 1995 WL 18253237, at *1 (Kan. App. May 19, 1995) (unpublished), a husband argued the trial court misapplied the law by considering factors outside the statutorily required ones when dividing the parties' property. The Court of Appeals likewise held this was not preserved because he never objected to that misapplication in the trial court, and objections to "inadequate findings of fact *and conclusions of law*" are required to preserve a claim for appeal. *Id.* (emphasis added). This then was further confirmed in *Stewart*, where the wife's failure to file a post-judgment motion arguing that the trial court should not have awarded her husband certain rental income doomed her challenge on appeal. 2023 WL 8499235, at *7.

There is no meaningful difference between requiring a post-judgment motion to preserved arguments alleging a judgment's "insufficient or inadequate ... conclusions of law" and its "improper appli[cation] of the" law, as the Court of Appeals put it (Opinion 10-11). The law of Kansas plainly requires that both be argued to the trial court to give it a chance to modify its

judgment before the party appeals and challenges it. Especially when the alleged error appears for the first time in a judgment, that is the first and proper opportunity to raise the argument to the trial court.

The Court of Appeals' decision that Husband preserved his issues for appeal anyway was error. At no point below did Husband *ever* make the arguments in his brief on appeal. Tellingly, his brief in the Court of Appeals did not even have a required Rule 6.02(a)(5) statement explaining where he raised or preserved his arguments for appeal. As Wife explained to the Court of Appeals, this alone requires his appeal be dismissed (Brief of the Appellee ["Aple.Br."] 16-17, 23) (citing *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (failure to follow Rule 6.02(a)(5) is fatal, dismissing appeal)). Indeed, even in his reply brief, while Husband argued he did not need to file a post-judgment motion, he still never showed where he made his arguments in the trial court.

This Court should follow the well-established existing law of Kansas and hold Husband's arguments are not preserved for appeal. It should reverse the Court of Appeals' judgment and either affirm the district court's judgment or dismiss Husband's appeal.

II. If the Court holds Husband's argument was preserved for appeal, then it should affirm the Court of Appeals' holding that under K.S.A. § 23-2801, all personal injury awards are marital property subject to equitable division.

Standard of Appellate Review

"Issues of … statutory interpretation constitute questions of law, over which an appellate court exercises unlimited review." *Benchmark Prop. Remodeling, LLC v. Grandmothers, Inc.*, ___ Kan. ___, 553 P.3d 974, 978 (2024).

* * *

A. Summary

The Court of Appeals held the trial court should not have applied the "analytical approach" to determine whether the parties' annuities were marital or non-marital at all. This Court granted review because Husband argued this "conflicted" with several prior Court of Appeals decisions holding otherwise, on which the trial court had relied. As the Court of Appeals explained in its decision here, however, those prior decisions looking to other dissimilar states' schemes were wrong. Instead, it correctly held that under K.S.A. § 23-2801, all property belonging to a married couple is marital property subject to division. It also then correctly held that this did not necessitate a different result in the trial court, either.

Therefore, if the Court holds that Husband's argument on appeal was somehow preserved, it should affirm the Court of Appeals' judgment.

B. The Court of Appeals' decision correctly recited and declared the law of Kansas, which does not employ an "analytical approach" during property division in a divorce proceeding because under K.S.A. § 23-2801 all property is considered marital and subject to equitable division.

In Kansas, a spouse's "sole and separate property" includes property that "come[s] to a person by descent, devise or bequest … or by gift from any person" and is not "subject to the disposal of the person's spouse" K.S.A. § 23-2601. But this protection only applies *before* divorce proceedings are initiated. This is because under K.S.A. § 23-2801, "[a]ll property owned by married persons" – including separate property under § 23-2601 – becomes "martial property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment."

Applying this straightforward statutory scheme, the Court of Appeals here held that the trial court erroneously classified the parties' annuities as their own separate property at all. It explained that "[u]nlike states that employ the analytical approach to identify marital or separate property in divorce actions, Kansas does not have a dual classification statutory scheme" under § 23-2801 (Opinion 19). Instead, "Kansas law requires the district court to define the personal injury awards and associated annuities as martial property subject to equitable division" (Opinion 19).

As the Court of Appeals acknowledged, a few prior decades-old Court of Appeals decisions held instead that the law of Kansas mandates using an "analytical approach" to classifying property in a divorce proceeding (Opinion

17-18) (citing *In re Marriage of Buetow*, 27 Kan. App. 2d 610, 611, 3 P.3d 101 (2000); *In re Marriage of Powell*, 13 Kan. App. 2d 174, 766 P.2d 827 (1988)).

In *Powell*, the Court of Appeals declared a husband's personal injury settlement to be marital property, noting the nature of the underlying loss and characterizing the award not just as compensation for personal expenses, but also as maintenance for the husband's family. 13 Kan. App. 2d at 179-80. The Court of Appeals relied on decisions from several other jurisdictions to make its decision, noting that "[m]ost courts applying equitable distribution statutes have ruled that the entire award received by the injured spouse prior to divorce is marital property." *Id.* at 178-79 (citing *Liles v. Liles*, 289 Ark. 159, 168-70, 711 S.W.2d 447 (1986); *In re Marriage of Fjeldheim*, 676 P.2d 1234, 1236 (Colo. App. 1983); *In re Marriage of Gan*, 83 Ill. App. 3d 265, 268-70, 404 N.E.2d 306 (1980); *Nixon v. Nixon*, 525 S.W.2d 835, 839 (Mo. App. 1975); *Platek v. Platek*, 309 Pa. Super. 16, 20-24, 454 A.2d 1059 (1982); *Bero v. Bero*, 134 Vt. 533, 535, 367 A.2d 165 (1976)).

Similarly, in *Buetow*, the Court of Appeals looked to a Nebraska decision employing the analytical approach to determine whether personal injury awards are marital property. 27 Kan. App. 2d at 611-12 (citing *Parde v. Parde*, 258 Neb. 101, 108-10, 602 N.W.2d 657 (1999)). It also approvingly cited a Colorado Court of Appeals decision using the same methodology. *Id.* at 612 (citing *In re Marriage of Smith*, 817 P.2d 641, 644 (Colo. App. 1991)).

But in its decision in this case, the Court of Appeals acknowledged the holdings in *Powell* and *Buetow* but correctly explained where the panels in those decisions went awry. The other states to which the Court of Appeals

looked in *Powell* and *Buetow* "have distinct statutory schemes from Kansas" (Opinion 17-18). For example, the Court of Appeals explained, in Nebraska, "the marital estate should include only property created by the marital partnership," and the trial court is tasked with, "as a threshold matter," classifying "the parties' property as either marital or nonmarital" (Opinion 17) (citing *Parde*, 258 Neb. at 108). Similarly, in Colorado, the divorce court first "set[s] apart to each spouse his or her property" and then "divide the marital property" (Opinion 16-17) (quoting Colo. Rev. Stat. § 14-10-113(1)).

Kansas, on the other hand, makes no distinction between marital and nonmarital property. Rather, under § 23-2801, all property married people own becomes "martial property at the time of commencement by one spouse against the other of" a divorce action. That is, "[d]uring a divorce action in Kansas, all property owned by marital persons is combined into one pot of *marital property*" (Opinion 19) (emphasis in original).

The Court of Appeals in *Powell* explained it followed other jurisdictions' "analytical approach" because "the reasoning applied by the majority of the *equitable distribution jurisdictions* is persuasive." 13 Kan. App. 2d at 180 (emphasis added). But as the Court of Appeals recognized here, that was based on a false premise. What the Court in *Powell* should have asked is how other jurisdictions approach property *classification*, not *division*.

The Court of Appeals' decision here recognized what the prior panels in *Powell* and *Buetow* did not: that classifying property as marital or separate *before* dividing it between the parties in a divorce action is not part of Kansas's statutory scheme. That is a correct reading of the law of Kansas.

This Court recognized as much nearly five decades ago in *Cady v. Cady*, 224 Kan. 339, 344, 581 P.2d 358 (1978) (When a spouse files for divorce, "each spouse becomes the owner of a vested, but undetermined, interest in *all the property individually or jointly held*" (emphasis added)).

The Court of Appeals correctly interpreted Kansas's statutory scheme to not require any classification of property as marital or nonmarital before equitably dividing it. As it pointed out, the older prior decisions on which Husband relied failed to consider that Kansas law differs from those other jurisdictions in the crucial ways the Court of Appeals identified.

C. The Court of Appeals correctly held that treating the annuities as marital did not have to change the outcome of the district court's decision, but still properly remanded that issue.

Having held that the district court – relying on prior erroneous Court of Appeals decisions – erred in applying an "analytical approach" and treating the annuities as non-marital property under Kansas's statutory scheme, the Court of Appeals remanded the case with instructions to "treat both annuities as marital property and make an equitable distribution of the marital property consistent with the considerations in K.S.A. 23-2802(c) for a just and reasonable property division" (Opinion 20). Husband had argued that the Court of Appeals should "re-apportion a significant percentage of [Wife's] future payments from the annuity issued to her as an equitable division of their property" (Opinion 22). The Court of Appeals properly declined to do so.

As the Court of Appeals explained, district courts in Kansas have "wide discretion to make a 'just and reasonable division of property'" in divorces

(Opinion 20) (citing *In re Marriage of Rodriguez*, 266 Kan. 347, Syl. ¶ 1, 969 P.2d 880 (1998)). Section 23-2802(c) sets out the ten factors trial courts must consider when deciding how best to equitably divide the parties' property. Under them, trial courts are not required to equally split marital property, but rather may divide that property as necessary to "arrive at a just and reasonable division" (Opinion at 21) (quoting *Rodriguez*, 266 Kan. 352-53).

The Court of Appeals' decision here therefore followed this rubric, too, and explicitly acknowledged that the trial court on remand may "reach the same property division" even after treating the annuities as marital property, as it already weighed all the equities in its decision (Opinion 20-23). It stated the difference between classifying annuities as martial property rather than separate property "may have little effect on the district court's ultimate property division because many of the concepts underlying the analytical approach are included when dividing the marital property" under these factors (Opinion 19). So, "requiring the district court to reclassify the parties' personal injury awards does not necessarily require the district court to change its equitable property division" (Opinion 21). In declining Husband's invitation to divide the marital property itself, the Court of Appeals noted the trial court already "considered all the property – marital and separate – in making its division," so "recategorizing" the annuities "does not necessarily require any change in the result of the court's equity analysis" (Opinion 22).

This was plainly the correct approach. Regardless of its treatment of the annuities as non-marital property, the trial court based much of its decision to award each party their own annuity on the equities at hand. It

held the parties' annuities "do not replace (and were apparently not intended to replace) any income stream or lost wages by either party" and are more aptly characterized as property rights under Kansas law, but Wife and Husband agreed to treat them as income and it would not interfere with that (R1 at 102-03). It stated it did not want to be seen as relitigating the personal injury case, which would be unfair (R1 at 108). It stated it also would be unfair to allow Husband to "benefit from a significant award of spousal maintenance that was calculated based upon monthly payments from the annuity … while at the same time re-apportioning the amounts of those payments and re-directing that same 'income' stream back to" Wife (R1 at 108). As well, the court noted Husband "entirely omits his own separate annuity when addressing what property the Court should consider and divide" and reasoned he "cannot have his 'cake' and eat it too" (R1 at 109). It held that in light of the parties' annuities and Husband's disability from his injury, no equalization payment was necessary as to either party (R1 at 109).

Accordingly, the Court of Appeals recognized that the trial court's ultimate division of this property did not have to change based on its reclassification. But because this is a question of discretion, it appropriately remanded the issue for the trial court to make its own determination.

The Court of Appeals properly clarified Kansas law on this important issue. If the Court holds Husband's arguments on appeal are at all preserved, it should affirm the Court of Appeals' judgment.

III. If the Court holds Husband's argument was preserved for appeal and the Court of Appeals was wrong to hold the "analytical approach" is not the law of Kansas, then it should affirm the district court's judgment correctly applying that approach.

Standard of Appellate Review

The district court's division of the marital estate may be reversed only if, viewing the evidence in the light most favorable to it and drawing all reasonable inferences in its favor, no reasonable person would agree with it. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 483, 193 P.3d 504 (2008).

There are three possible types of an abuse of discretion: when a judicial decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of fact; or (3) based on an error of law. *State v. Ward*, 292 Kan. 541, Syl. ¶3, 256 P.3d 801 (2011) (discussing *State v. Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 (2010)).

But whether a division of a martial estate constitutes an abuse of discretion falls under the *first* type of abuse of discretion: if it is arbitrary, fanciful, or unreasonable. "[D]istrict courts are granted wide discretion in dividing property in a divorce action," including in deciding whether property is separate or marital, and to reverse that decision as an abuse of discretion an appellant must "show that the district court's division was fanciful, arbitrary, or unreasonable." *Hair*, 40 Kan. App. 2d at 483. In this form of abuse of discretion, "[d]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court. If reasonable [persons] could differ as to the propriety of the action taken by the trial court then it cannot

be said that the trial court abused its discretion." *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992).

At the same time, in making this determination, this Court must view the record in the light most favorable to the trial court's judgment, "accept[ing] as true the evidence, and all inferences to be drawn therefrom, which support or tend to support the findings in the trial court, and disregard[ing] any conflicting evidence or other inferences which might be drawn therefrom." *In re Est. of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984). The Court does not reweigh evidence, pass on witness credibility, or redetermine questions of fact. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 704-05, 229 P.3d 1187 (2010). And when, as here, the appellant did not file a post-judgment motion objecting to a trial court's findings of fact or conclusions of law, "this [C]ourt will presume the trial court found all facts necessary to support its judgment." *O'Brien v. Leegin Creative Leather Prods., Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012).

* * *

In his petition for review, Husband never actually argued why the Court of Appeals' decision that the "analytical approach" was not the law of Kansas was wrong. But if the Court of Appeals *was* wrong to hold that, then the district court plainly applied the "analytical approach" correctly, within its discretion and viewing the facts most favorably to its judgment.

Therefore, if this Court holds Husband's argument *was* preserved for appeal, and also holds the Court of Appeals' holding that all property is marital is wrong, it should still affirm the district court's judgment.

A. Under Kansas's "analytical approach," a personal injury settlement is a party's separate property in a divorce if it compensates a party for post-dissolution (i.e., future) losses.

"[T]he analytical approach evaluates the nature and underlying reasons for the compensation," and instead "the classification of the award depends upon the nature of the underlying loss." *Buetow*, 27 Kan. App. 2d at 611. If "the benefits compensate for a diminution of the marital estate, that is, compensation for past wages, medical expenses, and other items incurred during the marriage, the benefits are marital property subject to division." *Id.* at 613. If, on the other hand, the trial court determines the benefits compensate for losses "which extended beyond filing for divorce," the award is "properly excluded … from the marital estate." *Id.* Therefore, under this approach, not all personal injury awards and settlements are deemed marital property, and instead some are separate property. *See, e.g.*, *id.* at 612.

The Court of Appeals has used this approach in a handful of cases over the past 40 years beginning with *Powell*, 13 Kan. App. 2d at 174.

In his brief, Husband principally relied on *Powell* and *In re Marriage of Lash*, No. 99,417, 2008 WL 4966486 (Kan. App. Nov. 21, 2008) (unpublished) (Aplt.Br. 18-19, 24). But unlike what Husband advocated here, in both cases the Court of Appeals *affirmed* a determination as to the personal injury award at issue as *not* being an abuse of discretion. But the fact "that a district court [in one case] did not abuse its discretion by" taking an action "does not lend measurable support to the contrary position that the district court in this case abused its discretion by refusing to" take that action. *N. Am. Specialty Ins. Co. v. Britt Paul Ins. Agency, Inc.*, 579 F.3d 1106, 1112

(10th Cir. 2009) (joined by Gorsuch, J.). This is "the nature of judicial discretion," which "precludes rigid standards for its exercise." *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967) (Burger, J.).

Neither *Powell* nor *Lash* supports Husband's argument on appeal. Instead, both decisions – and several other decisions Husband omitted from his brief – made plain that a future annuity a trial court finds compensates a party for future losses is properly assigned to that party as her separate property. This makes sense, because the annuity compensates for losses "which extended beyond filing for divorce," so it is "properly excluded … from the marital estate." *Buetow*, 27 Kan. App. 2d at 613. *Powell*, *Lash*, and these other authorities support the trial court's conclusion here that Wife's annuity is her separate property. Wife explained these decisions in her Court of Appeals brief and cited others from other states, too (Aple.Br. 32-37). In his reply brief, Husband did not address this issue at all.

B. The trial court reasonably concluded that Wife's future annuity is to compensate her for her future losses, making it her separate, nonmarital property.

Ultimately, Husband's argument why the trial court erred in applying the "analytical approach" stems from his failure to view the evidence in the light most favorable to the trial court's judgment.

The sole argument Husband made in the trial court about why he believed Wife's annuity was marital under the "analytical approach" (R11 at 120), which he repeated in his brief (Aplt.Br. 13, 17, 26), was that Husband's and Wife's annuities are in "equal amounts." At the outset, this is untrue. The total possible *funding* for the two annuities was equal, but Wife's

monthly payment from her annuity is one sixth less than Husband's, and her future lump sum payments are less than Husband's (R13 at 29-30).

Husband also argued Wife's "claim was derivative from [Husband]'s claim" (Aplt.Br. 20). This, too, is untrue. The personal injury suit and settlement here were in Missouri (R1 at 93; R12 at 122; R3 at 16; R13 at 1-15), with the settlement specifically stating it was governed by Missouri law (R13 at 22). As the special master noted (R12 at 20), in Missouri a loss of consortium claim *is not* derivative from a primary claim, but instead "is a separate, distinct, and personal legal claim, and is derivative only in the sense that it must be occasioned by a spouse's injury." *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 112 (Mo. App. 2006). Wife explained this more in her Court of Appeals brief, too (Aple.Br. 39).

Most importantly, viewing the evidence most favorably to the trial court's judgment, Wife's future annuity was to compensate her for her future losses occasioned by her loss of consortium. As Wife testified, she "suffered the loss of consortium *and continue[s] to suffer the loss of consortium*" (R9 at 32) (emphasis added). She explained her "lack of consortium is lasting 'til today as I sit here" (R9 at 47) and would last the rest of her life (R9 at 62). Wife said the accident left Husband with substantial cognitive defects and his personality significantly changed (R9 at 53), such that, "I lost the man I loved. I lost Aaron, the Aaron who was there before he got injured" (R9 at 34), he became more aggressive and impulsive, and this was a large part of the reason for the divorce (R9 at 53-54). The annuity was in part to ensure that for the future, despite Husband's disability, the parties' children would

have a "parent that is there to ensures [their] safety and wellbeing and ensure [their] financial future" (R9 at 63).

Therefore, regardless of whether they would be characterized as "noneconomic" or "economic," as in *Buetow* the trial court reasonably "determined that [Wife's annuity] compensated h[er] for '… loss which extended beyond filing for divorce,'" and therefore "properly excluded the [annuity] award from the marital estate." 27 Kan. App. at 613. *That* is the analytical approach. Viewing the evidence in the light most favorable to its decision, the trial court faithfully followed that approach.

Husband's other arguments in his Court of Appeals brief all fail to view the evidence this way, omit that the trial court found him not credible in suggesting he was misled or defrauded into the settlement agreement (R1 at 108 n. 4), and are amply addressed in Wife's Court of Appeals brief (Aple.Br. 40-44). The trial court's application of the analytical approach was plainly sound and reasonable. It certainly is not something with which no reasonable person could agree.

Therefore, if the Court holds Husband's arguments were preserved and the Court of Appeals was wrong in holding the analytical approach is not Kansas law, it should still affirm the district court's judgment.

Conclusion

The Court should reverse the Court of Appeals' judgment and dismiss Husband's appeal or affirm the district court's judgment. Alternatively, it should affirm the Court of Appeals' judgment. Alternatively still, it should reverse the Court of Appeals' judgment and affirm the district court's.

Respectfully submitted,

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Certificate of Service

I certify that on October 24, 2024, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

223 P.3d 837 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of the MARRIAGE
OF James C. FISHER, Appellee,
and
Laurie C. Fisher, now Grey, Appellant.

No. 101,816.
|
Feb. 12, 2010.

West KeySummary

1 **Divorce** Record
Divorce Harmless Error
A divorce decree was upheld based on failure to show that the issuance of the decree was an abuse of discretion. Appellant appealed pro se, alleging that the court failed to consider the required statutory factors, but she failed to include a transcript of the divorce proceeding. Even so, that the court granting the decree failed to articulate and discuss each statutory factor did not mandate a reversal. West's K.S.A. 60–1610(b)(1).

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.

Attorneys and Law Firms

Laurie C. Grey, appellant pro se.

Nancy Ogle, of Ogle Law Office, L.L.C., of Wichita, for appellee.

Before STANDRIDGE, P.J., MARQUARDT, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Laurie Grey appeals from the district court's divorce decree which divided marital assets and denied her spousal maintenance. We affirm.

Citing incompatibility, James Fisher filed for legal separation and separate maintenance from his wife, Laurie Fisher (now Grey), in August 2006 after nearly 5 years of marriage. The district court entered a temporary order that granted the parties joint legal custody of their daughter, V.F. Fisher was designated as the primary custodial parent. The district court made a temporary division of the marital assets and debts and ordered no spousal maintenance.

The same month that the temporary order was issued, Grey filed a motion to modify the temporary order, asking for primary custody of V.F.; $463 per month in child support; $721 per month in spousal maintenance; a freezer; a washer; a dryer; half of the equity in the marital property; and half of Fisher's retirement benefits. The district court denied the motion and ordered Grey to submit to drug testing.

In November 2006, Grey reported to the district court that the parties were attempting to reconcile. However, almost a year later, in September 2007, Fisher amended his petition for legal separation and requested a divorce. In response, Grey filed another motion for temporary spousal maintenance. The district court granted the motion.

Claiming that her two previous attorneys were ineffective, Grey filed four pro se motions in August 2008. The first motion asked the district court's permission "to allow her friend and mentor to assist her" through the court proceedings. She alleged in the motion for the first time that Fisher physically and mentally abused her and their children during the marriage and divorce proceedings. However, Grey withdrew this motion before the district court ruled on it.

In her second motion, Grey asked permission to attend all court hearings by telephone. Grey claimed she needed to move away from Wichita to protect herself from Fisher's "ongoing instances of mental and even physical abuse, and

treats [*sic*] of physical abuse." The third motion requested the district court to enjoin Fisher from selling the marital residence. The fourth motion requested an increase in spousal maintenance to $1500 per month. The district court denied all of these motions.

On December 3, 2008, the district court filed a divorce decree, noting Grey's "lengthy history of using illegal drugs and her psychological disabilities." The district court granted the parties joint legal custody of V.F., designating Fisher as the primary custodial parent. Although the district court ordered Fisher to satisfy his outstanding spousal support obligation, the district court did not order Fisher to pay additional spousal maintenance. Grey was not ordered to pay child support.

Numerous domestic relations affidavits were filed which listed the parties' marital assets and debts. A pretrial conference order included each party's proposed division of assets and debts, the age of the parties, the duration of the marriage, the property owned by the parties, each party's present earning capacity, and their family ties and obligations. The divorce decree divided the parties' assets and debts; however, it did not assign a monetary value on each item. Grey appeals.

***2** The district court has broad discretion when dividing the property and debts in a divorce proceeding, and this court will not disturb the exercise of that discretion on appeal absent a clear showing of abuse. *In re Marriage of Wherrell,* 274 Kan. 984, 986, 58 P.3d 734 (2002). The district court abuses its discretion when no reasonable person would adopt the district court's position. See *In re Marriage of Bradley,* 282 Kan. 1, 7, 137 P.3d 1030 (2006). Further, the district court abuses its discretion when it goes outside the applicable legal standards or statutory limitations when making its decision. *Dragon v. Vanguard Industries, Inc.,* 277 Kan. 776, 779, 89 P.3d 908 (2004).

An appellate court will not reverse a district court's decision denying spousal maintenance absent a clear abuse of discretion. *In re Marriage of Day,* 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003). If reasonable persons could differ as to the propriety of the action taken by the district court, then it cannot be said that the district court abused its discretion. *Bradley,* 282 Kan. at 7, 137 P.3d 1030. The party asserting an abuse of discretion bears the burden of showing such abuse. See *In re Marriage of Larson,* 257 Kan. 456, 463–64, 894 P.2d 809 (1995).

Although this court must liberally construe the filings of pro se litigants, a pro se litigant must follow the same rules of procedure as represented parties. See *In re Estate of Broderick,* 34 Kan.App.2d 695, 701, 125 P.3d 564 (2005). Even liberally construing Grey's arguments on appeal, her appellate brief fails to comply with Supreme Court Rule 6.02 (2009 Kan. Ct. R. Annot. 38). This failure precludes a meaningful review by this court.

An appellant's brief shall contain facts that are "keyed to the record on appeal by volume and page number so as to make verification reasonably convenient. Any material statement made without such a reference may be presumed to be without support in the record." Rule 6.02(d) (2009 Kan. Ct. R. Annot. 38). Grey does not cite to the record on appeal to support any fact alleged in her appellate brief. Thus, this court presumes her factual statements are without support. See *In re Sylvester,* 282 Kan. 391, 400, 144 P.3d 697 (2006).

Further, Rule 6.02(e) (2009 Kan. Ct. R. Annot. 38–39) states: "Each issue shall begin with citation to the appropriate standard of appellate review and a reference to the specific location in the record on appeal where the issue was raised and ruled upon." Grey has failed to cite a standard of review for any issue.

Grey filed a cross-appellee's brief on September 8, 2009. However, Fisher did not file a cross-appeal. Therefore, we assume that Grey's cross-appellee's brief is most likely a reply brief. Assuming her brief is a reply brief, she argues for the first time on appeal that the district court abused its discretion when it divided the martial property. After thanking Fisher's appellate counsel for "all the references and keys to the record on appeal" and researching the issue, she cites Fisher's appellate brief for authority regarding the standard of review.

***3** Grey cites to the Pledge of Allegiance; the preamble to the United States Constitution; and the Fifth, Sixth, and Eighth Amendments to the United States Constitution as evidence that she received ineffective representation during the divorce proceedings.

In Kansas, K.S.A. 60–1601 *et seq.* governs divorce proceedings, the division of marital property, and the award of spousal maintenance, not the United States Constitution, not Fisher's appellate brief, and not the Pledge of Allegiance. *E.g., In re Marriage of Welliver,* 254 Kan. 801, 810, 869 P.2d

653 (1994). Further, there is no general constitutional right to counsel in civil cases; therefore, Grey had no constitutional right to effective assistance of counsel. See *Brown v. State,* 278 Kan. 481, 483, 101 P.3d 1201 (2004).

In Grey's reply brief, she argues that the district court abused its discretion by ignoring her pro se motions that alleged: (1) Fisher mentally and physically abused her; (2) she contributed $148,000 during the marriage; and (3) she contributed to the marriage as a wife, mother, and homemaker. However, the record on appeal reveals that the district court considered all of her motions and denied them.

Grey alleges in her reply brief that the district court failed to consider the factors listed in K.S.A. 60–1610(b)(1). This court's review is severely limited by the absence of a transcript of the divorce proceeding. However, the district court stated in the divorce decree that it reviewed the file and exhibits.

Moreover, Grey has failed to show that the district court arbitrarily disregarded consideration of any statutory factors or that it relied solely on one factor. The district court's failure to articulate and to discuss each of the factors listed in K.S.A. 60–1610(b)(1) does not mandate reversal of the district court's decision. See *In re Marriage of Whipp,* 265 Kan. 500, 508–09, 962 P.2d 1058 (1998).

Further, Grey does not claim that she objected to the district court's method of property division or that she asked the court to reconsider its divorce decree. Generally, a litigant must object to inadequate findings of fact and conclusions of law to preserve the issue for appeal. Without an objection, we presume the district court found all facts necessary to support its judgment. *Dragon v. Vanguard Industries,* 282 Kan. 349, 356, 144 P.3d 1279 (2006).

Accordingly, Grey has failed to carry her burden of showing that the district court abused its discretion when it issued its divorce decree.

Affirmed.

All Citations

223 P.3d 837 (Table), 2010 WL 597012

369 P.3d 343 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of the MARRIAGE
OF Richard FRIARS, Appellant,
and
Jessica FRIARS, n/k/a Bruch, Appellee.

No. 113,512.
|
May 6, 2016.

Appeal from Reno District Court; Timothy J. Chambers, Judge.

Attorneys and Law Firms

Kyle P. Sollars and Douglas C. Cranmer, of Stinson, Lasswell, & Wilson, L.C., of Wichita, for appellant.

Shawnah K. Corcoran, of Hutchinson, for appellee.

Before ATCHESON, P.J., BRUNS, J., and WALKER, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Richard Friars appeals from the district court's order denying his motion to modify his child support obligations. Richard contends the district court failed to set forth sufficient findings of fact and conclusions of law, failed to account for his reasonable business expenses in determining his income, and failed to give him a parenting time adjustment on his child support calculations. Since we find these claims lack merit, the district court's orders are affirmed.

FACTS

This is the second time in 2 years this case has come before us on similar issues. A prior panel of this court considered Richard's appeal from child support orders issued by the district court. As we will describe later, that panel reversed the district court's ruling because of inadequate findings and remanded for additional findings of fact and conclusions of law. *In re Marriage of Friars and Bruch,* No. 109,411, 2014 WL 113461 (Kan.App.2014) (unpublished opinion). We are once again plagued with similar problems in this appeal.

The parties are familiar with the history of this case, and we need not repeat it here in great detail. Instead, we will focus primarily on those events which have occurred since the prior remand.

Richard and Jessica Bruch (f/n/a Jessica Friars) were married in January 2003. Almost 2 years later, Richard filed for divorce. The couple had one child, then 18–month–old Levi. In June 2005, the parties reached a settlement agreement addressing both property issues as well as parenting time and child support. Under the agreement, the parents would share joint legal custody of their child with Jessica being designated as the primary residential custodian. Richard also agreed to pay $350 per month in child support. A detailed parenting time schedule was set out in the agreement. The court adopted these agreements at the time the divorce was granted.

In May 2011, Jessica filed a motion to modify child support. Jessica sought the modification because the child's age—Levi had turned 7 years old—called for an increase of support under the state's child support guidelines. Ultimately, the parties agreed to a modified child support amount of $533 per month beginning July 1, 2011, which was approved by the district court.

In November 2012, Jessica filed a second motion to modify child support asserting that Richard's income had substantially increased and he had failed to respond to a written request for income information as required by the guidelines. After the district court ordered financial records to be exchanged, a hearing on the motion was held. Jessica argued that Richard had made $3,200 per week during a 6–month period in 2012, but he then had voluntarily quit his job. She asked the court to impute that income to him and increase support from $533 to $1,595 per month.

Richard responded to Jessica's motion by arguing that his welding employment was seasonal, and he received unemployment benefits from the union for part of the time he was not working. Richard asked the district court to consider historical information about his income and expenses, noting that the average income he received over the last 4 years

was $96,852. Although he received some reimbursement for travel expenses from his employer, Richard explained he was responsible for any expenses over the contractual reimbursement rate. He claimed he had approximately $36,000 in unreimbursed business expenses every year, reducing his pretax income to $60,852.

***2** Following the hearing, the district court issued an order drafted by Jessica's counsel finding that Richard's annual income was $127,722 per year and that Jessica would be imputed to earn minimum wage. Based on an attached child support worksheet, Richard was ordered to pay $1,317 per month in child support. Richard appealed from this ruling, objecting to the district court's calculations and contending he had been deprived of due process of law by the court.

As noted above, the prior panel of this court rejected Richard's due process claim but concluded the district court's finding that he should be imputed income of $127,722 was not supported by sufficient evidence in light of the court's sparse findings. The panel remanded the case for further findings of fact and conclusions of law to support its reasoning or for the recalculation of Richard's child support. *In re Marriage of Friars and Bruch,* 2014 WL 113461, at *7.

Following remand, the district court held a hearing in March 2014. After considering all of Richard's wages and reimbursements, and imputing 7 weeks of additional voluntary unemployment, the court found Richard's wages were $84,690 in 2012. The court rejected Richard's claims that his reasonable business expenses exceeded the per diem and reimbursements he obtained from his employers and disallowed reductions of his income based upon other claimed expenses. This resulted in a child support order of $1,015 per month effective January 1, 2013. Significantly, no appeal was taken from this order.

The events leading to this second appeal began shortly thereafter, as antagonism between the parties spilled onto the district court's docket. Jessica filed a motion to hold Richard in contempt for failing to pay the ordered support and asserting he was in arrears in excess of $11,000. She also requested a restraining order based upon her assertion that Richard had harassed her by issuing a subpoena for records for the child's therapist and conducting video surveillance of her home. Jessica claimed that she, her friends, and family, felt threatened by the actions of Richard's and his agents.

After a hearing on Jessica's motion, the district court found Richard in indirect contempt of court for failing to pay child support as ordered. The court awarded Jessica $150 in attorney fees. While the judge denied Jessica's request for a restraining order, she admonished both parties to behave appropriately in the future. Both parties were ordered to provide current income and employment records, and a further hearing was scheduled during July 2014 to review Richard's payment record and consider the status of the contempt order.

In July 2014, the Kansas Department of Children and Families (DCF) entered an appearance as assignee of Jessica's child support rights. DCF requested the district court to modify an existing income withholding order to withhold the $1,015 current child support required, plus $100 per month to pay toward an outstanding arrearage of nearly $15,000. An income withholding order was issued thereafter.

***3** In August 2014, Richard filed a motion to modify his child support obligation. He asserted that he had a new job located in or near Reno County which was more conducive to his parenting schedule. In addition, he asserted that he was no longer incurring work-related expenses. Based upon his new domestic relations affidavit, Richard reported that he was earning $31,176 annually. Richard also requested a parenting time adjustment and an income tax adjustment under the child support guidelines.

After Richard retained different counsel, he filed an additional request that the judgment for the child support arrearages be set aside under K.S.A. 60–260(b)(6). No additional information was provided in the motion as to the factual grounds for the K.S.A. 60–260 request, and the motion to set aside was not discussed at the next hearing. A new domestic relations affidavit reported Richard's income was $2,560 per month.

At the hearing on his motion, which was held before a different district court judge than previous child support hearings, Richard described the patchwork quilt of his employment arrangements since the divorce. He testified that he had worked as a welder for the last 10 years and was sometimes self-employed and sometimes employed by a company. At the time of the hearing, Richard was working as a laborer and part-time welder for Frank Construction and was working locally. Prior to this job, he was a self-employed subcontractor on a job working as a welder on a gas pipeline in Independence, Kansas. When he was self-

employed he was required to provide his own truck, welding equipment, and oxygen acetylene. He was paid wages, rig expenses (that related to equipment expenses), and an hourly wage; however, he had to pay his own expenses such as fuel, wear and tear on his equipment and truck, equipment to move the welding machines, and special fire-retardant clothing. Richard testified that his average *unreimbursed* expenses when working a job as a self-employed welder was $3,000 to $5,000 per month if he worked in Texas or Oklahoma and higher if he worked further north. Richard also testified that he generally was only able to work 8 months out of the year due to union rules. His union contract precluded him from doing other welding projects involving pipes. Richard further testified that although he was scheduled for 48 percent parenting time, he usually maintained at least 35 percent parenting time. Richard admitted he constantly worked multiple jobs every year and that some of his wage statements from contracts reflected that he brought home $26,000 to $32,000 per month, including wages, rig pay, and per diem. His records also showed he received per diem for an average of 245 days in 2012 and 2013.

The district court took the matter under advisement with Richard agreeing to present a statement from his accountant within 30 days. There is significant confusion as to what happened thereafter. The appearance docket and record fail to reflect any written ruling from the court, yet Richard filed a motion to reconsider the court's ruling. In his brief, he contends the judge issued a ruling via e-mail. Richard's motion alleged that the court failed to properly consider his reasonable business expenses and failed to grant him a parenting time adjustment. Apparently another hearing was held on January 30, 2015, after which the judge denied the motion for reconsideration. Richard filed a timely notice of appeal from the "[o]rder filed February 5, 2015."

ANALYSIS

***4** On appeal, Richard first challenges the district court's order denying his motion to modify on the grounds that it lacks sufficient findings of fact and conclusions of law and fails to adequately analyze the Kansas Child Support Guidelines (KCSG) with respect to the case. Richard correctly noted that K.S.A.2015 Supp. 60–252(a) obligates the district court to make findings of fact and conclusions of law in contested matters. See also Supreme Court Rule 165 (2015 Kan. Ct. R. Annot. 257).

Richard's argument faces two hurdles, however. First, he failed to file a motion seeking additional findings of fact and conclusions of law from the district court prior to filing and perfecting this appeal. See K.S.A.2015 Supp. 60–252(b). As a general rule, a party must object to inadequate findings of fact and conclusions of law to preserve the issue for appeal because such objections give the district court an opportunity to correct any alleged inadequacies. *Fischer v. State,* 296 Kan. 808, 825, 295 P.3d 560 (2013). This requirement gives the district court the opportunity to correct its orders. " 'Where no objection is made, this court will presume the trial court found all facts necessary to support its judgment. However, this court may still consider a remand if the lack of specific findings precludes meaningful review. [Citations omitted.]' " *O'Brien v. Leegin Creative Leather Products, Inc.,* 294 Kan. 318, 361, 277 P.3d 1062 (2012). The second path was the one chosen by the prior panel of this court.

Following remand from the 2013 appeal, the district court subsequently issued an order in March 2014 revising downward Richard's child support obligation and explaining its reasoning. These findings included a determination that Richard's claimed business expenses in excess of his per diem and rig fees were unreasonable. He did not appeal from this decision.

In his August 2014 motion, Richard requested a reduction in his child support payments, plus the inclusion of a parenting time adjustment and an income tax adjustment. After a hearing before a new judge, additional evidence was presented as to Richard's employment history since 2009. Richard requested that the court recalculate his child support based upon his current employment, or if basing child support on his prior income, to properly consider his reasonable business expenses. In other words, Richard effectively asked the court to reconsider the ruling regarding business expenses from the March 2014 order which he did not appeal.

The second hurdle Richard faces in bringing this appeal is the absence of an adequate record to permit meaningful appellate review. It appears from the briefs that the district court judge issued an e-mail ruling that is not included in the record on appeal. An e-mail ruling was also the root of the problem in the prior appeal, although that panel apparently had the benefit of the e-mail included in the record. See *In re Marriage of Friars and Bruch,* 2014 WL 113461, at *7 (in e-mail to counsel, district court gave only brief explanation for its decision). In this case, an e-mail issued by a different judge again appears to have been sent but was not included

in the record on appeal. Before a journal entry reflecting that ruling in the e-mail could be filed, Richard filed a motion to reconsider. Following a hearing thereafter, the court signed a very brief order denying the motion to modify.

***5** Once again the absence of a critical record makes it difficult for us to review the propriety of the actions in the lower court. Without the district court's e-mail ruling, we are left to speculate whether the district court, in fact, made any detailed findings. When combined with Richard's failure to object to the inadequate findings, we are placed in an awkward procedural situation. As a general rule, we presume the district court found all the facts necessary to support its judgment. See *O'Brien,* 294 Kan. at 361. This is especially true since it appears from the record that Richard was primarily seeking reconsideration of a child support determination made 6 months earlier, based upon many of the same arguments raised prior to the March 2014 order.

Without having a copy of the district court's e-mail decision, we have no idea what findings were made or how the court expected them to be preserved for the record. In such situations it is imperative that the district court maintain the integrity of its records. This includes making sure that all orders, including e-mail orders, which direct counsel to draft journal entries based upon a ruling are timely filed with the clerk of the court. The court needs to make sure counsel drafting such journal entries include as much information as possible from the hearing/informal order to enable a meaningful review in the event of an appeal.

We could simply stop at this point and affirm the district court's decision based upon a finding that Richard has failed to provide a record adequate to allow appellate review. But in the interest of bringing finality to these issues and forestalling a potential third appeal on similar grounds in this case, we will deal with the issues the parties raise in their briefs to the extent we are able.

In determining a parent's child support obligations, a district court's decision must be governed by statutes and the guidelines developed by our Supreme Court. See K.S.A.2015 Supp. 23–3001 *et seq.;* KCSG, Administrative Order No. 261 (2015 Kan. Ct. R. Annot. 111). The interpretation or application of the KCSG is a question of law over which the appellate court has unlimited review. However, a district court's ultimate child support award is generally reviewed for an abuse of discretion. *In re Marriage of Thomas,* 49 Kan.App.2d 952, 954, 318 P.3d 672 (2014). An abuse of discretion can only be found if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. See *Fischer,* 296 Kan. at 825.

Although the parties have been litigating child support sporadically since the original 2005 divorce, the district court issued an order in March 2014 finding that, based upon Richard's historical income and what the court determined to be reasonable business expenses, child support in the amount of $1,015 was proper under the KCSG. Richard did not appeal from this order.

Instead, Richard filed a motion to modify child support 6 months later asserting his wages had decreased and his parenting time increased due to a change in his employment. In seeking a modification so soon after the prior order, Richard was obligated to establish that a material change of circumstances existed. Whether a material change of circumstances is established is reviewed under the abuse of discretion standard. *In re Marriage of Schoby,* 269 Kan. 114, 120–21, 4 P.3d 604 (2000).

***6** Here, Richard initially relied on his reduced pay and increased parenting time due to his engagement in local, nonunion work which provided a decreased salary. By the time the case proceeded to a hearing, however, Richard's local job was nearly complete. After hearing very brief testimony about his current employment, his counsel focused on his union work and work history, which involved his claim for work-related expenses beyond what he received in per diem and rig expenses under his union contract. After taking the matter under advisement, the district court issued by e-mail a notice that it was denying a motion. Before a journal entry was prepared, Richard filed a motion for reconsideration. Following another hearing, the district court again denied the motion in a brief 1–page order.

Although Richard had established a temporary change in his employment, his motion to modify largely sought to revisit the issues of his work-related expenses from his higher-paid union work that had been decided in March 2014. Thus, although Richard may have proven a temporary change in circumstances, by the time of the final order, those circumstances appeared to no longer exist. In fact, at the hearing on the motion to reconsider, there was indication that Richard was working a union job in New Mexico.

In light of the apparent temporary nature of the changes in Richard's parenting time and salary and the fact that the focus of the hearings in November 2014 and January 2015 was a rehashing of his claims relating to the work-related expense issue resolved in March 2014, Richard failed to establish a material change of circumstances. He continues to dispute the court's failure to account for his unreimbursed business expenses noted in his tax returns. As this court has noted, however, " '[t]he taxable income shown in a tax return is not always a reliable indication of domestic gross income.' " *In re Marriage of Cox,* 36 Kan.App.2d 550, 553, 143 P.3d 677 (2006) (depreciation claimed on income tax return not always indicative that depreciation was reasonably necessary for production of income).

Although the district court's verbal statements at the hearing on reconsideration focused on the best interests of the child, the record before us fails to show that Richard proved a material change in circumstances (other than for about 6 months) to justify a modification in his child support obligation. The focus of Richard's arguments below was to revisit the March 2015 ruling as to the reasonableness of his claimed business-related expenses. Richard did not appeal from the court's decision in March 2015 and cannot now be allowed to revisit that finding due to his failure to establish a material change in circumstances.

Affirmed.

All Citations

369 P.3d 343 (Table), 2016 WL 2609622

1995 WL 18253237
Only the Westlaw citation is currently available.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the Matter of the Marriage of Mary Frances HEIDEMAN, Appellee,
v.
Russell Leroy HEIDEMAN, Appellant.

No. 71,789
|
Opinion filed May 19, 1995.

Appeal from Butler District Court; JOHN M. JAWORSKY, judge.

Attorneys and Law Firms

Norman G. Manley, of Davis & Manley, of El Dorado, for appellant.

No appearance for appellee.

Before ROYSE, P.J., PIERRON, J., and ROBERT J. SCHMISSEUR, District Judge, assigned.

MEMORANDUM OPINION

Per Curiam:

***1** On May 25, 1993, Mary Frances Heideman and Russell Leroy Heideman were divorced. Subsequently, the trial court conducted a hearing on property division, maintenance, and attorney fees. Russell appeals from the trial court's distribution of assets. Russell maintains that the trial court erred in considering the duration of the parties' entire 22-year relationship (as opposed to confining its inquiry to consideration of the length of the 3-year marriage), in refusing to grant a new trial, and in awarding Mary a percentage of the entire 401(K) retirement plan.

The issue is whether the trial court abused its discretion in dividing the marital property.

We affirm.

The facts are well known to the parties and will only be noted as is necessary to place the findings into the context of the record.

The parties have a relationship extending back over 20 years with a first marriage in 1972. The divorce decree in this matter is the third entered between the parties. Several other divorce actions were filed and dismissed. The last marriage was entered into on May 25, 1990. An emergency divorce was awarded to Mary on May 25, 1993. The financial issues were reserved for later hearings.

Following the initial ruling on financial issues, Russell filed a motion for reconsideration or a new trial. Following a hearing on that motion, the trial court reduced the term of maintenance by Russell to Mary from 60 months to 18 months and clarified other rulings but declined to grant a new trial. Russell timely appeals.

Appellate review of financial issues in a divorce is limited to whether or not the trial court abused its discretion. See *Clark v. Clark*, 236 Kan. 703, 708-09, 696 P.2d 1386 (1985).

Discretion of a trial court is abused only where no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Powell v. Powell*, 231 Kan. 456, 459, 648 P.2d 218 (1982).

Russell bases his claim of abuse of discretion primarily on the supposition that the trial court improperly considered the entire relationship of the parties in reaching its decision.

K.S.A. 60-1610(b)(1) sets forth eight specific factors, including the duration of the marriage, that a trial court shall consider in dividing property. The statute further provides that such other factors as the court considers necessary to make a just and reasonable division of property may be considered.

Under the facts of this case, we cannot say the trial court abused its discretion in apparently considering both the

duration of this marriage and the prior marriages and the 22-year relationship of the parties.

The findings of the trial court in its March 4, 1994, memorandum opinion and March 22, 1994, order are not detailed. However, generally, a litigant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal. Where there has been no such objection, the trial court is presumed to have found all facts necessary to support the judgment. *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 378, 855 P.2d 929 (1993). A review of the record discloses that it contains facts pertinent to several of the factors listed in K.S.A. 60-1610(b)(1) to support the trial court's property division.

***2** Affirmed.

All Citations

Not Reported in Pac. Rptr., 1995 WL 18253237

196 P.3d 451 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF Tessa R. LASH, Now Tessa Merrell, Appellant,
and
Mark E. Lash, Appellee.

No. 99,417.
|
Nov. 21, 2008.

West KeySummary

1 **Divorce** Income and assets

The trial court's factual finding that a wife was able-bodied and able to maintain gainful employment, and that an award of spousal maintenance thus was not appropriate, was contrary to the evidence. The evidence showed that the wife had been receiving Social Security disability benefits since 2000 as a result of her medical conditions and through periodic evaluations had continued to be found disabled. The court relied on the wife's testimony that she could perform her daily activities. However, that testimony did not necessarily establish that she could maintain full-time employment, and it went against her testimony that she might, at best, have a chance of working part-time. 20 C.F.R. § 404.1572.

Appeal from Jefferson District Court; Gary F. Nafziger, Judge.

Attorneys and Law Firms

Susan D. Szczucinski, of Szczucinski Law Firm, of Overland Park, for appellant.

Dan K. Wiley and Pamela Campbell Burton, of Murray, Tillotson & Wiley, Chartered, of Leavenworth, for appellee.

Before GREENE, P.J., GREEN and CAPLINGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** In this divorce action, Tessa R. Lash, now Tessa Merrell, appeals the district court's decision denying her spousal maintenance and its division of marital property.

Factual and procedural background

Tessa and Mark E. Lash were married in 1993. Together, they had three children, and Mark adopted Tessa's child from a previous marriage. In 1998, Tessa was diagnosed with systemic lupus and a congenital heart defect. Tessa had complications during heart surgery to install a pacemaker. Tessa and Mark jointly filed a medical malpractice claim and received a settlement, which they used to pay off marital debts and make a down payment on a new home. Prior to her heart surgery, Tessa had worked as a licensed day-care provider. In 2000, Tessa began receiving Social Security disability benefits, which she continues to receive to date. During their marriage, Mark maintained a full-time job, and Tessa was the primary care giver for the children.

Tessa filed for divorce in December 2005. While the divorce was pending, Tessa moved to Missouri to live near her parents. Prior to trial, the parties agreed to sell their house, use the proceeds to pay off marital debts, and divide any remaining proceeds. Tessa requested that the remaining proceeds be divided proportionally based on the income of each party. Mark requested that the remaining proceeds be divided equally. Each party requested primary residential custody of the children.

Following a 2-day trial, the district court issued a memorandum decision granting the divorce, giving primary residential custody of the children to Mark, declining to award spousal maintenance to Tessa, distributing the marital property, and dividing the proceeds from the sale of the house

based on the parties' proportionate shares of income with Tessa receiving about two-thirds of the proceeds. The district court also ordered Tessa to pay $158 per month in child support.

Tessa filed a motion for reconsideration challenging the district court's refusal to award spousal maintenance and the division of the proceeds from the sale of the house. She later filed an amended motion for reconsideration, and following a hearing on that motion, the district court denied the motion for reconsideration. Tessa timely appeals, challenging the denial of spousal maintenance and the division of property.

Denial of Spousal Maintenance

Tessa first contends the district court abused its discretion when it refused to award spousal maintenance based upon erroneous findings regarding Tessa's employability and earning capacity.

We will not reverse a district court's decision denying an award of spousal maintenance under K.S.A.2007 Supp. 60-1610(b)(2) absent a clear abuse of discretion. *In re Marriage of Day,* 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the district court, then it cannot be said that the district court abused its discretion. *In re Marriage of Bradley,* 282 Kan. 1,7, 137 P.3d 1030 (2006). The party asserting an abuse of discretion bears the burden of showing such abuse. *Vorhees v. Baltazar,* 283 Kan. 389, 394, 153 P.3d 1227 (2007).

***2** The district court's refusal to award spousal maintenance was based entirely upon its finding that Tessa "is able-bodied and able to maintain gainful employment and based upon her education and work experience should have approximately the same earning capacity as [Mark] once she is gainfully employed."

While the parties' present and future earning capacity is certainly a factor for the court to consider in determining spousal maintenance, it is not the only factor. See *In re Marriage of Day,* 31 Kan.App.2d at 758, 74 P.3d 46 (in determining maintenance, the court may consider "age of the parties, present and future earning capacities, the length of the marriage, the property owned by each party, the parties' needs, the time, source, and manner of acquisition of property, family ties and obligations, and the parties' overall financial situation"). Moreover, our review of the record reveals that the district court's statement regarding Tessa's present and future earning capacity is not supported by the evidence.

Tessa did not present any evidence at trial of her ability to maintain employment or of her present or future earning capacity. Further, Mark did not suggest that Tessa could or should be employed or that income should be imputed to her. Instead, it appears the parties recognized that since 2000 Tessa had been unemployed and receiving Social Security disability benefits, which at the time of trial were $553.50 per month. In fact, the domestic relations affidavits filed by the petitioner and the respondent both indicate Tessa was unemployed with her only source of income being Social Security disability benefits. Mark's maintenance and child support worksheets also show Tessa receiving Social Security disability benefits of $553 per month and further impute $500 to Tessa as income from "parents."

The fact that neither party felt it was necessary to put on evidence regarding Tessa's medical condition is evidenced by the "stipulation" agreed to by Mark's counsel at the pretrial conference. At the end of the conference, the district judge asked "Is there any issues about-as I recall, she, lady, mother, has medical, a medical problem." Mark's counsel responded, "Judge, we would stipulate that [Tessa] does have a medical condition. I don't think that's an issue." The judge then stated, "Okay, good. That's what I want to know. As to residency and child care and custody and all that stuff?" Again, Mark's counsel responded, "We'll stipulate that she does have the medical condition."

While Mark now argues that this stipulation was not meant to relate to Tessa's employability or earning potential, it is difficult to separate these concepts. It was undisputed that Tessa received Social Security disability benefits because she was unable to engage in substantial work activity due to her medical conditions. Thus, a stipulation as to Tessa's medical conditions might well be perceived as recognition of her continued inability to obtain employment.

***3** In any event, at the close of the evidence at trial, the trial court asked to have Tessa recalled in order for the court to ask her "a couple questions," and the following colloquy occurred:

> "THE COURT: Ma'am, now we've probably skirted around this, and it wasn't your fault, but with this medical condition

that you've got can you tell me what it is so that I understand.

"A: Well, I had a diagnosis for a heart, it was a congenital heart defect in 1998.

THE COURT: Okay.

> "A: I think I was about 28 at the time and what it causes are arrhythmias.

THE COURT: Okay.

> "A: And I went for treatment and the doctor that I was seeing recommended an ablation.

....

> "A: I was diagnosed in late 1998 with systemic lupus. I had a blood clot in my, one of my lungs. I had previously before that, that summer I had chronic mouth ulcers and had been to the dentist and to numerous doctors.

THE COURT: Okay. So are you considered disabled now or not disabled?

> "A: I'm on disability right now and it's like reviewed every year to two years to see-

THE COURT: Disability by whom? Social Security?

"A: Social Security.

THE COURT: Okay. And are there any restrictions by your doctor on your I-understood there are not. Is that right?

> "A: No, there's, as long as it's treated more like symptomatically and it's more, you know-there's times where you might have a flare, like a, what they call a flare-up where-

THE COURT: You're talking about the lupus; right?

"A: Yes.

THE COURT: Okay.

"A: You know, and it's-they're kind of like flu-like symptoms usually.

THE COURT: I know. I understand. Yes, I know. Okay. So is it your testimony, then, that you cannot work or can work or what? I don't understand that.

> "A: Well, the work that I was doing, I was doing-I had a licensed day care and it was, the day care got to be too much at the time, you know. I had gone through the heart problem and lifting the children, I had a pacemaker put in-

THE COURT: Okay, I'm talking about now, though, about now.

> "A: I could prob-, you know, if-my health is, as the years have gone, since I've been on disability it get, it's gotten better and better.

THE COURT: Okay.

"A: And so, you know, I'd say, you know-*I don't know. I could, you know, there could be a chance I could go get a part-time job, you know. I, I go, you know, in for check-ups like every six months and the doctor looks me over.*"

The district court ultimately denied spousal maintenance for the sole reason that Tessa "is able-bodied and able to

maintain gainful employment and based upon her education and work experience should have approximately the same earning capacity as [Mark] once she is gainfully employed." This factual finding, however, is contrary to the evidence-evidence that showed Tessa had been receiving Social Security disability benefits since 2000 as a result of her medical conditions and underwent periodic evaluations by a physician to determine her continued qualification for such benefits.

***4** In order to receive Social Security disability benefits, Tessa must have been found to be, and must continue to be, unable to engage in substantial gainful work activity by reason of a medically determinable physical or mental impairment. See 42 U.S.C. § 423(d)(2000); 20 C.F.R. § 404.1572 (2008). The court's finding-*i .e.,* that Tessa was able-bodied and able to maintain gainful employment"-simply cannot be squared with Tessa's Social Security disability determination. Moreover, while it appears the court may have relied upon Tessa's testimony that she was able to perform her daily activities, including caring for the children and doing housework and running errands, that evidence did not necessarily establish that Tessa was able to maintain full-time employment. See, *e.g.,* 20 C.F.R. § 404.1572(c) (activities such as caring for oneself, household tasks, hobbies, clubs, and social activities not considered substantial gainful work activity).

Further, and perhaps most importantly, the court's finding was contrary to Tessa's testimony that although her condition had improved, she might, at best, have "a chance" of working part-time depending upon her physician's evaluation.

We conclude the district court abused its discretion in denying spousal maintenance based solely upon the erroneous determination that Tessa was "able-bodied and able to maintain gainful employment ." Accordingly, we remand this case to the district court to make a determination of spousal maintenance based upon the existing evidence. On remand, the court may, in its discretion, hear additional evidence regarding Tessa's ability to maintain employment and her present and future and earning potential or it may simply rule based upon the existing record.

Division of marital property

Tessa also contends that the district court abused its discretion in distributing the marital property. Specifically, Tessa claims she was entitled to a larger share of the proceeds from the sale of the parties' residence because (1) the down payment was made with the proceeds of the settlement of her medical malpractice action and (2) the district court inaccurately calculated the parties' proportionate shares of income. Tessa also claims the district court erred in failing to divide Mark's 401(k) retirement account.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and we will not disturb the exercise of that discretion absent a clear showing of abuse. *In re Marriage of Wherrell,* 274 Kan. 984, 986, 58 P.3d 734 (2002).

In a divorce proceeding, the district court is required to "divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts," and the division of property must be "just and reasonable." K.S.A.2007 Supp. 60-1610(b)(1).

***5** Factors to be considered in making the division of property are "the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary." K.S.A.2007 Supp. 60-1610(b)(1).

As a result of complications with Tessa's heart surgery, the parties jointly filed a medical malpractice lawsuit and were awarded a settlement. The parties agreed to use the settlement money to pay off marital debts and make a down payment on a new house. Nevertheless, by the time Tessa filed for divorce in 2005, the parties had two mortgages on the house, substantial credit card debt, and unpaid medical bills. The parties agreed to sell their house, use the proceeds to pay off marital debts, and divide the remaining proceeds.

Tessa initially asserted that the remaining proceeds should be awarded inversely based on the parties' proportionate shares of income, while Mark asserted that the proceeds should be divided equally. Ultimately, the district court divided the proceeds from the sale of the house 66.1% to 33.9% in favor of Tessa. The district court noted that it derived these

percentages from the proportionate shares of income reported on a child support worksheet submitted by Mark.

The worksheet relied upon by the court indicated monthly income for Tessa as $1,053, which included her Social Security disability benefits and $500 in imputed income from Tessa's parents. In comparison, the child support worksheet attached to the final divorce decree and relied upon to award Mark child support indicated monthly income for Tessa as $753, and the parties' proportionate shares of income as 81.9% for Mark to 18.1% for Tessa.

Tessa appears to argue that the district court abused its discretion in awarding the proceeds from the sale of the house in a 66.1/33.9 split instead of a 81.9/18.1 split. Tessa further contends she was entitled to receive most or all of the proceeds from the sale of the house "to assure her future medical care." Tessa's argument fails for several reasons.

First, the district court was not required to use figures from child support worksheets to determine the just and equitable division of property. See K.S.A.2007 Supp. 60-1610(b)(1) (listing factors to be considered when making the division of property). The only mandate for the district court in dividing marital property is to make a just and reasonable division of property. K.S.A.2007 Supp. 60-1610(b)(1).

Second, assets arising from a personal injury settlement constitute marital property subject to division in a divorce proceeding. *In re Marriage of Powell,* 13 Kan.App.2d 174, 180, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989). In this case, the district court found that a greater portion of the settlement money was intended to compensate Tessa for medical treatment and future medical expenses incident to her use of a pacemaker. The district court further found that "a fair, just, and equitable division" of the parties' assets would be to apply proceeds from the sale of the parties' house to pay off all marital debts and divide the remaining proceeds two-thirds to one-third in favor of Tessa. Thus, the district court essentially complied with Tessa's request to divide the proceeds from the sale of the house based on the parties' proportionate shares of income.

***6** Tessa also argues the district court erred in failing to divide Mark's 401(k). In support of this argument, Tessa claims, "had the sum of $8408.47 in his 401(k) at the time of the hearing." However, Tessa's argument ignores the fact that Mark had taken out a $3,200 loan against his 401(k), leaving the net value of the 401(k) at approximately $5,000. Pursuant to the divorce decree, Mark was awarded the entire 401(k) and also became solely responsible for the outstanding loan. When viewed in light of the court's division of all marital property, we conclude the district court did not abuse its discretion in refusing to divide Mark's 401(k).

Finally, we note that the factors to be considered when distributing marital property are essentially the same factors considered by the court in determining spousal maintenance. See K.S .A.2007 Supp. 60-1610(b)(1); *In re Marriage of Day,* 31 Kan.App.2d at 758, 74 P.3d 46. Because we are remanding this case to the district court to reconsider its denial of spousal maintenance, the district court should, upon remand, also consider the effect, if any, its determination as to spousal maintenance has upon the division of marital property.

Affirmed in part, reversed in part, and remanded with directions.

All Citations

196 P.3d 451 (Table), 2008 WL 4966486

169 P.3d 696 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

In the Matter of the MARRIAGE
OF Thomas E. MUNKER, Appellee,
and
Julie K. MUNKER, Appellant.

No. 95,609.
|
Nov. 2, 2007.
|
Review Denied April 23, 2008.

Appeal from Shawnee District Court; Evelyn Z. Wilson, judge. Opinion filed November 2, 2007. Affirmed.

Attorneys and Law Firms

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, L.L.C., of Topeka, for appellant.

Holly A. Theobald and Alan F. Alderson, of Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C., of Topeka, for appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Thomas E. Munker (Tom), filed for divorce from respondent Julie K. Munker (Julie) on June 30, 2004, after 21 years of marriage. At that time, Tom and Julie had two daughters, ages 18 and 14. On July 7, 2005, the district court entered a divorce decree.

In this appeal, Julie challenges the district court's calculation of child support and maintenance. Specifically, she asserts the district court erred in utilizing Tom's adjusted gross income from his 2003 tax return to calculate its maintenance and support awards. Further, Julie challenges the district court's determination that it lacked jurisdiction to order Tom to maintain existing life insurance in order to preserve maintenance and child support in the event of Tom's death. Julie also appeals the district court's method of dividing the couple's personal property and its order requiring the sale of the cash assets of two of Tom's businesses.

We have set forth below, as relevant, the parties' factual and legal allegations and the trial court's rulings as to the issues on appeal.

Calculation of child support and maintenance

On appeal, Julie first challenges the district court's calculation of support and maintenance. Specifically, she takes issue with the district court's reliance on the 2003 tax return as evidence of Tom's income; the characterization of Tom's auto restoration hobby as a business; and the reduction, as a business expense, of Tom's office manager's salary. She also argues the court failed to consider the economic effect of the income tax exemption for the couple's minor child, which the court assigned to Tom until the couple's marital residence was sold.

We review a district court's order determining the amount of child support for abuse of discretion, while interpretation of the Kansas Child Support Guidelines is subject to unlimited review. See *In re Marriage of Cox,* 36 Kan.App.2d 550, 553, 143 P.3d 677 (2006). Similarly, the trial court has wide discretion in determining spousal maintenance, and we will not disturb that calculation absent an abuse of discretion. *In re Marriage of Day,* 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003).

At all times relevant hereto, Tom was self-employed as a financial planner/insurance salesperson. He earned commissions for selling financial planning services through his company, Kansas Health and Financial, a sole proprietorship, and by selling insurance through his company LTC Pro, an S corporation. Tom also operated an automotive restoration business.

In establishing maintenance, the court noted that during much of the marriage Julie did not work outside the home, but at her most recent job she had earned $8 per hour. At the time of the hearing, Julie was unemployed and had no job offers. The district court found Tom's monthly income to be $4,641, relying in part upon Tom's adjusted gross income as set forth on his 2003 federal income tax return—$55,693 for a monthly gross income of $4,641. The court established maintenance at 20 percent of the difference between the parties' relative incomes, resulting in an award

of $750 per month maintenance until further order or until all payments were made. The court imputed minimum wage to Julie and ordered Tom to pay maintenance for 90 months beginning August 1, 2005, with credit for months in which he had already paid temporary maintenance. The district court retained jurisdiction over the maintenance issue.

***2** Regarding custody, the district court memorialized the mutual agreements of the parties, including joint legal custody; primary residence with Julie; and "reasonable and liberal, unsupervised" parenting time to Tom. The court assessed 75 percent of the cost of the conciliator's services to Tom and 25 percent to Julie. Tom was ordered to pay child support in the amount of $504 per month based on the child support guidelines.

Tom's monthly income

Julie takes issue with the district court's decision to give extra weight to the adjusted gross income figure from Tom's 2003 tax return to establish the amount of maintenance and child support. Julie asserts the adjusted gross income figure in the tax return was "inconsistent" with other financial information Tom provided to the court. Specifically, Julie points out that in his domestic relations affidavit, Tom claimed $16,000 as the amount of his monthly "domestic gross income."

However, Tom testified that when he completed his domestic relations affidavit, he did not understand the term "domestic gross income," and the $16,000 amount he claimed as monthly domestic gross income was actually gross revenue and did not reflect reductions for taxes, business, or personal expenses. Based on the 2003 tax return, Tom testified his gross domestic pre-tax income was $4,835 per month. He claimed his actual "in-pocket" monthly income, after taxes, was closer to $3,500.

This testimony was consistent with records and testimony not substantially in dispute which indicated Tom had acquired numerous loans through Educational Credit Union. He shared a mortgage with Julie, and he personally held four vehicle loans, and three business accounts containing six loans associated with Kansas Financial and Health Services. When securing these loans, Tom had submitted various 1099 receipts indicating his total gross income in 2003 was $191,202.30, resulting in a monthly gross income of $15,930.

When confronted with the disparity between his income and his expenses, Tom admitted his income fluctuated greatly from one month to the next, and little or nothing was left over each month. Tom agreed he was living beyond his means.

The district court found this testimony credible. Additionally, in finding Tom's income to be $4,641 per month, the district court placed extra weight on the 2003 tax return. On that return, Tom reported business income of approximately $4,641 monthly.

Our Supreme Court recently reviewed the district court's income assessment to a self-employed Subchapter S shareholder and noted: "Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating support." *In re Marriage of Brand,* 273 Kan. 346, 356, 44 P.3d 321 (2002). However, "[e]ven in those states with particularized formulas for determining the income available to self-employed payors, the calculation of income is highly fact specific." 273 Kan. at 356. For many jurisdictions, as in Kansas, the absence of evidence that the spouse or parent manipulated income or wished to shield income from support obligations is highly persuasive. 273 Kan. at 357.

***3** Here, we find no evidence indicating Tom was deceitful in claiming the amount of his earnings or that he attempted to shield his income to lessen his support obligations. Further, inconsistencies in the financial information were explained to the satisfaction of the district court.

A district court is charged with evaluating all the relevant evidence before it. A wealth of evidence was presented regarding Tom's income, including itemized business expenses. In denying Julie's motion to reconsider, the court stated:

> "The Respondent has asked the Court to reconsider what has been assigned to the Petitioner as income for support purposes. There was no expert testimony given regarding that matter; the Court gave extra weight to income as shown on tax returns; some evidence was more suspect than others; and this matter was quite complicated. However, the Court is convinced that the conclusions regarding Petitioner's

> income [are] fully supported by the evidence presented. In any event, the Respondent's spousal maintenance is protected under the escalator factor of the *Monslow* case....”

We may not reweigh the evidence, substitute our evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses. *In re S.M.Q.,* 247 Kan. 231, 234, 796 P.2d 543 (1990).

Moreover, as the district court noted, Julie is protected from any discrepancy between the income found by the court and the actual income Tom may later earn. The court did not order that a specific amount of maintenance be paid. Rather, the court set maintenance on an income-dependent sliding scale, *i.e.,* 20 percent of the difference between the parties' relative incomes. This has been held to be an appropriate method by which to award maintenance. See *In re Marriage of Monslow,* 259 Kan. 412, 414–15, 912 P.2d 735 (1996) (upholding escalator clause in maintenance award).

Thus, we hold the district court did not abuse its discretion in relying significantly upon the income figures in the 2003 tax return in determining the amount of Tom's monthly income for purposes of calculating maintenance and child support.

Tom's automotive restoration business

Julie also argues the district court erred in utilizing the 2003 tax return figures because it included a loss of $9,515.40 with respect to Tom's automotive restoration business. Julie terms this business a “hobby” and suggests this amount should not have been considered in calculating Tom's income.

As Tom points out, Julie did not object at any point to the treatment of Tom's automotive restoration business as a “hobby,” nor did she specifically object to the trial court's consideration of these expenses by utilizing Tom's 2003 tax figures. Thus, we decline to consider this claim here.

Office manager's income

Julie also complains that the 2003 income tax returns include inappropriate expenses for the salary of Tom's office manager. Julie points to testimony from Tom that he paid his business manager $623 per week and commissions. She also points out that Angela Parra, Tom's business manager, testified her salary was 25% of her income.

***4** On appeal, Julie infers from this testimony that Parra's income was $120,000. She then suggests the district court “blindly” allowed Tom to expense a salary in excess of his own income and that this should not have been permitted “for an employee, let alone a possible girlfriend.”

Julie bases this last assertion upon the fact that both Tom and Parra testified they were “just friends,” yet, according to Julie, they subsequently became husband and wife. (Apparently, this event occurred after the trial court's rulings, as Julie's brief conspicuously lacks a citation to the record as to this assertion.)

In response, Tom suggests his relationship with Parra is completely irrelevant. Further, he points out that Parra testified she had just begun earning commissions from Tom's business, and she continued to receive commissions directly from previous clients and carriers, not from Tom. Tom further points to Parra's deposition testimony, where she testified she had worked for Edward Jones for 6 years and had approximately 300 clients of her own, which she was in the process of gradually transferring to Tom's business.

Finally, Tom points out the record contains absolutely no support for Julie's assertion that Tom's 2003 return somehow reflected a salary expense of $120,000 for Parra. We agree and find this assertion to be without merit.

Use of 2003 income

Julie also argues that even if the 2003 income tax figures were accurate, the district court erred in utilizing 2003 figures rather than 2004 or current income. Tom responds that at the time of trial, he did not have final 2004 figures available, but that he conceded in his testimony that his 2004 income might well be higher than his 2003 income.

Importantly, the trial court anticipated the potential income fluctuations of Tom's businesses when it set maintenance on an income-dependent sliding scale, or 20 percent of the difference between the parties' relative incomes. Thus, we also find this assertion without merit.

Income tax exemption

Finally, with respect to the calculation of income, Julie asserts the trial court erred in permitting Tom to claim the couple's

minor child as a dependent in 2005 and every year until the couple's residence was sold. Julie suggests this was a *"sua sponte"* action by the trial court and that the court prepared no worksheet or findings to "compensate" for granting the dependency exemption to Tom.

As Tom points out, in ruling on the motion for new trial, the trial court stated its reasons for allowing Tom the income tax exemption. Specifically, the court pointed out it had ordered that Tom be responsible for all prior year tax penalties. Plus, the court noted it was troubled by Julie's disincentive to sell the marital residence and determined it was appropriate to award Tom the exemption until the residence was sold. We find no abuse of discretion with respect to this ruling.

In summary, we find the district court did not abuse its discretion in determining the amount of Tom's monthly income for purposes of calculating maintenance and child support.

Maintenance of life insurance policy to secure post-motion maintenance

***5** Julie requested in a posttrial motion for modification that the court order Tom to maintain a life insurance policy to guarantee payment of both maintenance and child support in the event of Tom's death. Tom argued the district court lacked jurisdiction to adjudicate post-mortem maintenance and support payments.

In its post-judgment decision, the district court specifically held Tom "should not be required to provide life insurance to secure child support or spousal maintenance." The court further stated, however, that it "probably lack [ed] jurisdiction" to require [Tom] to do so.

Although the district court specifically ruled Tom was not required to provide life insurance to ensure support or maintenance, Julie nevertheless appeals the district court's ruling that it "probably" lacked jurisdiction to require Tom to do so.

Whether jurisdiction exists is a question of law over which the appellate court's scope of review is unlimited. *In re Marriage of Harbutz,* 279 Kan. 359, 361, 109 P.3d 1191 (2005). However, because the district court did not require Tom to maintain a life insurance policy to secure maintenance and support payments, Julie's request for a ruling on the court's comment regarding jurisdiction seeks an advisory ruling.

Our function as an appellate court is to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case before us and to adjudicate those rights in such a manner that our determination will be operative, final, and conclusive. *Smith v. Martens,* 279 Kan. 242, 244, 106 P.3d 28 (2005). Appeals are not for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant. *Blank v. Chawla,* 234 Kan. 975, 978, 678 P.2d 162 (1984) (citing *Anderson v. Carder,* 159 Kan. 1, 4, 150 P.2d 754 [1944])

Because the district court did not require Tom to maintain life insurance to secure his child support and maintenance payments, the district court's comment that "it probably [lacked] jurisdiction" to do so, did not give rise to a justiciable controversy and we decline to consider this issue.

Division of personal property by lottery

Julie next argues the district court erred in the method it designated for division of the couples' personal property.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and we will not disturb that exercise of discretion absent a clear showing of abuse. *In re Marriage of Wherrell,* 274 Kan. 984, 986, 58 P.3d 734 (2002).

The parties disagreed as to the value of their personal property, but at the close of trial they agreed to hire an appraiser to place values on all items of personal property. Ultimately, the district court ordered a division in kind of personal property. Specifically, relying on the expert appraiser's inclusive list, the court ordered the parties to divide the property using a method whereby Tom would first select an item, then Julie would select two items; Tom would then select another item, then Julie would select an item, and so on until all of the items were chosen and each party presumably possessed approximately 50 percent of the property.

***6** On appeal, Julie refers to the court's method of dividing property as a "snake order lottery," and concedes this method may have "resulted in an equitable distribution of the net

value" of the property. Nevertheless, she also suggests this method was akin to "flipping a coin" and "would probably result in about equal division of the property." Julie further argues the district court failed to consider the factors set forth in K.S.A. 60–1610(b) in ordering this division of the couple's personal property.

Tom argues Julie is precluded from raising this issue on appeal because she did not object to this method of property division and she acquiesced in the order by participating in the method the court ordered for dividing personal property.

While the issue of the value and division of personal property was contested at trial, Julie did not object to the method of property division ultimately designated by the court. Nor did Julie object to the district court's failure to consider the factors set forth in K.S.A. 60–1610(b).

Generally, a litigant must object to inadequate findings of fact and conclusions of law before the trial court to preserve the issue for appeal. This allows the trial court an opportunity to correct its findings and conclusions. If no objection is made, we must presume the trial court found all facts necessary to support its judgment. *Dragon v. Vanguard Industries,* 282 Kan. 349, 356, 144 P.3d 1279 (2006).

Moreover, as Tom points out, the property is now divided, and Julie has not alleged she suffered harm as a result of the property division. Julie concedes she has "partially acquiesced" in the judgment. Citing *Martin v. Martin,* 5 Kan.App.2d 670, 672, 623 P.2d 527, *rev. denied* 229 Kan. 670 (1981), Julie nevertheless contends acquiescence does not strictly apply in divorce cases.

In *Martin,* the plaintiff argued the defendant had acquiesced in the divorce decree by his remarriage and thus was barred from challenging orders for the division of property and alimony. The *Martin* court recognized that the general rule pertaining to acquiescence in judgments should not be strictly applied in divorce cases because of "the peculiar situations of the parties and the equitable considerations involved." 5 Kan.App.2d 670, Syl. ¶ 2. The court held, however, that "when the complaining party cannot show prejudice, the determinative factors of acquiescence in a domestic relations case revolve around the consistency with which the litigant is attacking the judgment or the severability of the provision of the judgment under which the benefits have been accepted or burdens assumed." 5 Kan.App.2d at 672. Because neither party challenged the marriage dissolution, which would be the only portion of the decree inconsistent with remarriage, the *Martin* court found the marriage dissolution was not affected by the appeal and was a final judgment. 5 Kan.App.2d at 672.

Here, Julie complains about a provision of the divorce decree that she acquiesced in, *i.e.,* the method of property division. And she does not assert any prejudice resulted from that aspect of the judgment.

***7** Julie's acquiescence to the property division, her failure to suggest prejudice from the method of distribution, and her failure to object to the district court's method of distribution lead us to conclude Julie is precluded from raising this issue on appeal.

Sale of businesses

Next, Julie argues the district court erred in ordering the sale of Tom's businesses and in failing to divide certain savings accounts and CDs. As stated above, we review the district court's determinations as to property rights for abuse of discretion.

Tom testified that after subtracting debt from assets (including checking and savings accounts, desks, file cabinets, and computers) the value of Kansas Health and Financial Services was $7,738.25; and the value of LTC Pro, which Tom operated out of his home, was $10,034.15. These numbers represented the hard assets of the businesses; they did not represent any future commissions or assign any intangible value to client files. Tom suggested that beyond the hard assets, the businesses had little to no value; he estimated the businesses would be valued at no more than $17,772.

In contrast, Julie testified that using the Shawnee County Family Law Guidelines for business valuation, she calculated the value of Tom's businesses to be over $1,000,000. She claims she based this estimate on the businesses' gross revenues using a multiple factor of 3.5.

On appeal, Julie argues the district court "should have required the division of the cash assets, divided the accounts receivable and then either valued the remaining assets or had them sold." She urges this court to remand to the district court with an order to "divide the liquid assets, account for the

accounts receivables received, and either value the business, appoint a master or take more evidence in a timely fashion."

Julie also devotes much argument in her brief on this issue to a discussion of whether goodwill is an asset subject to division by the court. She contends the district court erred as a matter of law in finding goodwill was not subject to division. However, our review of the court's order indicates the district court merely cited Tom's testimony estimating the value of the hard assets of the business and recognized Tom's allegation that "anything over and above that [amount] would consist of nonmarital 'goodwill' that is not subject to division." The district court did not accept that allegation, but rather cited the allegation in its summary of the highly disparate evidence as to the value of Tom's businesses.

Faced with these irreconcilably disparate valuations and no expert testimony, the district court set about to fulfill its task under K.S.A. 60–1610(b)(1), citing its options for division under subsections (A) through (C) and stating:

> "The Court is not an expert in valuation of a business. Neither party chose to call such an expert to provide insight to the Court. There is no evidence beyond the petitioner's conclusory testimony to prove the business is worth nothing more than its 'hard assets.' There is no evidence to justify multiplying a year's net profit by 3 .5, or any other number, as respondent wishes.
>
> ***8** "Consequently, the Court finds that the only choice available to it which will assure an equitable division of these businesses is to order their sale in an arm's length transaction. If the petitioner is correct, and their value is no more than the value of cash, receivables, and tangible personal property, there will be no loss to him. If he is not correct, the net sales price will determine an equitable division of these businesses. In any case, the net amount realized by the parties from this sale should be equally divided."

In a subsequent journal entry, the district court rejected Julie's request to rescind the order to sell the businesses, but clarified that "[t]hose accounts [that] are savings accounts belonging to the Petitioner's businesses ... shall be sold with Petitioner's businesses." Further, the court declined Julie's invitation to value the businesses according to her estimated values. Finding the evidence insufficient to establish the value of the businesses, the court affirmed its order requiring the businesses be sold.

Julie essentially seeks to relitigate a number of factual questions on appeal, and she asks this court to reevaluate the evidence and reweigh the credibility of certain testimony. This court is not at liberty to do so. See *In re Marriage of Kuzanek,* 279 Kan. 156, Syl. ¶ 3, 105 P.3d 1253 (2005). Nor is it the prerogative of this court, absent an abuse of discretion, to impose a different method or procedure for selling Tom's businesses.

Accordingly, we hold that given the evidence presented to the district court, the district court's order to sell the businesses and divide the proceeds was reasonably designed to insure a just division under K.S.A. 60–1610, and the district court did not abuse its discretion in so ordering.

Finally, we note that Julie has filed a motion to assess attorney fees pursuant to Supreme Court Rule 7.07(b) (2006 Kan. Ct. R. Annt. 57). In light of our decision today, we deny Julie's motion.

Affirmed.

All Citations

169 P.3d 696 (Table), 2007 WL 3275894

End of Document

318 P.3d 1020 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of the MARRIAGE of
Tamara May OLIVER, Appellee,
and
Craig Edward Oliver, Appellant.

No. 109,872.
|
Feb. 28, 2014.

Appeal from Osage District Court; Phillip M. Fromme, Judge.

Attorneys and Law Firms

Suzanne Valdez, of Smith Legal, LLC, of Lawrence, for appellant.

Kimberly Bieker, and Lowell C. Paul, of Kansas Legal Services, of Topeka, for appellee.

Before MALONE, C.J., BUSER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Tamara May Oliver (Tamara) filed for divorce against her husband, Craig Edward Oliver (Craig). This is Craig's appeal of the divorce decree entered by the district court. Having considered the parties' briefs and oral arguments and reviewed the record on appeal, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Tamara and Craig were married in 1993 in Fresno, California. The marriage resulted in the birth of two children, a daughter born in 1996, and a son born in 1999. After their marriage, Tamara and Craig lived and worked in California. Craig worked in the business of satellite and home theater installation, which led the couple to incorporating Innovative Video Applications, Inc. (Innovative Video). The couple both worked for the business, but the extent of their involvement was disputed.

In 2006, Tamara's father died and she and her two siblings inherited a substantial sum of money, title to a residence in San Diego, California, and a Vanguard account. Three years later, one of the siblings died, and Tamara and her sister inherited his share of the San Diego property. The residence is valued for tax purposes at $349,393, with no mortgage. A property management company rents the property, and Tamara and her sister each typically receive $1,000 per month in rental income.

According to Tamara, she and Craig wanted to keep her inheritance separate from their joint assets, so she established the Tamara M. Oliver Family Trust (Trust) and directed the executor of her father's estate to transfer her share of the inheritance monies and her interest in the Vanguard account into the Trust. Tamara also had the executor deed her interest in the San Diego residence to the Trust.

In 2006, Tamara and Craig relocated to Kansas and purchased their first marital home in Osage City for about $252,000. Using trust funds, Tamara made a down payment of $55,865.27 and paid the earnest money deposit of $5,000. Later, she used trust funds to make principal payments totaling $32,500 and purchased a new boiler system for the home, which cost $16,000. Craig, however, disputed that Tamara paid the entirety of the down payment.

In 2009, Tamara and Craig had to refinance the home, and due to Craig's low credit score, Tamara completed the refinancing solely in her own name. At that same time, the couple agreed to execute a warranty deed conveying the home, which was originally titled to Tamara and Craig, to the Trust.

Innovative Video's profitability in Kansas was insufficient to cover the family's monthly mortgage payment and other household expenses. As a result, Tamara sought fulltime employment, while Craig started a second business, Rural Wide Broadband. Notably, Tamara designated the Trust as the beneficiary of a 401(k) from her new employment. (Craig signed a notarized waiver consenting to this designation.)

Tamara and Craig attempted to dissolve Innovative Video, but for some reason, the business continued operating. Tamara testified that she was not involved in any way with the

operation of Rural Wide Broadband because Craig wanted to maintain that business as his separate asset.

***2** Similar to the financial arrangement they utilized while living in California, every month Craig drew a salary of roughly $1,500 from his businesses, which the couple used for the family's expenses. Tamara and Craig controverted each other, however, regarding whether any of this money was used to pay the mortgage on their marital home.

Sometime after they moved to Kansas, the couple purchased 60 acres of farmland in Osage County for $60,000. Tamara made a down payment of $15,000 on the land using funds from the Trust, and the rest of the purchase price was financed. According to Tamara, the loan payments were made from rental income from the San Diego property. The land was titled in both of their names. The couple sharecropped the property.

On June 18, 2012, after approximately 19 years of marriage, Tamara filed a petition for divorce claiming incompatibility. At the time, Tamara was 43 years old and worked as a bank teller. Craig was 58 years old and incarcerated in the Coffey County Jail. While the divorce proceeding was pending, Craig was found guilty of committing rape and aggravated sexual battery on the couple's daughter. On November 19, 2012, District Judge Phillip M. Fromme sentenced Craig to a prison sentence of 165 months and he was transported to the Norton Correctional Facility.

On March 19, 2013, the parties' divorce trial began with Judge Fromme, once again, presiding. Due to his incarceration, Craig participated by telephone with his counsel representing him in court. Both parties agreed that Tamara would have sole legal and residential custody of the minor children. During the trial, the parties focused on child support and the division of the marital estate.

Child Support

Prior to trial, the district court issued a temporary order requiring Craig to pay Tamara $409 per month in child support commencing July 1, 2012. At the trial, Craig proposed that the district court compute—using an imputed minimum wage as his income—the aggregate amount of child support Tamara would receive for the two children and award her an equivalent amount of marital assets because he would be unable to pay a monthly child support obligation during his incarceration. Likewise, Craig requested that Tamara provide medical and dental insurance for the children and be solely responsible for the payment of any future unreimbursed medical expenses.

Tamara contested Craig's proposal and requested the entry of a domestic support judgment for Craig's child support arrearages (Craig did not make any payments under the court's temporary order), a final child support order obligating Craig to pay $388 per month, which she calculated using an imputed minimum wage, and, while she agreed to maintain her current medical insurance for the children, an order requiring Craig to pay a 37% share of the children's future unreimbursed medical expenses.

The Marital Property

In summary, Tamara asked the district court to award her the following property: the marital home, plus any equity therein; the San Diego property and any equity therein; her personal checking account, Vanguard account, and 401(k); a 2007 Saturn which she and Craig purchased for $22,000 using a trade-in vehicle and $18,000 from the Trust; a 2000 GMC truck purchased with $10,000 from the Trust; and assorted personal property.

***3** When Tamara filed her petition, there was an outstanding mortgage obligation on the marital home of $130,327.87 and an outstanding balance of $31,729 on the loan for their farmland. Tamara remained current on the payments for both of these obligations following Craig's incarceration and during the pendency of the divorce proceedings, using her paycheck, rental income, and assets from her Vanguard account.

Tamara agreed to assume responsibility for all of the marital debt, which included primarily credit cards with a total balance of less than $20,000. She also agreed to pay the children's outstanding medical bills which totaled several thousand dollars. Tamara did request, however, that the district court order the sale of some assets, including the farmland and four vehicles to assist with the repayment of the debt. Moreover, Tamara asked the court to set aside Craig's businesses and any debt listed in his name as his sole and separate property. These debts included a $23,164 loan he owed to his mother for legal fees relating to his criminal case.

Craig, on the other hand, requested the equity in their marital home ($127,882); a portion of the equity in the San Diego property ($87,348); a portion of Tamara's Vanguard account ($45,000); a certificate of deposit listed in the Trust's name ($7,406); a portion from the Trust's bank account ($12,100);

possession of the 60 acres of farmland, plus any equity therein; and an assortment of personal items. Craig requested a cash payment for the equity in their marital home and the San Diego property. With the exception of a firearm, Tamara agreed to provide Craig or his family with the personal items he requested.

Regarding the marital debt, Craig only agreed to assume responsibility for the outstanding loan on the 60 acres of farmland and his debt to his mother; he asked that the court assign the credit card debt, the children's outstanding medical bills, and Innovative Video's outstanding debt of $8,383 to Tamara.

The District Courts Decree of Divorce

At the conclusion of the trial, the district court found the parties' differences were irreconcilable and it granted the requested divorce on grounds of incompatibility. Regarding child support, although the district court noted that it was unlikely Craig would be able to pay a child support obligation, he awarded Tamara a domestic support judgment for Craig's child support arrearages and ordered him to pay a future monthly obligation of $388 and a 37% share of the children's future unreimbursed medical expenses.

With regard to the division of the marital estate, the district court awarded Tamara the marital home, including any indebtedness and equity; the San Diego property, including any indebtedness and equity; the majority of the household goods and furnishings; her checking account; the Vanguard account; her 401(k); the Saturn Outlook; the GMC truck; and her safety deposit box.

The district court awarded Craig his requested personal effects, papers, and clothing; Innovative Video Applications, including indebtedness; and Rural Wide Broadband, including indebtedness. It assigned almost all of the marital debt to Tamara, with the exception any debts related to Innovative Video and Rural Wide Broadband. The district court further ordered that the farmland and assorted motor vehicles be sold, with the proceeds to be applied first to any existing loan on the assets and second to the minor children's existing medical debt or other marital debt.

***4** Craig filed this timely appeal challenging the district court's division of the marital property.

DIVISION OF THE MARITAL PROPERTY

Craig contends the district court was biased and abused its discretion when it considered Craig's fault in the division of the marital property. He also claims the district court failed to articulate the applicable statutory factors to be considered in the division of marital property as set forth in K.S.A.2012 Supp. 23–2802(c).

We begin with a brief summary of our relevant standards of review and Kansas law regarding the division of marital property. District courts have broad discretion in adjusting the property rights and financial affairs of parties involved in a divorce action. *In re Marriage of Wherrell,* 274 Kan. 984, 986, 58 P.3d 734 (2002). Absent a clear showing of abuse, appellate courts will not disturb the exercise of that discretion, and the party asserting the district court abused its discretion bears the burden of establishing such abuse. See 274 Kan. at 986; *In re Marriage of Hair,* 40 Kan.App.2d 475, 480, 193 P.3d 504 (2008), *rev. denied* 788 Kan. 831 (2009). A judicial action constitutes an abuse of discretion

> "if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.,* if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.,* if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.,* if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion, is based." *State v. Ward,* 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

At the commencement of a divorce proceeding, all of the property owned by the parties becomes part of the marital estate regardless of whether the property was "owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage[,] or acquired by the spouses' joint efforts." K.S.A.2012 Supp. 23–2801(a); K.S.A.2012 Supp. 23–2802(a). Although each spouse has common ownership in the marital property, the extent of each party's respective interest must be determined by the district court pursuant to K.S.A.2012 Supp. 23–2802. K.S.A.2012 Supp. 23–2801(b). The district court must make "a just and reasonable division of [the marital] property," and when undertaking this task, the court shall consider:

> "(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property." K.S.A.2012 Supp. 23–2802(c).

***5** Importantly, district courts are not required to make an equal division of all property acquired during the marriage. *In re Marriage of Rodriguez,* 266 Kan. 347, 352–53, 969 P.2d 880 (1998). In fact, a district court " 'has discretion to award marital property entirely to one party so long as the overall division is fair.' " 266 Kan. at 353. In short, although the division of property must be just and reasonable, it need not be equal. *In re Marriage of Vandenberg,* 43 Kan.App.2d 697, 715, 229 P.3d 1187 (2010).

Craig claims "the district court improperly considered 'fault' in the division of the parties' marital property and debt where the petitioner, Tamara Oliver, sought the divorce solely on the ground of incompatibility." The crux of Craig's challenge is that because Judge Fromme presided over his criminal case, he "formed a negative bias that influenced the court when it divided the marital property and debt in the parties' divorce action."

Preliminarily, Craig did not object in the district court on the basis that Judge Fromme was biased or prejudiced against him because of his knowledge of Craig's criminal convictions. Generally, an issue not raised before the trial court cannot be raised on appeal. *In re Care & Treatment of Miller,* 289 Kan. 218, 224–25, 210 P.3d 625 (2009). Although caselaw exceptions to this rule exist, Craig waived and abandoned this aspect of the issue by failing to brief whether an exception applied. See *Superior Boiler Works, Inc. v. Kimball,* 292 Kan. 885, 889, 259 P.3d 676 (2011); *In re Estate of Broderick,* 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009).

We also note that Craig knew prior to the divorce trial that Judge Fromme—the same judge who presided over the criminal proceedings—would be the presiding judge in this civil case. Yet, Craig never filed a motion under K.S.A.2012 Supp. 20–311d seeking the judge's recusal, thereby bypassing the statutory procedure established for raising claims of judicial bias.

Furthermore, although Judge Fromme signaled his intention to consider what impact Craig's incarceration had on the Oliver family's financial situation prior to the introduction of any testimony or evidence, Craig did not lodge any objection until *after* Judge Fromme issued his rulings dividing the marital property. In fact, Craig's belated objection never referenced any claim of judicial bias and essentially challenged the relevancy of the facts developed in his criminal case:

> "Judge, if I could just make a quick record. I would just object to the Court relying on the criminal case as basis for the Court's decision or any part thereof. There was actually no evidence presented in the criminal case. I realize there were statements made during the sentencing but those are not evidence and I don't think the Court can consider anything from the criminal case regarding that. Custody and residency was not an issue. They allege no fault divorce. And so I think this is just a straight division of assets that those issues that [the] Court relies on from the criminal case aren't relevant to this case."

***6** Judge Fromme subsequently overruled the objection, stating:

> "Well, if it goes up on appeal I don't know whether it's fair game or not but, anyway, it has been referred [to] in this divorce case that this child has not only current mental health and medical bills that were incurred as a direct result of that incident but she will have ongoing bills and expenses and I'm not going to forget that anyway."

Given this record we are not persuaded that Craig preserved the issues he now raises on appeal. Assuming Craig did preserve the issues of judicial bias and improper fault considerations for appellate review, his claims of error still fail on the merits.

Craig asserts that Judge Fromme was biased against him because he divided the marital property based on Craig's fault as evidenced by his criminal convictions. Craig asserts this error is shown by three statements made by the district court during the trial.

The first challenged statement was made shortly after Craig's attorney made introductory remarks that "Mr. Oliver obviously cannot pay child support while he is incarcerated. And both children will turn 18 while he is still in custody." Craig's attorney also advised the district court that if Craig earned good-time credits while incarcerated, the earliest he would be released would be in 14 years. Judge Fromme responded:

> "*[T]his is kind of a unique situation in that [Craig] is currently incarcerated and is likely to be incarcerated for some time* and the mention was made at least 14 years. The children are residing with [Tamara] and she has the responsibility now of raising these kids and I assume starting in college if they're going to go to college, *along with mental therapy for the daughter and other issues surrounding the criminal conduct. And I guess the Court, anyway, thinks those things need to be taken into consideration in this case* in that we're not just separating a family here and the parties going their own way and [Craig] is incarcerated and unemployed and will not have a job for 14 years at least." (Emphasis added.)

Craig did not object to the district court's remarks.

Second, Craig challenges a statement Judge Fromme made in announcing his decision at the conclusion of the trial:

> "*And clearly the damage that was done here with regard to the family and the child primarily is the fault of [Craig]* and although the Court is not here to place fault in awarding the divorce, I do think that I can take into consideration the evidence that was presented and some of the medical needs that will be ongoing for this child during minority due to the fact that the father is incarcerated and will have no meaningful income with which to support or contribute to the family." (Emphasis added.)

Craig did object to this statement but not on grounds of bias or prejudice.

Third, Craig complains about another statement Judge Fromme made in an effort to explain his child support order after the decision was announced:

> ***7** "*[E]ven though[Craig] is incarcerated and unlikely to be able to pay for some time ... it's by his own fault that he is there* and he has a duty to pay support and I don't think his going to prison should release him from that obligation. And although it's unlikely he'll pay it, I think it should be awarded in case somehow or other he comes in to some money with which it can be paid ." (Emphasis added.)

Once again, Craig did not object on the basis of bias or prejudice.

On appeal, in support of his claim that Judge Fromme impermissibly considered Craig's fault in making the division of property, Craig cites *In re Marriage of Sommers,* 246 Kan. 652, 792 P.2d 1005 (1990). In *Sommers,* our Supreme Court held that in order to insure that "marriage dissolutions occur with minimal hostility and vituperation," " '[f]ault' is

[considered] a term of art," in domestic relations actions, which relates solely to the fault ground for divorce in K.S.A. 60–1601(a) (now K.S.A.2012 Supp. 23–2701) (failure to perform a material duty or obligation). 246 Kan. 652, Syl. ¶ 1. The *Sommers* court clarified that for purposes of adjusting the divorcing parties' financial affairs, district courts should not impose financial penalties on the basis of fault except in "extremely gross and rare situations." 246 Kan. 652, Syl. ¶ 1.

Importantly, in *Sommers* however, our Supreme Court noted that a district court may appropriately consider evidence of misconduct when necessary to render a realistic evaluation of the divorcing parties' financial situation, future income, and needs:

> "For illustration, let us say that because of the husband's mental abuse of the wife she is so emotionally impaired that her earning capacity is affected. Certainly, the court should consider this in its determination of a fair and equitable award. The court, in such circumstances, is not imposing a penalty for fault but is considering the circumstances of the parties as they exist and making its award based on such existing circumstances and the likely future results arising therefrom.... For a final example, let us say we have a physician who because of alcoholism or drug abuse is on a downward professional spiral. The physician's income is high now, but the circumstances show that this income level is not likely to continue. The trial court should have this information before it. It might well conclude that the physician's future ability to pay adequate maintenance and child support is highly questionable and that it would be more provident to award a greater than usual share of the marital property to the custodial spouse. Again, such action would not be a penalty for fault, but rather would be based upon a realistic evaluation of the parties' circumstances, future income, and needs." 246 Kan. at 657–58.

A divorce matter with particular relevance to this case is *In re Marriage of Fallis,* No. 104,691, 2012 WL 924802, at *1–2 (Kan.App.2012) (unpublished opinion), wherein our court concluded that the district court did not err when it considered evidence relating to the husband's criminal record.

> ***8** "*Sommers* held the district court may not consider a party's fault *as it pertains to the reason for divorce* when dividing property. 246 Kan. at 659. Here, the district court did not grant Sandra property because it believed Bret was at fault for the divorce—as he had numerous DU1 convictions [during the marriage]. Instead, the district court considered this information for purposes of analyzing the financial situation of the parties—who contributed money to certain expenses during the marriage and who was therefore entitled to what assets. In other words, the district court did not award certain assets to Sandra because Bret caused the marriage to fail, but only considered Bret's inability to contribute to the marriage financially at times due to his criminal history. The district court's consideration of this factor was permissible. [Citation omitted.]" 2012 WL 924802, at *7.

Our independent review of the trial proceedings convinces us that Judge Fromme did not grant the divorce or divide the marital property because he was biased or prejudiced against Craig or because Craig was at fault in sexually assaulting his minor daughter. Rather, the district court pointedly observed, *"the Court is not here to place fault* in awarding the divorce." (Emphasis added .) This statement is in full accord with *Sommers.*

Moreover, also in keeping with *Sommers,* Judge Fromme assessed the impact of Craig's incarceration on the family's financial situation and indicated that his consideration of Craig's incarceration was focused on its effect upon the family —especially the fact that Tamara will have full financial and custodial responsibility for the children during the remainder of their minority. A reasonable person could certainly reach the same conclusion as Judge Fromme did that due to Craig's inability to contribute financially to the rearing of his children, it was fair and equitable to assign a larger share of the marital estate to Tamara. Under these unique circumstances, we find no abuse of judicial discretion.

Next, Craig asserts "the district court's negative bias toward Mr. Oliver was so salient that the court failed to adequately apply the statutory factors required under K.S.A. [2012 Supp.] 23–2802(c) to properly distribute the parties' marital property and debt." In particular, Craig notes that the district court failed to "address the age of the parties and the duration of the marriage as they both directly relate to the parties' accumulation of marital property over time."

Initially, a district court's failure to articulate and discuss each of the factors listed in K.S.A.2012 Supp, 23–2802(c) is not necessarily fatal to the court's decision. See *In re Marriage of Whipp,* 265 Kan. 500, 508–09, 962 P.2d 1058 (1998); *In re Marriage of McGinnis,* No. 108,098, 2013 WL 5976071, at

*3 (Kan.App .2013) (unpublished opinion). This is especially true when, as in this case, the appellant fails to object to the district court's allegedly inadequate findings. See *In re Marriage of Vandenberg,* 43 Kan.App.2d at 703.

***9** In order to give the trial court the opportunity to correct inadequate factual findings and conclusions of law, the aggrieved party bears the responsibility of objecting to such errors, and in the absence of an objection, omissions in findings will not be considered on appeal. *O'Brien v. Leegin Creative Leather Products, Inc.,* 294 Kan. 318, 361, 277 P.3d 1062 (2012). Without an objection, this court presumes the trial court found all the facts necessary to support its judgment. But a remand may still be considered, if the lack of specific findings precludes meaningful review. 294 Kan. at 361. Accordingly, an appellate court's function is to review the record and determine whether it supports a presumption that the district court found all of the necessary facts. *In re Marriage of McGinnis,* 2013 WL 5976071, at *3.

While Judge Fromme did not explicitly state on the record each of the statutory factors articulated in K.S.A.2012 Supp. 23–2802(c), our review of the record persuades us that Judge Fromme found all of the facts necessary to support his judgment. In fact, Judge Fromme heard evidence on all of the statutory factors, and his detailed ruling shows that he based the property division—not upon matters of judicial bias or fault—but upon his findings regarding the property owned by the parties, the manner of acquisition of that property, and the parties' familial obligations:

> "I think here's what I'm going to do....
>
> ....
>
> "And with regard to the Tamara M. Oliver Family Trust despite the case that was cited by [Craig's counsel], the Court believes that I've heard satisfactory evidence here today to convince me, anyway, that money in that trust came from an inheritance of her father and has been kept separate and for her use and benefit and she is entitled to be awarded that trust and be awarded the real property and also the address in Osage City,.... And with regard to that property the evidence I heard would indicate that she made considerable payments out of her trust in order to purchase that property and she has covered any equity, I guess, that would be in that property through initial payments that she made which were listed, I believe, $5,000.00 or $5,500.00 and $55,000.00, another $25,000.00, and then whatever she said after that, all were coming from her trust account and this is not money that was earned through the joint contributions of the parties but came from her father's trust. In the Court's opinion she should be allowed to keep that property.
>
> "Court will also note that even though this case has been pending a while she has continued to make the real estate payments, despite all the other payments she's had to make. This property is not in foreclosure due to her ability to keep making the payments and I think she needs to be credited for that. There would be extreme and considerable expense involved had payments not been made and the matter had been referred to foreclosure so I think she's entitled to keep that and any equity in it.
>
> ***10** "With regard to the real property that's connected with the San Diego, California, and the legal description there, I guess, whatever interest she has in that should be awarded to her separate and apart also. And I already made the determination that came from inheritance along with her other siblings from her father and I don't believe it would be proper to award that to [Craig] or give him any credit with regard to any equity in that. Note that he's not on the account or that trust, it's only by marital relationship that he claims any right to it.
>
> "I've looked at the division of household goods and personal property and I'll approve it as fair and equitable. And I guess she has indicated in her proposed journal entry with regard to accounts and including her 401(k) life insurance, vehicles, and all, I'll approve that arrangement including [the] safety deposit box.
>
> "He'll get all the household goods and furnishings that are currently in his possession along with the other items that were discussed here today and agreed to. And I guess I will go ahead and give him the business Innovative Video Applications and any indebtedness on it and indicate, anyway, [Tamara] should be resolved [*sic*] from any responsibility to pay those debts for whatever that's good and worth, I don't know, but if it is part of a corporation then I don't know if she could be held personally liable. He gets Rural Wide Broadband, ... I'll follow what's in the proposed divorce decree here.
>
> "As far as the 60 acres of land are concerned, I guess I'm going to order that to be sold and any profit should be applied to the existing medical debts and the children's existing medical debts, and that also should apply to the ′37 Chevy pickup, the Ford Explorer, the Southwind RV, stock trailer, and the boat, and the International tractor.

....

"As far as the debts you've listed under Item 26 of the proposed journal entry, all the debts that she's willing to assume and I'll order her to pay those debts. And rather than list and go through the list specifically, I'll just state they're at Paragraph 26.

"Twenty-seven are the debts known with regard to the business and I'll assign those debts to [Craig]....

"Parties will be responsible for any debts they've accumulated since the filing of this divorce, I guess, and any acquired in their name."

Craig has failed to show that Judge Fromme based the property division on judicial bias or that he was influenced by notions of Craig's fault. On the contrary, our review convinces us that the district court properly applied the standards set forth in K.S.A.2012 Supp. 23–2802.

Finally, Craig claims error because it was "misguided and inappropriate" for the district court to place "significant weight on the medical needs of the minor child" that was sexually abused. Primarily, Craig states there was no evidence at trial that the child would have future medical needs to address any emotional issues that developed as a result of the sexual assaults.

***11** Having reviewed the record, we do not find reversible error. Tamara testified their daughter's hospitalization was related to Craig's criminal conduct. Similarly, Tamara explained that their daughter had received on-going counseling due to the sexual abuse. Invoices from the counseling center showed 8 visits within 6 months and that the last visit occurred only 2 months prior to the divorce trial. Given this evidence, we find the district court's determination that the child would require on-going counseling in the future to be based on a reasonable inference.

In conclusion, after a careful review of the record, Craig has failed to prove an abuse of discretion. Judge Fromme satisfied his obligation to make a "just and reasonable division" of the parties' real and personal property and that determination was supported by substantial competent evidence. See K.S.A.2012 Supp. 23–2802(c).

Affirmed.

All Citations

318 P.3d 1020 (Table), 2014 WL 802464

471 P.3d 34 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the MARRIAGE OF
Nancy B. POGGI, Appellee/Cross-appellant,
and
Joseph T. Poggi, Appellant/Cross-appellee.

No. 121,012
|
Opinion filed September 4, 2020.

Appeal from Sedgwick District Court; JEFF DEWEY, judge.

Attorneys and Law Firms

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Before Hill, P.J., Malone, J., and Walker, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** Joseph T. Poggi and Nancy B. Poggi appeal and cross-appeal, respectively, from the district court's orders on child support and spousal maintenance in their divorce proceedings. Joseph claims the district court erred in calculating and ruling on child support. More specifically, Joseph argues that the district court erred by using the extended-income formula to calculate child support without making sufficient written findings of fact to support that decision. Nancy claims the district court erred by granting Joseph's motion to alter or amend the judgment to award Joseph a credit for the children's direct expenses he paid during the divorce proceedings. She also claims the district court erred by granting Joseph's posttrial motion to modify child support and spousal maintenance without a material change in circumstances. For the reasons we will explain in this opinion, we find no reversible error and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Nancy and Joseph Poggi were married on December 27, 1994. They have four children who are still minors, born in 2003, 2004, 2006, and 2008. Joseph is a plastic surgeon who has operated his own practice since 2002. Nancy is an emergency-room physician who, for the past several years, has worked part-time so that she could be home with the children. Nancy filed for divorce on January 6, 2016, and the district court entered a temporary order under which, as of March 2017, Joseph paid Nancy $2,712 per month in child support. On October 26, 2017, the district court bifurcated the proceedings and entered a decree of divorce, reserving jurisdiction on all other issues.

To their credit, the parties resolved their child custody, residency, and parenting time issues. On October 10, 2018, the district court began a four-day trial on the remaining issues: the division of assets and debts, spousal maintenance, and child support. Nancy and Joseph each presented evidence on the valuation of certain assets, computation of their income, and their ability to work. Nancy testified on her own behalf and presented testimony from her treating physicians about her diagnosis in April 2018 of breast cancer, her ongoing treatment, and how it affected her ability to work. She had stopped working altogether in June 2018.

Nancy also testified that she historically paid the children's direct expenses, and she asked the district court to order that she continue to pay them. Joseph testified on his own behalf, asserting that he had been paying the children's direct expenses and requesting an order that he continue to do so. After hearing all the evidence and closing arguments of counsel, the district court took the matter under advisement. The district court issued its "Memorandum and Rulings of the Court" on December 20, 2018, setting forth its rulings and directing Nancy to prepare the journal entry.

On January 23, 2019, Joseph moved to alter or amend the judgment seeking credit for the children's direct expenses he had paid during 2017 and 2018. Nancy responded that Joseph's motion was premature since the district court had not yet filed a final journal entry and that it was improper for Joseph to request credit for past direct expenses because he

had not made such a request at trial and because his paying for those expenses should be considered a gift.

***2** On February 1, 2019, the district court filed its "Journal Entry of Final Judgment." In the section on current child support, the district court ruled that Nancy "shall be responsible for the minor children's direct expenses," but the section on past child support did not refer to direct expenses. The district court set Nancy's gross annual income at $210,000 and Joseph's at $648,708, and it used the extrapolated-income or extended-income formula set forth in the Kansas Child Support Guidelines (the Guidelines) to calculate child support. It ordered Joseph to pay $3,617 per month in child support beginning January 1, 2019 and $7,300 per month for 49 months in spousal maintenance beginning December 31, 2018. As to spousal maintenance, the journal entry stated that "[t]hese payments may be reviewed by the Court if there is a material change in circumstances, as controlled by K.S.A. 23-2903."

The district court also "re-figured" Joseph's past child support obligations; under the temporary order, he had been paying $2,712 per month. For March 2017 through February 2018, the district court "re-set" Joseph's obligation to $9,003 per month and from March 2018 through December 2018 it "re-set" Joseph's obligation to $4,319 per month. Thus, the district court found that Joseph owed a child support arrearage totaling $91,562, which the district court ordered would be satisfied by a reduction in the equalization payment Nancy owed Joseph as part of the asset division.

The same day that the journal entry of judgment was filed, Joseph moved to modify spousal maintenance and child support. He noted that the district court had calculated child support obligations based on the information available at trial in October 2018, but he had since been able to determine his actual 2018 income; it was $423,929—much less than the figure the district court had estimated by averaging his income from the three prior years. With that in mind, Joseph asked the district court to modify spousal maintenance and child support to more accurately reflect his income.

Nancy replied, arguing that the evidence had not changed on her need for spousal maintenance, so the district court should not modify that amount. As for child support, Nancy argued that there had not been a material change of circumstances, as required to modify the child support amount. She noted that Joseph had argued at trial that his 2018 income would be less than the average figure used by the district court, and she asserted that Joseph's motion to modify simply revived his argument, which the district court had rejected. Joseph replied, arguing that he had shown a material change of circumstances.

On February 25, 2019, the district court held a hearing on Joseph's posttrial motions. The parties generally repeated their arguments in their written submissions to the district court. After hearing the parties' arguments, the district court took the matter under advisement.

On March 5, 2019, the district court filed its memorandum order on Joseph's posttrial motions. It granted Joseph's motion for credit for the children's direct expenses he had paid between March 1, 2017 and October 1, 2018. This amounted to $12,003.99. The district court explained that its December 2018 judgment "provided, in part, that the child support should be calculated retroactively to March 1, 2017" and that "[t]he level of child support contemplated that the mother would pay the direct expenses of the children, effective March 1, 2017." The district court also decreased the amount of child support and spousal maintenance based on the new information about Joseph's actual income in 2018. The district court filed a journal entry on April 1, 2019, reflecting the modifications. Joseph's spousal maintenance was reduced to $6,355 per month effective February 1, 2019, and his child support obligation was reduced to $3,282 per month effective February 1, 2019.

***3** Joseph appeals, arguing that the district court erred in its December 2018 order of past and prospective child support. Nancy cross-appeals, arguing that the district court erred in granting Joseph's motion to alter and amend and his motion to modify child support and spousal maintenance.

ANALYSIS

Did the district court err by using the extended-income formula to calculate current child support without making sufficient findings of fact to support that decision?

Joseph first claims the district court abused its discretion by using the extended-income formula to calculate current child support without making sufficient written findings of fact to support that decision. Nancy disagrees, arguing that the district court properly followed the Guidelines and made all necessary written findings. But Nancy also contends that this issue is not preserved for appeal because Joseph failed to

object in the district court to any alleged inadequacies in the district court's journal entry.

Kansas appellate courts review a district court's award of child support to determine whether the district court abused its discretion. *In re Marriage of Leoni*, 39 Kan. App. 2d 312, 317, 180 P.3d 1060 (2007). Interpretation of the Guidelines requires statutory interpretation, which is subject to unlimited review. 39 Kan. App. 2d at 317.

Preservation

K.S.A. 2019 Supp. 60-252(a) requires a district court to make specific factual findings and conclusions of law when entering judgment in an action tried on the facts without a jury. Subsection (b) of that statute allows a party to make a timely motion after the entry of judgment asking the court to amend or make additional findings. K.S.A. 2019 Supp. 60-252(b). When an appellant fails to object in the district court to allegedly inadequate findings "in order to allow the trial court the opportunity to correct any omissions," that appellant "is precluded from challenging the allegedly deficient findings on appeal." *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 703, 229 P.3d 1187 (2010).

Nancy characterizes Joseph's argument as one that asserts inadequacies in the district court's written ruling, and she asserts that his failure to object on those grounds in the district court renders the issue unpreserved for appellate review. In his reply brief, Joseph argues that because the plain language of K.S.A. 2019 Supp. 60-252 does not require him to file a motion to alter or amend the judgment, he did not need to do so. But Kansas courts have repeatedly held that an objection to alleged inadequacies in a district court's findings generally is required for preservation. See *Ponds v. State*, 56 Kan. App. 2d 743, 756, 437 P.3d 85 (2019) (holding that because the record did not preclude meaningful appellate review, the failure to object in district court to the adequacy of the findings meant this court would presume the district court made all necessary findings to support its legal conclusions); *Hooks v. State*, 51 Kan. App. 2d 527, 529, 349 P.3d 476 (2015) ("The district court has the primary duty to provide adequate findings of fact and conclusions of law on the record of its decision on contested matters" but parties "must object to inadequate findings of fact and conclusions of law to preserve an issue for appeal.").

Joseph also argues that Nancy has mischaracterized his appellate argument, which he claims challenges the sufficiency of the evidence. As Joseph asserts, under K.S.A. 2019 Supp. 60-252(a)(4): "A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them or moved for judgment on partial findings." To prove he is challenging the sufficiency of the evidence, Joseph argues that his issues "are clearly framed as abuse of discretion issues," and he contends that he "challenges the sufficiency of the district court's findings when compared to the weight of the evidence presented at trial." We agree with Joseph that if he argues the insufficiency of the evidence, that argument is properly before this court. But any argument concerning insufficient findings is not properly before this court. Thus, we must examine Joseph's argument in detail.

***4** In his initial appellate brief, Joseph frames his position as follows: "That the Trial Court Abused Its Discretion and Awarded Child Support Payable by Joseph T. Poggi to Nancy B. Poggi Above the Child Support Guidelines and by Extrapolating the Parties' Income Without Making Written Findings of the Factors that would Justify Increased Levels of Child Support." Joseph then explains the use of the Guidelines and notes this court's previous holding that a district court deviating from the Guidelines when determining child support must make written findings explaining the deviation. See *In re Marriage of Leoni*, 39 Kan. App. 2d at 317 ("Any deviation from the amount of child support determined by the use of the guidelines must be justified by written findings in the journal entry, and failure to make such written findings is reversible error.").

Joseph continues by asserting that "the Journal Entry of Final Judgment contains no written findings supporting a deviation from the Child Support Guidelines and the use of the extrapolated formula, [*sic*] to determine the amount of child support payable." Complaining that the district court's "itemization of the factors" relevant to its decision "is not a written finding as to why the Court decided to deviate from the Child Support Guidelines," Joseph emphasizes that the district court did not make "the required written findings that this Court could review and make a determination of whether the appropriate analysis was used and the appropriate factors considered." He concludes: "When the Court failed to make the appropriate findings as required by the Kansas Child Support Guidelines and failed to explain the application of the guidelines to the facts of this case, the trial court committed reversible error."

Contrary to his assertions in his reply brief, Joseph does not make a sufficiency of the evidence argument in his

initial appellate brief. Rather, he argues that the district court committed reversible error by failing to make required written findings. Joseph does not mention any evidence or the insufficiency of it in his argument on this issue. Thus, because Joseph is challenging the adequacy of the district court's written findings and is doing so for the first time on appeal, we find this issue is not properly before this court. But in the alternative, we will address the merits of Joseph's claim.

The merits

The Guidelines include schedules that calculate the amount of support per month per child; the schedules consider the parents' combined gross monthly child support income, the number of children in the family, and each child's age. Kansas Child Support Guidelines Appendix II (2020 Kan. S. Ct. R. 133). The schedules identify monthly child support for combined gross monthly incomes ranging from $50 to $15,500, and they provide specific calculations to use "[t]o determine child support at higher income levels." (2020 Kan. S. Ct. R. 134.) The Guidelines also instruct that if the combined gross monthly income "exceeds the highest amount shown on the schedules, the court should exercise its discretion by considering what amount of child support should be set in addition to the highest amount on the child support schedule." Kansas Child Support Guidelines § III.B.3. (2020 Kan. S. Ct. R. 100).

Joseph argues that the district court abused its discretion by using the extended-income formula to calculate current child support without making sufficient written findings of fact to support that decision. We agree with Joseph that the district court did not make specific findings of fact to support its use of the extended-income formula, but the district court did express in its memorandum decision the factors it considered in finding extrapolated child support to be appropriate:

> "The court has considered the evidence in this case as it applies to factors, including, the standard of living and situation of the parties; the relative wealth and income of the parties; the ability of Joseph Poggi to earn; the ability of Nancy Poggi to earn; the needs of Joseph, Nancy and the children; the family history and tradition; and the past and present lifestyle of the children. The court finds that uncapped (extrapolated) child support is appropriate and warranted."

***5** This court has interpreted the Guidelines to direct that if parents' combined income exceeds the highest level set forth in the schedules, the district court must exercise its discretion to either award child support at the highest amount on the relevant schedule or use the "extended-income formula" or "extended-income extrapolation formula" to calculate the amount. See *In re Marriage of Wilson*, No. 104,830, 2011 WL 4717202, at *4 (Kan. App. 2011) (unpublished opinion). And the Kansas Supreme Court has instructed that "[a]ny deviation from the amount of child support determined by the use of the guidelines must be justified by written findings in the journal entry." *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

Joseph argues that the use of the extended-income formula constitutes a deviation from the Guidelines that must be supported by written findings in the journal entry. But no Kansas appellate court has ever held that the use of the extended-income formula is a deviation from the Guidelines. Two of the three cases Joseph cites to support his claim did not involve child support awards based solely on the extended-income formula.

In re Marriage of Leoni addressed whether the district court erred in imposing a $5,000-per-month cap on child support despite the extended-income formula calculations resulting in a higher amount. 39 Kan. App. 2d at 321-24. *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 525, 920 P.2d 450 (1996), reviewed whether the district court erred by not using the extended-income formula despite the combined monthly income exceeding the highest amount in the schedule and whether the amount calculated using the extended-income formula creates a rebuttable presumption of the appropriate child support amount. Neither of these cases held that the use of the extended-income formula requires specific written findings justifying its use. Interestingly, the *Patterson* court even distinguished cases that "dealt with deviation from the presumptive payment established in the support schedules" from those that "involved a monthly income higher than that found on the support schedules." 22 Kan. App. 2d at 529.

The third case Joseph cites, *In re Marriage of Wilson*, involved a child support amount that resulted from the district court using the extended-income formula. But that case works against Joseph's position. In *Wilson*, this court held: "[W]hen computing this support figure, the district court followed the extended-income formula found in the guidelines. We cannot say that when a district court follows the guidelines it is an abuse of discretion." 2011 WL 4717202, at *7.

This court recently filed an opinion that directly addresses Joseph's claim that the district court must make written findings of fact to support the use of the extended-income formula to calculate child support. In *In re Marriage of Madrigal*, No. 120,930 unpublished opinion filed on August 21, 2020 (Kan. App.), the district court ordered the father to pay child support using the extended-income formula. He argued that the district court erred because it did not make specific written findings justifying its reliance on the extended formula. This court rejected the father's argument with the following analysis:

> "[Father's] argument fails because no specific findings were required here. The cases [Father] cites all involve the findings required to deviate from a presumptive-support figure based on the capped schedules. No case he cites applies that same rule to the discretionary decision to award support beyond the cap using the extended formula.
>
> ***6** "So long as the district court awards at least the presumptive amount of support, the Guidelines themselves do not require written findings to use the extended formula. The Guidelines require written findings 'to make an adjustment' from the presumptive figure recommended by the schedules. See Guidelines § I. One way the district court can satisfy that requirement is by completing the portion of the child support worksheet (Section E) that covers adjustments. See Guidelines § I. Doing so 'constitute[s] the written findings for deviating from the rebuttable presumption.' See Guidelines § I. Written findings in that situation are required because a departure from the presumptive amount is a disagreement with the default support number that the economic model and the Guidelines say is reasonable under the circumstances. One would expect that such a decision would require a more thorough, written explanation.
>
> "The same cannot be said about the discretionary decision to use uncapped income. There is no presumption that the support amount calculated by the extended formula is appropriate. The purpose of requiring more explanation disappears when the district court is simply deciding whether to apply the extended formula as opposed to deviating from a presumptively correct figure. [Citation omitted.]" *In re Marriage of Madrigal*, Slip op. at 12.

In sum, the district court must make written findings when it deviates from the presumptive amount of child support set forth in the Guidelines. But the district court's discretionary decision to use the extended-income formula to calculate child support is not a deviation from the Guidelines. The extended-income formula is set forth in the Guidelines and, as such, the use of the extended-income formula cannot logically be considered a deviation from the Guidelines that requires specific findings. We conclude the district court did not err by failing to make written findings when it used the extended-income formula to calculate Joseph's current child support obligation.

Did the district court err by recalculating Joseph's pretrial child support obligation?

In his second issue, Joseph focuses on the district court's award of retroactive child support after it recalculated his temporary child support obligations based on evidence presented at trial. As discussed above, Joseph's initial child support obligation was $2,712 per month. But in its 2019 journal entry of final judgment, the district court recalculated Joseph's past child support obligation and found that he owed a child support arrearage totaling $91,562, which the district ordered would be satisfied by a reduction in the equalization payment Nancy owed Joseph as part of the asset division. Joseph argues that the district court abused its discretion by using the extended-income formula in awarding retroactive child support without making written findings. He also argues there was insufficient evidence to support the order for retroactive child support.

To the extent that Joseph challenges the district court's failure to make certain written findings he contends are required, that claim fails for the reasons set forth above: (1) he failed to preserve the issue for appeal by not objecting to the inadequate findings in the district court and (2) the district court did not have to make specific findings justifying the use of the extended-income formula because, by doing so, it did not deviate from the Guidelines. But unlike his argument in the last issue, Joseph also legitimately challenges the sufficiency of the evidence supporting the district court's decision to award retroactive child support based on a recalculation of the parties' income. And as noted above, K.S.A. 2019 Supp. 60-252(a)(4) allows an appellate challenge to "the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them or moved for judgment on partial findings."

***7** When reviewing the sufficiency of the evidence supporting an award of child support, this court must "review the district court's findings of fact to determine if those findings are supported by substantial competent evidence and

are sufficient to support the district court's conclusions of law." *In re Marriage of Skoczek*, 51 Kan App. 2d 606, 607-08, 351 P.3d 1287 (2015). "Substantial evidence" refers to "legal and relevant evidence [that] a reasonable person might accept as being sufficient to support a conclusion." 51 Kan. App. 2d at 608. When reviewing the sufficiency of evidence, appellate courts do not reweigh conflicting evidence or reconsider witnesses' credibility. 51 Kan. App. 2d at 608.

The thrust of Joseph's insufficiency of the evidence argument is that the district court erred by recalculating his past child support obligation because Nancy presented no evidence at trial that the child support he had paid was inadequate. Joseph asserts that Nancy presented no evidence at trial about her actual expenses after March 2017, her actual income during that time frame, how her income related to her expenses, or how the children's needs were unmet by the $2,712 in child support he had paid. Joseph argues that because he presented evidence that Nancy had incurred no debt during the divorce proceedings, "which would have indicated that she had insufficient alimony and/or child support to care for herself and the children," the additional amount he was ordered to pay in past child support constituted a windfall to Nancy.

Joseph fails to identify any legal authority to support the proposition on which his argument rests: the district court could not recalculate past child support set forth in a temporary order unless Nancy proved that the initially ordered amount was insufficient. "Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue." *City of Neodesha v. BP Corporation*, 50 Kan. App. 2d 731, 769-70, 334 P.3d 830 (2014). "When a litigant fails to adequately brief an issue, it is deemed abandoned." *Hill v. State*, 310 Kan. 490, Syl. ¶ 7, 448 P.3d 457 (2019).

Moreover, as this court has held, a child's actual needs alone do not determine the amount of child support. In *In re Marriage of Wilson*, a similarly high-income case, The father argued that the district court abused its discretion by not limiting child support to an amount based on the child's actual needs, thereby granting a windfall to the child's mother. This court noted that the statute authorizing child support orders at the time did not limit child support to the actual needs of the child, nor did the Guidelines. 2011 WL 4717202, at *3. The *Wilson* court also noted that in *Patterson*, this court had "rejected the contention ... that child support must be limited to a child's demonstrable needs" in high-income circumstances. *In re Marriage of Wilson*, 2011 WL 4717202, at *4 (citing *In re Marriage of Patterson*, 22 Kan. App. 2d at 528-29). Rather, "[a] child's needs are not the sole focus in determining a child support obligation in Kansas." *In re Marriage of Wilson*, 2011 WL 4717202, at *5.

The *Wilson* court also rejected the father's request that it "apply the 'Three Pony Rule,' " a phrase Joseph incorporates into his appellate argument in this case. 2011 WL 4717202, at *6. As this court explained in *Wilson*:

> "[H]e refers to an argument heard frequently in the wealthier parts of our state that 'no child, no matter how wealthy the parents, needs to be provided more than three ponies.' *Patterson*, 22 Kan. App. 2d at 528. While the court in *Patterson* did glibly refer to the 'Three Pony Rule' in dicta, such a rule is not the law in Kansas as demonstrated in the *Patterson* case itself. *Patterson* recognized that Kansas law does not focus solely on a child's demonstrable needs to guide a district court's discretionary application of the extended-income formula. 22 Kan. App. 2d at 528-29." *In re Marriage of Wilson*, 2011 WL 4717202, at *6.

***8** In sum, Kansas law is clear that child support is not based solely on the actual needs of the child. It primarily depends on the parents' income and a child support award based on the parents' ability to pay may be upheld even if it exceeds the actual needs of the child. Thus, we reject Joseph's claim that the district court erred by recalculating his past child support obligation even though Nancy presented no evidence that the original child support award was inadequate to meet the needs of the children.

Did the district court err by awarding Joseph credit for direct expenses?

In the first two issues of her cross-appeal, Nancy argues that the district court erred by granting Joseph's motion to alter or amend the judgment to award Joseph a credit for the children's direct expenses he paid during the divorce proceedings. As we stated earlier, this credit amounted to $12,003.99. Under the Guidelines, direct expenses are "fixed expenses paid directly to a third party, such as a school, church, recreational club, or sports club to allow participation in an activity or event, or to attend school," as well as "all necessary supplies

and equipment purchased to support such activity." Kansas Child Support Guidelines § II.A.1. (2020 Kan. S. Ct. R. 93). Although Nancy frames her arguments as two distinct issues, we will address them together because both relate to the credit for direct expenses. Nancy first argues that the district court exceeded its authority under a motion to alter or amend when it granted Joseph the credit. Second, she contends that res judicata barred the credit. Joseph disagrees, arguing that the district court's award of credit for direct expenses was proper.

This court reviews a district court's decision on a motion to alter or amend the judgment to determine whether the district court abused its discretion. *Florez v. Ginsburg*, 57 Kan. App. 2d 207, 218, 449 P.3d 770 (2019). A district court abuses its discretion when (1) no reasonable person would agree with the district court's ruling; (2) the court bases its ruling on a factual error; or (3) the court bases its ruling on an error of law. *Florez*, 57 Kan. App. 2d at 218.

Nancy first contends that Joseph failed to request credit for direct expenses at any point before his motion to alter or amend and she argues that a motion to alter or amend is not a vehicle by which a party may raise an issue or seek relief for the first time. Joseph disagrees with Nancy's claim that he raised direct expenses for the first time in his motion to alter or amend. He argues that because direct expenses are part of child support, his request for credit was at issue at the trial because child support was contested at trial.

At the hearing on Joseph's motion to alter or amend the judgment, he conceded that during the trial, "at no time did we request that you have Joseph Poggi be reimbursed for those expenses." Joseph reminded the district court that he had presented evidence at trial of his paying the children's direct expenses "to show you some history, but it was not presented to you with a request that he be reimbursed. That is our request today."

As Nancy asserts, this court has explained that " '[t]he purpose of a motion to alter or to amend under K.S.A. 60-259(f) is to allow a trial court an opportunity to *correct prior errors*.' " *AkesoGenX Corp. v. Zavala*, 55 Kan. App. 2d 22, 37-38, 407 P.3d 246 (2017). In *AkesoGenX*, this court held that a party could not raise a challenge to venue for the first time in a motion to alter or amend the judgment "because Zavala never challenged venue before the district court entered default judgment against him, [so] there was no prior error to correct." 55 Kan. App. 2d at 38.

***9** In *Ross-Williams v. Bennett*, 55 Kan. App. 2d 524, 564, 419 P.3d 608 (2018), this court reiterated that a motion to alter or amend is meant "to allow a district court to correct a prior error. It is not an opportunity to present additional evidence [or an additional argument] that could have been previously submitted" with "reasonable diligence." See also *Wenrich v. Employers Mut. Ins. Co.*, 35 Kan. App. 2d 582, 590, 132 P.3d 970 (2006) (holding that district court did not abuse its discretion in denying motion to alter or amend when party could have presented argument before the verdict).

Under the cases cited by Nancy, the district court could have *denied* Joseph's motion to alter or amend simply because he was arguing for relief that he did not explicitly request at trial, and the court would have been on solid legal ground to do so. But the question before this court is whether the district court abused its discretion by *granting* Joseph's motion to alter or amend, which is a slightly different question.

As Joseph concedes, he did not explicitly ask the district court to order that he receive credit for the children's direct expenses he paid while the case was pending. But Joseph did not ask for reimbursement of the children's direct expenses at trial only because he was asking the district court to order him to be responsible for the children's direct expenses in the first place. And Joseph's request for reimbursement of direct expenses became more significant after the district court "re-figured" Joseph's past child support obligations and found that he owed an arrearage totaling $91,562. Nancy does not dispute that the district court's order for Joseph to receive credit for the children's direct expenses he paid was fair and appropriate; she only argues that the order was improper on a motion to alter or amend because Joseph had not made the request at trial. But none of the cases cited by Nancy explicitly state that the district court *lacked jurisdiction* to grant Joseph's request for credit in his motion to alter or amend. It appears to us from the record that even though the district court could have denied Joseph's motion to alter or amend on procedural grounds, the district court decided to grant the motion because Joseph's request for credit for the children's direct expenses he paid was fair and appropriate under the circumstance. We are unwilling to find that no reasonable person would have agreed with the district court's ruling.

Nancy also argues that because Joseph could have requested direct expenses credit at trial but did not do so, res judicata barred him from doing so posttrial. This court exercises

plenary review over whether res judicata applies to bar a claim. *Cain v. Jacox*, 302 Kan. 431, 434, 354 P.3d 1196 (2015). For res judicata to operate, "the following four elements must be met: '(a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.' " 302 Kan. at 434.

As Joseph points out, Kansas appellate courts do not apply res judicata unless there are two cases to compare. Put another way, res judicata operates "across successive cases," not "within the life of a single case." *State v. West*, 46 Kan. App. 2d 732, 736, 281 P.3d 529 (2011); see *State v. Williams*, No. 118,781, 2018 WL 6580086, at *3 (Kan. App. 2018) (unpublished opinion) ("Res judicata typically applies to prevent relitigation of issues between the same parties in a subsequent action whereas the law of the case bars relitigation of issues decided in a prior appeal in the same case."), *rev. denied* 310 Kan. 1071 (2019). "The doctrine of res judicata is based on the idea that when a cause of action has once been litigated to a final judgment, it is conclusive on the parties in any later litigation involving the same action." *Penn v. State*, 38 Kan. App. 2d 943, 945-46, 173 P.3d 1172 (2008). Simply put, res judicata does not apply here because there is only one case at issue. There was no prior litigation that would trigger res judicata concerns.

***10** In her reply brief, Nancy asserts that *Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388, 949 P.2d 602 (1997), explains why Joseph's argument that res judicata does not apply here "misses the mark." But *Stanfield* held: "The doctrine of res judicata (or claim preclusion) prohibits a party from asserting *in a second lawsuit* any matter that might have been asserted *in the first lawsuit*." (Emphasis added.) 263 Kan. at 397. Because there is no prior lawsuit to consider, res judicata does not apply. Thus, the doctrine of res judicata does not bar the district court's award of credit for direct expenses.

Did the district court err by modifying child support and spousal maintenance amounts?

Nancy argues that the district court erred by granting Joseph's posttrial motion to modify child support and spousal maintenance because Joseph presented insufficient evidence to show the required material change in circumstances. Joseph disagrees, asserting that the modification was appropriate. The district court based the modification on Joseph's assertion that his actual 2018 income was substantially less than the estimated figure the district court relied on at trial.

"Generally, we review an order modifying child support for abuse of discretion. However, when an issue requires interpretation and application of the Guidelines, our review is unlimited." *In re Marriage of Ormiston*, 39 Kan. App. 2d 1076, 1078, 188 P.3d 32 (2008). Similarly, this court reviews an order modifying spousal maintenance for abuse of discretion and, if necessary, reviews the district court's findings of facts for substantial competent evidence. *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 935, 381 P.3d 490 (2016).

K.S.A. 2019 Supp. 23-3005(a) states that a district court "may modify any prior child support order ... when a material change in circumstances is shown." K.S.A. 2019 Supp. 23-2903 provides:

> "At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree."

Although Nancy concedes that K.S.A. 2019 Supp. 23-2903 provides that a district court may modify spousal maintenance "[a]t any time," she still argues that a material change in circumstances is always required for a district court to modify spousal maintenance. But the sole case she cites for this proposition, *In re Marriage of Hedrick*, 21 Kan. App. 2d 964, 968-69, 911 P.2d 192 (1996), required a material change in circumstances to modify spousal maintenance only because the parties agreed to that requirement in their settlement agreement. See 21 Kan. App. 2d at 967. In any event, the district court's journal entry of final judgment here stated that spousal maintenance "payments may be reviewed by the Court if there is a material change in circumstances, as controlled by K.S.A. 23-2903." Thus, the district court could only modify Joseph's spousal maintenance obligation upon finding a material change in circumstances.

The Guidelines provide that "[i]n addition to changes of circumstances which have traditionally been considered by courts," a "[c]hange of financial circumstances of the parents or the guidelines which would increase or decrease by

10% the amount shown on Line F.3 of the worksheet" will "constitute a material change of circumstances to warrant judicial review of existing support orders" Kansas Child Support Guidelines §§ V.B, V.B.1 (2020 Kan. S. Ct. R. 123). Nancy argues, and Joseph concedes, that his accurate 2018 income does not meet the 10 percent mark so as to create a presumptive material change of circumstances under the Guidelines. But this fact does not mean that the district court could not consider Joseph's request for a modification.

***11** As traditionally considered by courts, what constitutes a material change in circumstances is case-specific, but generally the change must be material, involuntary, and permanent. See *In re Marriage of Hedrick*, 21 Kan. App. 2d at 968-69. Joseph argued to the district court that the disparity between the court's estimation of his 2018 income and the actual amount of his 2018 income was so great that it constituted a material change in circumstances that warranted modification. Nancy, on the other hand, pointed out that Kansas appellate courts have repeatedly affirmed district courts' determinations of the income of self-employed individuals, including using a multi-year average when that income dropped in the 12 months before the determination.

In its memorandum order and journal entry on the motion, the district court noted that its December 2018 calculation of child support used a three-year average income for 2018. Because the more recent information showed a "significant reduction in [Joseph's] income for 2018," the court reconfigured the three-year average and decreased Joseph's spousal maintenance and child support obligations. Although the memorandum order stated that the modifications were effective February 1, 2018, the subsequently filed journal entry correctly stated that the modifications were effective February 1, 2019.

As Nancy points out, the only evidence before the district court on the motion to modify was Joseph's short-form domestic relations affidavit. She argues that this was not sufficient to support the asserted decrease in income, and she contends that she should have been afforded the opportunity to conduct discovery as to the accuracy of Joseph's claims about the reasons for his decreased income. While that request may have been appropriate, the question for this court is whether the district court abused its discretion by finding Joseph's short-form domestic relations affidavit was sufficient evidence to warranted modifying the child support and spousal maintenance orders.

A district court abuses its discretion if it bases its decision on an error of law or fact or if no reasonable person would agree with its decision. *Florez*, 57 Kan. App. 2d at 218. Here, the district court originally calculated Joseph's child support and spousal maintenance obligations based on his estimated 2018 income. In the context of his motion to modify those amounts, Joseph submitted a sworn affidavit stating that his 2018 income was much less than estimated. A reasonable person could accept a sworn affidavit as sufficient evidence for the district court to conclude that Joseph's 2018 income was lower than the number estimated by the district court. Moreover, a reasonable person could agree with the district court's conclusion that a lower actual income was a material change in circumstances and warranted recalculation of Joseph's child support and spousal maintenance obligations. Thus, we conclude the district court did not abuse its discretion by modifying the child support and spousal maintenance amounts.

Affirmed.

All Citations

471 P.3d 34 (Table), 2020 WL 5268841

396 P.3d 735 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the MARRIAGE
OF Karen S. RODROCK, Appellee,
and
Darol E. Rodrock, Appellant.

No. 115,078
|
Opinion filed June 9, 2017

Appeal from Johnson District Court; DAVID W. HAUBER, Judge.

Attorneys and Law Firms

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Before Arnold–Burger, C.J., Green and McAnany, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Darol Rodrock appeals from the district court's divorce decree which severed his marriage to Karen Rodrock, his wife of 49 years, and divided the parties' substantial personal and business assets. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In March 2014, Karen Rodrock filed for divorce from her husband of 49 years, Darol Rodrock, alleging incompatibility. At the time of trial, Karen was 69 and Darol was 71. During their marriage, Darol worked as a real estate developer while Karen primarily stayed home taking care of the house and children. Darol's real estate development business was extremely successful so that by the time of the divorce the Rodrocks had acquired substantial personal wealth and Darol's business owned numerous properties worth millions of dollars. Because Darol's business involved large expenditures of money upfront to purchase and develop land, the parties also had substantial debt.

Much of the 2 ½–day divorce trial was spent trying to establish the value of Darol's business, Rodrock Development. The other issue raised during the trial that presented an accounting issue was Darol's spending during the divorce. Karen presented evidence that Darol spent over $1 million gambling and sought compensation for Darol's dissipation of the marital estate.

After the trial but before the divorce decree was entered, Karen continued to be concerned about Darol's spending. At that time, Karen had no access to marital assets other than her home, except in the form of monthly maintenance payments. Darol, meanwhile, controlled all other income, assets, and credit. In light of Karen's concerns, the district court appointed a special master to look into how money from the marital estate was being spent. The district court also appointed special masters to oversee the disposition of assets, as needed, to equalize and divide the marital estate.

Nearly 9 months after trial, the district court entered a decree of divorce. In it, the district court divided the Rodrocks' assets, awarding Karen $14,737,352 in investment accounts, several items of personal property, her home, and an additional $538,376 to offset Darol's dissipation of the marital estate through gambling, for a total award valued at $15,932,668. In addition, because there was a $10 million lien against the investment accounts, the district court awarded Karen maintenance of $40,000 a month until such a time as the lien was paid. Darol was awarded his business, which the district court valued at $15,768,000, and various items of personal property for a total award valued at $16,654,244. The district court ordered the remainder of the parties' real property be sold by the special masters and for the money from the sales to be applied to pay down the lien on the investment account awarded to Karen. In the event that the sale of personal real property raised an insufficient amount of money to pay off the lien, the district court ordered Darol to sell business assets and apply the proceeds to eliminating the lien.

***2** Darol now appeals the district court's order.

ANALYSIS

We have jurisdiction to consider this appeal.

While this case was pending on appeal, this court issued a show cause order asking the parties to consider whether the district court's divorce decree was a final order so that it had jurisdiction to hear the case. The parties each filed briefs responding to the court's concerns—Darol arguing that this court had jurisdiction and Karen contending that it did not. This court made note of the parties' responses, issued an order retaining the appeal "on [the] present showing," and asked the parties to further brief the issue in preparation for oral arguments.

In its show cause order, this court expressed concern with language in the divorce decree wherein the district court noted its intention to maintain continuing jurisdiction to oversee and enforce its orders related to the sale and distribution of marital assets. In the months since the show cause order was issued, the district court's orders have been fully complied with—all property that the court ordered sold has been, the lien on the trust account awarded to Karen has been removed, attorney fees have been paid, maintenance payments have ceased, and all chattels awarded Karen are now in her possession. Any need for continuing oversight by the district court has ceased. Karen now agrees that Darol's appeal is properly before this court. So do we. Accordingly, no further examination of this issue is necessary.

The Kansas Commission on Judicial Qualifications is the body that investigates and resolves general claims of judicial misconduct.

Darol next argues that the district court violated the Kansas Code of Judicial Conduct at several points during and after the trial. He specifically claims District Court Judge David Hauber violated Kansas Code of Judicial Conduct, Supreme Court Rule 601B, Canon 2 (2017 Kan. S. Ct. R. 433) ("A judge shall perform the duties of judicial office impartially, competently and diligently."). He parses this further by claiming a violation of Rule 2.2 of this Canon (2017 Kan. S. Ct. R. 433) ("A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*.") and Rule 2.6(B) of this Canon (2017 Kan. S. Ct. R. 436) ("A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement."). These claims are based upon his allegation that Judge Hauber used ridicule and sarcasm throughout the proceedings in an effort to get the parties to settle. Moreover, Darol claims that by appointing special masters Judge Hauber was following through on his threats that he would sell off martial assets to liquidate the estate if the parties didn't settle. Darol claims there was no legal authority for him to do so.

While Darol spends a significant amount of time discussing Judge Hauber's alleged errors, Darol fails to demonstrate how he was prejudiced by them or to suggest any remedy this court could provide. This is not, generally, the appropriate forum for raising such complaints. While the appellate courts have heard and decided cases involving judicial misconduct, in those, misconduct is not the basis for a claim itself but rather is tied to some other error. See *State v. Kirkpatrick*, 286 Kan. 329, 347–48, 184 P.3d 247 (2008) (alleging that the defendant was denied his right to a fair trial by judicial misconduct), *overruled on other grounds by* *State v. Sampson*, 297 Kan. 288, 301 P.3d 276 (2013); *In re Marriage of Roby and Woodley*, No. 108,314, 2013 WL 1458014, at *7–8 (Kan. App. 2013) (unpublished opinion) (alleging that the district court judge committed misconduct by refusing to sign a child support order).

***3** Here, Darol concludes his first argument—that the district court judge used sarcasm to try to coerce the parties into settling—by stating: "The comments and decorum demonstrated by the Court show a bias and prejudice towards Respondent and a disregard for the Kansas Code of Judicial Ethics [*sic*] requiring a judge to perform the duties of judicial office impartially." Similarly, he ends his second argument—that the district court judge attempted to coerce the parties into a settlement by appointing a special master—by noting: "Through improper statements made throughout the proceedings and the erroneous appointment of Special Masters, the Court violated Rule 601B when it attempted to coerce the parties into settlement." Neither of these alleged instances of misconduct involves an issue that can be resolved on appeal because neither is linked to a procedural or evidentiary error. Rather, Darol alleges general malfeasance without consequence.

If, during the pendency of the proceedings below, Darol came to believe his right to a fair trial was in jeopardy because Judge Hauber was biased against him or was otherwise acting improperly, he could have filed a motion for a change of judge. See K.S.A. 20-311d(a). Had that been denied, the denial could have been raised on appeal. Having failed to

file such a motion, the appropriate course of action at this stage is not to raise general allegations of misconduct in an appeal but to file a complaint with the Kansas Commission on Judicial Qualifications. Supreme Court Rule 609 (2017 Kan. S. Ct. R. 472). It is that body that investigates and resolves general claims of judicial misconduct. Moreover, we remind counsel of their own ethical obligations under the Kansas Rules of Professional Conduct (KRPC). KRPC 8.3(b)KRPC 8.3(b) imposes a duty on lawyers to report ethical violations by judges that raise "a substantial question as to the judge's fitness for office." (2017 Kan. S. Ct. R. 378.) The fact that Darol pursued neither of these remedies certainly bears on the weight we should give to the merits of this contention.

To the extent that Darol's second complaint alludes to an actual procedural error—the appointment of special masters after the conclusion of the trial—that claim would generally be reviewable. But Darol does not make a separate claim that he was prejudiced by the appointment of a special master. He couches it only in terms that the appointment, after unethical threats to do so, further resulted in a violation of Judge Hauber's ethical duties. "An error which does not prejudice the substantial rights of a party affords no basis for reversal of a judgment and may be disregarded." *Drake v. Kansas Dept. of Revenue*, 272 Kan. 231, Syl. ¶ 3, 32 P.3d 705 (2001); see also K.S.A. 60-2105. Darol makes absolutely no claim of prejudice and does not appear to request reversal on that basis.

We do pause to note that Judge Hauber called the people he appointed to assist him in preserving the assets as both special masters and receivers at different times during the proceeding so it is unclear upon which statute he relied, K.S.A. 2016 Supp. 60-253 (special master) or K.S.A. 60-1301 (receiver). But the role he assigned to the persons appointed is more consistent with the role of a receiver to "keep, preserve, and manage all property and protect any business or business interest entrusted to the receiver pending the determination of any proceeding in which such property or interest may be affected by the final judgment." K.S.A. 60-1301. Receivers have the power to "perform such acts respecting the property or business as the judge may authorize." K.S.A. 60-1303. Additionally, the requirements for appointment of a receiver found in K.S.A. 60-1304 were met—the approximate value of the estate was known, Darol was put on notice that Karen was seeking the appointment of someone to guard the estate, and a hearing was held prior to the appointment.

It is not uncommon for a receiver to be appointed to assist with the disposition of marital property in situations where there is a concern that one of the parties will commit " 'fraud or [there is] imminent danger of the property sought to be reached being lost, injured, diminished in value, destroyed, wasted, or removed from the jurisdiction.' " *In re Marriage of Briggs*, No. 106,990, 2013 WL 195519, at *4 (Kan. App. 2013) (unpublished opinion). That was clearly the case in the Rodrock divorce.

***4** Before trial, Karen filed a motion asking the district court to appoint a receiver to oversee the parties' financial transactions because she was concerned about the way Darol was spending money and the fact that he had complete control over the marital estate. After a hearing, the district court denied the motion finding that Karen failed to present sufficient evidence that a receiver was needed. After trial, Karen filed a second motion asking that a special master be appointed to oversee the financial transactions the district court ordered the parties to engage in at the close of trial to ensure that each party receive a nearly equal portion of the marital estate. At that time, the district court agreed that oversight was necessary and appointed a professional to oversee the personal finances of the parties and two professionals to oversee business related income and expenditures as well as the sale of the parties' real property.

Judge Hauber frequently substituted the terms special master and receiver in his decree of divorce. He discussed the appointment of the special masters but then made note that it was within his power to "appoint a receiver or other agent in order to facilitate the sale of marital property." And that "[w]here the relationship between the parties is particularly acrimonious, the appointment of a receiver to sell marital real estate may be particularly provident." The court followed those statements of law by noting that it had chosen to appoint special masters to carry out those tasks. The district court did not address why it opted to call its appointees special masters rather than receivers either at the hearing or in the decree.

So not only is there no showing that his actions were unethical, it was not error for the district court to appoint receivers to assist with the sale of marital property and financial oversight while the district court's orders were being carried out. See *In re Marriage of Briggs*, 2013 WL 195519, at *4. Moreover, Darol does not claim he was harmed by the district court's actions.

Darol failed to properly preserve the issue of division of debt for appellate review.

Darol next argues that the district court erred when it failed to divide $2.8 million of marital debt between the parties. Darol contends that despite agreement between the parties about the existence of the marital debt, the district court failed to account for it in its divorce decree dividing the parties' assets. Before reaching the merits, it is necessary to determine whether Darol preserved this issue for appellate review so that this court can consider the claim.

Supreme Court Rule 165 (2017 Kan. S. Ct. R. 214) places on the district court the primary duty to provide adequate findings and conclusions in the record of the court's decision on contested matters. A party, however, must object to inadequate findings of fact and conclusions of law to preserve complaints regarding the adequacy of findings and conclusions for appeal. *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013).

In *In re Marriage of Bradley*, 258 Kan. 39, 899 P.2d 471 (1995), our Supreme Court was asked to clarify when a party's failure to object to the district court's findings of fact and conclusions of law in accordance with K.S.A. 60-252 becomes a barrier to appellate review. The court held:

> "In all actions under K.S.A. 60-252 and Rule 165, when the trial court has made findings, it is not necessary to object to such findings to question the sufficiency of the evidence on appeal. However, if the findings are objectionable on grounds other than sufficiency of the evidence, an objection at the trial court level is required to preserve the issue for appeal. If, however, the appellate court is precluded from extending meaningful appellate review, the case may be remanded although no objection was made in the trial court." 258 Kan. at 50.

The court explained that the purpose of the rule is to force parties to bring "alleged deficienc[ies] to the attention of the district court, which can then amend, clarify, or change its decision if necessary, *before* the parties go to the expense and delay of an appeal." 258 Kan. at 49.

***5** Here, Darol's complaint is about something more than the sufficiency of the evidence; it is, instead, that the district court failed to consider and account for a piece of property when dividing marital assets. It does not appear from the record that Darol raised the issue of the district court's failure to divide the debt between the parties below by filing a motion to alter or amend the divorce decree so that the division of the marital estate included a division of marital debt. By not raising it below, Darol failed to properly preserve this issue for appeal. See *Green v. Geer*, 239 Kan. 305, 311, 720 P.2d 656 (1986) ("In the absence of an objection, omissions in findings will not be considered on appeal.").

The district court did not err when it awarded Karen attorney fees.

Darol next complains that the district court erred when it awarded Karen attorney fees. K.S.A. 2016 Supp. 23-2715 vests district courts with the authority to award attorney fees in divorce cases to either party "as justice and equity require." When a district court exercises its authority and awards attorney fees, the decision is reviewed for an abuse of discretion. *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 534–35, 920 P.2d 450 (1996). A district court abuses its discretion when it acts (1) arbitrarily, fancifully, or unreasonably so that no person would have taken the view of the district court; (2) based on an error of law; or, (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

Although Darol complains that the district court awarded Karen attorney fees, in actuality what the district court did was "to equalize from the marital estate all sums expended so that each party will be entitled to an equal litigation expense sum, but no more." To that end, the district court ordered: "[B]oth sides will be awarded their costs up to and including the date of issuance of this Decree that does not exceed the amount spent by either side. In other words, if respondent spent or incurred $250,000 then petitioner shall be entitled to the same." Such expenses were to "be paid forthwith from the marital estate."

Darol's contention that the order required him to pay Karen's attorney fees is both partially true and misleading. The district court found that Darol had nearly complete control over the marital estate prior to its division. As a result, any payments made out of the marital estate were necessarily made by Darol. However, the order did not require Darol, as he tries to imply, to pay attorney fees out of the portion of the marital estate awarded to him; instead, they were to be paid from the marital estate prior to its division.

The district court did not abuse its discretion when it ordered the attorney fees incurred by both parties up to the date of the divorce decree to be paid out of the marital estate. See *Baumgardner v. Baumgardner*, 207 Kan. 66, 70, 483 P.2d 1084 (1971) (upholding the district court's order granting each

party an equal amount of money for attorney fees to be paid out of the parties' joint bank account). It was reasonable for the district court to ensure that both parties benefited equally from the depletion of the marital estate to cover their attorney fees, the district court had the statutory authority to make such an award, and the decision was based on a firm understanding of the facts. The district court's award of attorney fees should be affirmed.

The district court's award to Darol was not illusory.

Darol next makes something of a cumulative error argument, contending that the district court's various miscalculations and award errors resulted in his award being illusory. District courts have broad discretion to determine the property rights of parties to a divorce action. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). This court will not disturb a district court's award of marital property "absent a clear showing of abuse." 274 Kan. at 986. Discretion is abused when the district court acts (1) arbitrarily, fancifully, or unreasonably so that no reasonable person would have taken the view of the district court; (2) based on an error of law; or, (3) based on an error of fact. *Northern Natural Gas Co.*, 296 Kan. at 935.

***6** As with the issue of the district court's failure to divide and allocate the marital debt between the parties, there is a question regarding whether this issue is properly preserved for appeal. Darol did not object to the district court's award by filing a motion to reconsider or alter or amend the judgment so that the district court could review the award and make any necessary adjustments. See *In re Marriage of Bradley*, 258 Kan. at 50 (clarifying that an objection is necessary for appellate review unless the issue is sufficiency of the evidence). Darol's claim that his award is illusory alleges something more than that the evidence simply did not support the district court's factual findings; instead, he contends that the district court failed to properly consider various factors and the ultimate impact of the order. But even if we consider the issue properly preserved, Darol's arguments are not persuasive.

Our analysis begins with a look at K.S.A. 2016 Supp. 23-2802 which governs the division of marital property in the event of a divorce. When dividing property, district courts are to consider a number of factors:

> "(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property." K.S.A. 2016 Supp. 23-2802(c).

It is important to recognize that after considering all of these factors, the division of property need not be equal, it must merely be "just and reasonable." *LaRue v. LaRue*, 216 Kan. 242, 250, 531 P.2d 84 (1975).

Darol contends that the division was not just and reasonable because: he would be forced to pay off the lien on the trust account awarded to Karen and to pay the special masters' fees using assets he was awarded; he would be forced to sell business assets; and $2.8 million of debt that was solely in his name was awarded to him by default thereby reducing the value of his award.

Despite Darol's misgivings, the district court clearly took many of the K.S.A. 2016 Supp. 23-2802 factors into consideration when it arrived at its ultimate award, including the parties' ages, the property they owned, their present and future earning capacities, dissipation of assets, and Darol's need for liquidity to keep his business running. In light of these considerations, the district court awarded assets to Darol with present values estimated to be $16,654,244 including sole ownership of all of his business assets. Meanwhile, the district court awarded Karen assets, including all trust assets, valued at $15,932,668.19 plus maintenance of $40,000 a month until the lien on the trust account that was used to secure loans taken out by Darol's business was paid. Recognizing Darol's need for liquidity to keep his business running, the district court granted Darol the right to the $575,000 a year in interest that the trust generated during the period that he was working towards paying off the lien. Once the $10 million lien was paid, the trust income was to go to Karen.

Darol's accountant, Sarah Stubler, testified that in 2013, Darol's income was $1.8 million and that he made $1.5 million in the first 6 months of 2014. Karen had not worked in decades and was unlikely to obtain employment, at the age of 69, after the divorce. Her total yearly income, once maintenance payments ceased, was limited to the interest on her trust account. Thus, when it awarded Darol his business and all of its assets, the district court put Darol in a position

to earn multiple times what Karen would each year going forward.

***7** Although Darol complains that the district court's order that he pay off the Intrust Bank lien on the trust account awarded to Karen and pay the fees associated with the special masters will reduce his award and result in the forced sale of his business assets, this is not a foregone conclusion. The district court ordered that all real property owned by both Darol and Karen be sold and the proceeds be used to pay down the balance on the lien and pay all costs associated with the special masters. The collective appraised value of the parties' real property, after deducting the $592,000 lien on the Gardner property, was $9,643,000. It seems that the court anticipated that the sale of the property would be insufficient to completely pay off the lien and compensate the special masters and addressed the insufficiency in several ways.

First, the district court awarded Darol assets it valued at $721,576 more than those it awarded Karen. Second, the court recognized that the sale of the marital property, in addition to adding liquidity to the estate, would free up a substantial amount of money that had previously been spent maintaining the properties. With the sale of the properties, the district court anticipated that Darol would be able to repurpose money he had been spending on upkeep and focus on paying down the lien. It was only if these things alone were insufficient to enable Darol to quickly pay off the loan that the special masters were to oversee the sale of some of Darol's business assets.

Because Darol's business is to buy, develop, and resell land, sales are a normal part of Darol's business that, presumably, would be occurring with or without a court order to sell assets. The court order did not force Darol to immediately liquidate property or to sell anything in a way that might jeopardize Rodrock Development. The only difference the divorce decree made was to shift profits away from Darol and put them towards paying down the lien until such time as it was fully paid.

Specifically with regard to the fees associated with the work of the special masters, it was not an abuse of discretion for the district court to order Darol to pay them in the event the sale of the marital property did not generate enough income to cover them for an additional reason: It was Darol's actions that prompted the district court to appoint special masters. The district court ordered them to oversee the disposition of assets and the payoff of the lien because it did not trust Darol to do this on his own given his failure to pay the lien down in the past and history of dissipating marital assets. Since Darol's actions prompted the district court to appoint special masters, it is a reasonable consequence that Darol bear the burden of compensating them.

Finally, the district court's de facto award of the $2.8 million in debt to Darol does not make his award illusory. As already discussed, Darol's award was larger and his future earning potential greater than Karen's potential earnings. After the divorce and the resulting reduction of his assets, Darol had the ability to generate income for himself while Karen, 69 years old with several medical problems and no work history, did not. Thus Darol had a greater ability to pay the debt without the payments impacting his award or lifestyle. Divisions do not have to be equal to be upheld, they must simply be just and equitable. There is no indication that Darol did not receive a just and equitable portion of the marital estate he worked so hard to build.

The district court did not err when it found that Darol dissipated the marital estate.

In Darol's final argument, he once again raises an issue that should have been brought to the attention of the district court rather than raised for the first time on appeal. Darol argues that the district court erred when it concluded that he had dissipated the marital estate by gambling. Unlike several of his other complaints, Darol frames this as a sufficiency of the evidence argument, contending that "[t]here was not substantial competent evidence to show that the finances of the martial estate were disturbed or dissipated by [his] gambling."

***8** In its divorce decree, the district court made extensive factual findings regarding Darol's gambling habit. Of special note, the district court found:

> "A paralegal for petitioner's counsel, Patty Gehrke, testified as to her creation of a demonstrative exhibit, Pet. Ex. 6, which outlined ATM charges, credit card documents, etc., and concluded from August 2013 to through June 2014 gambling expenses were $681,134.48 and then from July 2014 to November 2014 there were gambling expenses of $301,155.17. Tr. II, at p. 146, 1. 20—p. 150, 1. 11. In the three months leading up to trial, gambling charges were $83,242.56. P. 150, 1. 17–20. The evidence shows that from August 2013 to February 2015, Mr. Rodrock gambled with $1,076,752."

The district court also referenced the special master's report, as evidence of Darol's dissipation:

> "There are an astounding number of ATM Cash Advances and large checks to others for unidentified purposes, totaling, from July 2014 to June 2015 $1,076,752. Exhibit of Monthly Breakdown of Cash Advances and Checks to Others, Special Master's report dated December 8, 2015. This is consistent with the evidence of large gambling expenses incurred by respondent. Little or no excuse was given for these expenditures or activities, other than Mr. Rodrock is a gambler in business and in pleasure."

While there was extensive testimony regarding the amount of money Darol spent gambling during the divorce proceedings, there is not testimony regarding whether the gambling impacted the estate. The evidence does support a finding that most of Darol's gambling was done using borrowed money. But we are unable to find any corresponding evidence in the record to show whether: (1) the credit card balances were routinely paid off using marital funds; if not, (2) Darol was the sole owner of the credit accounts so that he would automatically be liable for the debt after the dissolution of the marriage when the district court failed to specifically award/divide the debt; or, (3) if the credit cards were paid on/off during the pendency of the divorce, whether the payments were made using draws on other lines of credit owned solely by Darol and, by default, awarded to him in the divorce decree.

While Darol presents this court with an interesting hypothesis that could lead to a finding that the district court erred, he does little to support his hypothesis by reference to the record. Generally, the burden is on the party making a claim to ensure that the record on appeal includes all evidence necessary to support the claim and to point this court to the places in the record where that evidence can be found. *State v. Sasser*, 305 Kan. 1231, 391 P.3d 698, 709 (2017); *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013). Without such a record, the claim of error fails. 296 Kan. at 644. Darol has failed to properly support his argument that marital estate was not impacted by his gambling. Throughout the pretrial and trial process, Darol made no real effort to contradict Karen's evidence regarding the amount he spent gambling. Even on appeal, Darol makes no effort to argue that the finding regarding the amount he spent gambling was incorrect or not supported by the evidence.

***9** Based on its finding that Darol gambled away over $1 million, the district court concluded that he had "dissipated significant assets" and awarded Karen "an additional $538,376 to account for respondent's use of discretionary funds" out of the marital estate during the pendency of the divorce. Dissipation by either party is one factor that courts should consider when dividing a marital estate. K.S.A. 2016 Supp. 23-2802(c)(8). Dissipate is defined by "Black's Law Dictionary 473 (6th ed. 1990) ... as '[t]o destroy or waste, as to expend funds foolishly.' Webster's New Collegiate Dictionary 366 (9th ed. 1991) defines the term as 'a: to expend aimlessly or foolishly b: to use up esp. foolishly or heedlessly.' " *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998). It is hard to imagine that any reasonable person would not view losing over $1 million gambling as a foolish expenditure of funds. The district court was correct to label these expenditures dissipation. Furthermore, the district court was correct to offset Darol's award by half the amount of money he wasted from the marital estate. See 266 Kan. at 353.

Moreover, we pause to note that during Darol's testimony, he recognized that he is a gambler and told the court that "if it comes down as an issue, I'll pay her half of that to gamble. If it's a million dollars, put 500 more on it, whatever you said. I'm fine." To the extent Darol argues that it was error for the district court to award Karen an additional sum equal to half the amount Darol dissipated gambling during the pendency of the divorce, the error was invited. Generally, when a party has invited an error, the error cannot be complained of on appeal. *Thoroughbred Assocs. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013).

Following oral argument of this case, Karen filed a motion pursuant to Supreme Court Rule 7.07(b) and (c) (2017 Kan. S. Ct. R. 50) for attorney fees incurred in connection with this appeal. After due consideration and review, Karen's motion is granted in part. Darol is assessed attorney fees on appeal in the amount of $30,311.

Affirmed. Motion for attorney fees on appeal granted in part.

All Citations

396 P.3d 735 (Table), 2017 WL 2494704

End of Document

540 P.3d 408 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the MARRIAGE OF Julie Ann STEWART, Appellee/Cross-appellant,
and
Caleb Daniel Stewart, Appellant/Cross-appellee.

No. 125,850
|
Opinion Filed December 8, 2023.

Appeal from Crawford District Court; KURTIS I. LOY, judge. Submitted without oral argument.

Attorneys and Law Firms

Joseph W. Booth, of Lenexa, for appellant/cross-appellee.

John G. Mazurek, of The Mazurek Law Office, LLC, of Pittsburg, for appellee/cross-appellant.

Before Malone, P.J., Gardner and Cline, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Caleb Daniel Stewart appeals the district court's division of marital assets in his divorce from his wife, Julie Ann Stewart. Caleb contends the district court abused its discretion in dividing their assets and liabilities because the court was biased in Julie's favor, misvalued assets, and failed to consider his sweat equity and premarital interest in certain pieces of their real property. Julie cross-appeals, arguing the district court should not have permitted Caleb to keep revenues that flowed from a rental property she was awarded in the divorce. Caleb and Julie both ask this court to award them appellate attorney fees. After reviewing the record, we conclude that the district court did not abuse its discretion in dividing the marital assets, that Julie did not preserve her cross-appeal, and that both motions for appellate attorney fees should be denied.

FACTS

On February 11, 2020, Julie petitioned for divorce from her husband, Caleb. The couple were married in 2016 and had two minor children when Julie filed her petition. Julie asked the district court to enter ex parte temporary orders relating to child custody and parenting time as well as restraining any disposal of assets; she also filed a proposed parenting plan and a domestic relations affidavit, which detailed the parties' assets, debts, income, and expenses. Several months later, Caleb filed his answer and counterpetition for divorce, and his own domestic relations affidavit. In his domestic relations affidavit, Caleb used the same valuations as Julie had made, including valuations of their cattle at $80,000, the 1996 Chevy truck at $8,000, and the tractor at $8,100.

About a year later, the district court held a trial focusing solely on the division of marital assets—the parties agreed to address child custody and child support later. Both parties admitted extensive exhibits and spreadsheets detailing their positions on the various marital and premarital assets and debts. Caleb and Julie were the sole witnesses to testify. The parties agreed on the valuation and division of many of their joint and premarital assets except for a few items—most of which are the subject of this appeal. Caleb and Julie stipulated that they should each receive their separate residences as nonmarital assets—they also stipulated to the value of their homes and the mortgages.

The trial testimony showed that soon after they married, Caleb and Julie agreed to buy land together with a plan "to build a ranch and have, ... property and cows." Ultimately, they bought 320-, 80-, and 78-acre tracts of land after their marriage. The parties agreed that they had each brought about $200,000 into the marriage, which went to fund these purchases. These funds were placed in joint accounts and flowed from various premarital accounts and from the sale of their premarital homes. As of May 2018, Julie began paying the mortgages on these ranch properties with her income. Not long after their purchase of the three ranch properties, the couple also bought a rental property in Pittsburgh for $80,000.

***2** Turning to personal items, the couple's testimony highlighted disagreements about the valuations of several vehicles, farm equipment, and their stock of cattle even though both parties had filed domestic relations affidavits with identical valuations. Caleb testified that certain items had been previously overvalued, including the cattle, his

old Chevy truck, and an old tractor—he asserted that the valuations he made in his domestic relations affidavit were inaccurate and that Julie lacked sufficient knowledge to support her estimations. Caleb asked, based on the disparity in their incomes, for the district court to award him one year of maintenance payments so that he could "get [his] feet underneath [him]." He also asked the district court to grant him premarital interest in the three ranch properties that he and Julie had purchased together because the money he received from selling his premarital home could be traced to the purchase of those properties. Finally, Caleb asked the district court to allow him to make donations from his half of a "donor advised funds" account (the account the couple used to distribute money to charitable, nonprofit organizations); the account was initially funded by Julie with $45,000 before the marriage and did not permit withdrawals for personal use. Julie agreed that Caleb should be awarded the ability to use his portion of the funds to make donations as he saw fit. After the parties presented their evidence, the district court granted a decree of divorce on grounds of incompatibility and stated that it would enter a separate order on the division of assets and liabilities.

Two months after the trial, the district court entered a Journal Entry and Decree of Divorce, noting its bifurcation of the proceedings. Caleb and Julie later presented an Agreed Parenting Plan, which the district court approved.

On February 25, 2022, about a year after the trial, the district court issued an Order and Journal Entry on Division of Assets and Liabilities. In the order, the district court denied Caleb's request for maintenance, explaining that despite their disparate incomes, Caleb had chances to derive income from his agricultural endeavors and had not shown that the divorce would result in an inability to support himself. Turning to the division of the parties' assets and liabilities, the district court divided the estate as follows: Julie would receive assets totaling $960,025.50, minus indebtedness of $499,327.47, for a net award of $460,698.03. Caleb would receive assets totaling $618,079.82, less indebtedness of $119,162.24, for a net award of $498,917.58.

The district court itemized, valued, and divided Caleb and Julie's various assets and debts based on the detailed spreadsheets, exhibits, and testimony provided by the parties. Notably, the district court relied on valuations included in the parties' domestic relations affidavits over Caleb's lower estimations that he provided at trial. The district court allowed both parties to keep the personal household items in their possession. The district court noted its reliance on the worksheets and exhibits submitted by both Caleb and Julie, which "included comparative valuations from each party, as well as excluding nonmarital assets." The district court explained that it "accepted these exclusions with the exception of [the 78-acre] tract. [Caleb] wished to be awarded the real estate which the Court has done, but the Court did not consider the same as non-marital, as significant payments were made by [Julie]. The equity was considered marital." Finally, the district court ordered Caleb to make an equalization payment of $19,110 and to pay Julie one-half of stimulus payments and tax refunds in the amount of $32,327.

After the district court entered its order, Caleb moved to alter or amend, contending the court had committed several errors in making its division of the marital estate. Caleb disagreed with: (1) the district court's failure to grant him premarital equity in the 78-acre, $140,000 tract of land that he was awarded; (2) the district court's failure to give him premarital credit in one retirement account; (3) the district court's decision to grant Julie the rental property in Pittsburgh; (4) the district court's failure to give him the authority to make distributions to qualified non-profits from his half of the funds in their AG Financial Donor account; (5) the district court's valuations of the cattle, the 1996 Chevy truck, Julie's van, and the tractor; and (6) the district court's order that he and Julie each keep the household personal items in their possession.

On August 8, 2022, the district court held a hearing on Caleb's motion to alter or amend. After hearing the parties' arguments, the district court denied Caleb's motion explaining that "I've not heard anything today or read anything from the pleadings that would lead me to change my mind." That said, the district court clarified several matters from its original order. First, the district court clarified that Julie was to receive the future rental payments from the Pittsburgh property, but that Caleb could keep the payments of about $6,200 from the prior year. Second, the district court clarified that Caleb was required to provide all income, expense, and loan documentation for the real estate and rental property awarded to Julie. Finally, the district court clarified that Julie would not have to pay more than the $243,093.47 in debt she was assessed on a USDA loan covering the 320-acre property—Caleb would be liable for any excess amount.

***3** Caleb timely appeals, and Julie timely cross-appeals. Both parties have also filed motions asking this court to award appellate attorney fees.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL ESTATE?

Caleb claims the district court abused its discretion by failing to make a just and equitable division of the marital property because its decision was biased in Julie's favor. He alleges that the district court failed to appropriately credit him for certain premarital assets and misvalued other assets when making its division of the marital estate. Julie contends that the district court's division of the property was supported by the evidence and did not constitute an abuse of its discretion.

Under K.S.A. 2022 Supp. 23-2801 et seq., district courts are granted broad discretion to determine the property rights of parties involved in a divorce action. K.S.A. 2022 Supp. 23-2802(c) provides:

> "In making the division of property the court shall consider: (1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property."

Although a property division in a divorce proceeding must be just and reasonable, Kansas law does not require that division to be equal. *In re Marriage of Traster*, 301 Kan. 88, 111, 339 P.3d 778 (2014); *LaRue v. LaRue*, 216 Kan. 242, 250, 531 P.2d 84 (1975) ("Nowhere in any of our decisions is it suggested that a division of all the property of the parties must be an equal division in order to be just and reasonable[.]").

Appellate courts review a district court's decision relating to the division of marital assets and liabilities for an abuse of discretion. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002); *In re Marriage of Thrailkill*, 57 Kan. App. 2d 244, 261, 452 P.3d 392 (2019). Relevant here, this court also reviews a district court's decision on a motion to alter or amend under K.S.A. 60-259(f) for an abuse of discretion. *Wenrich v. Employers Mutual Ins. Companies*, 35 Kan. App. 2d 582, 585, 132 P.3d 970 (2006). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). As the party asserting the district court abused its discretion, Caleb bears the burden of showing that an abuse occurred. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

Caleb broadly asserts that the district court's division of the marital estate displays a clear bias in favor of Julie. His argument focuses on several specific assets and valuations within the district court's ruling, including: (1) the court's failure to award him any premarital interest in the 78-acre property that he was awarded; (2) the court's valuation of the cattle, the 1996 Chevy truck, and the tractor; (3) the court's failure to include its ruling on the donor advised funds account in its order; and (4) the court's decision not to award him for his labor on a particular piece of property during the divorce. Caleb raised each of these points in his motion to alter or amend, which the district court denied. Caleb argues that these alleged errors, when viewed collectively, show that the district court was biased against him and that it failed to make a just and reasonable division of the marital estate.

The 78-acre property

***4** Caleb first argues that the district court should have assigned one of the three tracts of land that he and Julie purchased together—the 78-acre property—as being part of his premarital property. He argues that although the property was purchased with Julie after their marriage, the funds for the purchase came, in part, from his sale of his premarital home. Julie asserts that the court appropriately treated the 78-acre piece of land as a marital property because both she and Caleb had brought in approximately $200,000 into the marriage and they placed those funds into joint accounts with which they bought the 320-, 80-, and 78-acre properties.

At trial, Julie explained that in purchasing the property she and Caleb "were combining our incomes, our assets, and moving our family forward. And then we—so there was the element of the marriage and the marital agreement that we were buying these tracts of land." She also testified that she and Caleb had discussed commingling their money to make the purchases and jointly owning the properties. While agreeing with Julie's assertion that they had bought the properties together with commingled premarital assets, Caleb insisted that the money he provided should be treated as premarital because those funds could be traced to the sale of his premarital home. That said, Caleb acknowledged that he had placed this money into their joint account before the

purchase and that Julie had also provided similar premarital funds to finance the purchase of the properties.

When dividing the parties' real estate, the district court acknowledged that the parties had combined their premarital assets and used them to buy various properties. It is well established that "[a] trial court is not obligated to award to each party all property owned by such party prior to the marriage[.]" *In re Marriage of Schwien*, 17 Kan. App. 2d 498, 505, 839 P.2d 541 (1992) (citing *McCain v. McCain*, 219 Kan. 780, Syl. ¶ 3, 549 P.2d 896 [1976]). Although Caleb and Julie each brought about $200,000 of premarital funds to buy properties together, the district court granted neither party a premarital interest in those properties when dividing their estate. The evidence supports the district court's decision not to grant Caleb any premarital interest in the 78-acre tract that he was awarded—just as it did not grant Julie premarital interest in the 320-acre property that she received in the division. Because neither party was favored over the other in this division, it cannot be said that the district court's decision was unreasonable.

In short, the district court's finding was supported by the evidence the parties presented: When Caleb and Julie married, they pooled their financial resources together and began buying properties and titling them under a company that they jointly owned. As a result, the three ranch properties were properly treated as marital property, even though they were purchased with funds that Caleb and Julie brought into the marriage. Caleb cannot show that this ruling constituted an abuse of discretion.

Valuation of the cattle, truck, and tractor

Next, Caleb asserts the district court abused its discretion in valuing certain pieces of property, including their cattle, his 1996 Chevy truck, and an old tractor. Julie contends the court's valuations were supported by the evidence and did not constitute an abuse of discretion.

Although Caleb and Julie provided trial testimony about the valuations of each of these items, the district court relied heavily on the valuations they made in their domestic relations affidavits in making its determinations. Caleb contends the district court acted irrationally in doing so, and that it should have instead granted greater credence to his later testimony in which he devalued certain assets. The purpose of domestic relations affidavits, which contain income information and property valuations—and are required in divorce actions under Kansas Supreme Court Rule 139 (2023 Kan. S. Ct. R. at 220)—is to ensure that the district court has the necessary financial information to make determinations that are fair, just, and equitable. That said, a district court may also obtain such financial information via other means, such as testimony or other evidence presented at trial. See *In re Marriage of Kirk*, 24 Kan. App. 2d 31, 32-33, 941 P.2d 385 (1997); *In re Marriage of Meier*, No. 121,497, 2020 WL 4249538, at *4 (Kan. App. 2020) (unpublished opinion).

***5** Caleb claims the district court should not have used the valuations included in his domestic relations affidavit because (1) they were filed at the beginning of the case and (2) he had simply copied the valuations used by Julie in her affidavit. He concedes that his use of her valuations was a "fateful mistake." While Caleb may feel that the district court should have given more weight to his trial testimony, the court properly used the valuations he made in the domestic relations affidavit—especially considering that he did not try to offer different valuations of the items until the time of trial.

The first item Caleb alleges the district court overvalued was the couple's cattle. Although Caleb certified that the value of the cattle was $80,000 in his domestic relations affidavit, he later testified that he had sold $50,000 worth of their stock to fund his purchase of a 2017 Ford truck. He asserted that, after that sale, the value of the herd was closer to $27,050. Julie testified that she had arrived at the $80,000 valuation based on information contained in deprecation tables in the couple's 2019 tax returns—the tax asset detail showed that the Stewarts had $97,326 of cattle, bulls, and heifers as of December 31, 2020. Despite having previously adopted Julie's valuation, Caleb testified that the tax information was incorrect because many cattle were no longer in their possession. That said, he agreed that their cattle business was "a calf-cow operation," meaning that they continuously bred and sold cows. The district court found that Caleb's prior valuation was more appropriate because Caleb had certified that the value of the cattle was $80,000, and only adjusted his valuation right before the trial. Moreover, Caleb's valuation at trial was supported solely by his own testimony; he presented no other evidence to establish his $27,050 valuation. Although Caleb may disagree with the valuation of the cattle he was granted in the division, the district court's decision was based on substantial competent evidence and was not arbitrary or unreasonable.

Caleb also contends the district court misvalued his 1996 Chevy truck and an old tractor, both of which he was

awarded in the divorce. Caleb contended that the 1996 Chevy was a premarital asset and should not be considered in the division because he bought it before the marriage. But Caleb and Julie both valued the truck at $8,000 in their domestic relations affidavits. And Julie explained that although Caleb had brought the truck into the marriage, he later made $8,000 worth of improvements to it with marital funds, including adding a light bar, a feed bin, a hay baler, a flat bed, and a siren call. Caleb disagreed that the value of the improvements should be imputed to the value of the truck. But the district court was entitled to weigh the competing testimony and to credit Julie's valuation. Similarly, the couple had an old tractor, which Julie and Caleb originally valued at $8,100 in their domestic relations affidavits. But at trial, Caleb testified that the tractor was not salvageable, could be sold only for parts and scrap, and was worth $750. Again, in the face of competing testimony and Caleb's changing valuation, the district court sided with the original valuation contained in the parties' domestic relations affidavits.

Caleb's assertion that the district court's valuation of these items was "irrational" is baseless—the district court based its rulings on the domestic relations affidavits and Julie's testimony. When a court assigns values to marital property in a divorce proceeding, its valuations must be "within the range of evidence" that has been presented. *In re Marriage of Schwien*, 17 Kan. App. 2d at 509. Here, the district court's valuation of the cattle, the 1996 Chevy, and the tractor are all supported by substantial evidence in the record. That the court did not adopt Caleb's last-minute changes to his valuations does not render the court's rulings arbitrary or unreasonable.

Donor advised funds account

***6** Next, Caleb contends the district court abused its discretion by failing to explicitly include in its order that he had a right to make distributions from their donor advised funds account where he and Julie had deposited money that could be designated to be given away to charities, but not withdrawn for personal use. Julie counters that the "court properly addressed this account" and that "[b]oth parties have the right to direct contributions."

In his motion to alter or amend, Caleb asked the district court to clarify that the account be "divided equally between the parties." Because of the nature of the account, which prohibits personal use of the funds, Caleb is not requesting possession of the account but the right to make donations with his portion of the account. Addressing this concern, the district court explained that it had not originally included the account in the division of their marital estate because "it had no cash value." Throughout the proceedings, Julie agreed with Caleb's request to be given the right to designate his portion of the account with one caveat. Although Caleb and Julie had collectively funded the account during their marriage, Julie noted that she had created the account and had deposited $45,000 before the marriage. Thus, she agreed that Caleb should have a right to make donations from the account, for his half of the amount beyond the $45,000 that preceded the marriage. But upon the district court's questioning, it became apparent that neither party knew the present value of the account, and both argued that they could not access it—Julie stated that the account was under Caleb's email. Caleb's attorney stated that they would attempt to recover the necessary information to access the account.

The district judge stated that it approved of the parties' plan to share disbursement authorization of the account:

> "I'm not sure how you are going to do that, but whatever cooperation is needed, that needs to occur since you are both in agreement that it should happen without interference by the Court. ... [A]s long as the parties are available to work through that, that's fine with me. And the agreement is fine with me as well."

Thus, there is no dispute that the district court honored the parties' agreement that both parties can direct contributions from the account. Julie's counsel agreed to prepare an order once the parties were able to access the account and determine the balance. But no such order appears in the record on appeal. The order following the hearing on Caleb's motion to alter or amend, which was prepared and approved by both parties' attorneys, did not mention the district court's ruling about the account.

On appeal, Caleb does not contend that the district court committed an error of fact or law with its handling of the donor account, nor does he assert that the court's decision was arbitrary or unreasonable. Rather, his argument is that the fact that the district court preserved Julie's premarital portion of the account (the $45,000 she deposited before the marriage) exemplifies a broader trend of bias against him in the property division. Despite Caleb's chagrin about the district court's reservation of Julie's premarital portion of the account, it cannot be said that the decision was an abuse of discretion. The evidence supported that Julie created the account and that she had deposited $45,000 before the marriage, and that both

parties should be given the right to make donations with their individual portions.

Failure to award Caleb for his labor and management of the ranch

***7** Finally, Caleb contends the district court abused its discretion by failing to find that his management of their ranch properties constituted a compensable contribution to the marital estate—specifically, he contests the court's failure to grant him the profits gained (during the divorce proceedings) from one of the properties that it granted to Julie in the divorce. He asserts that the district court punished him for working on that marital property during their divorce. At the hearing on Caleb's motion to alter or amend, he asked the district court to award him the profits earned from the 320-acre property, which he estimated to be about $100,000. But Caleb presented no evidence to support this figure. Moreover, as the district court pointed out, Caleb never made his work on that property a condition of the divorce. As the judge explained:

> "The fact that you managed or anything else, you did that. There was a chance [the property] was going to be awarded to you but there was no written agreement that you would be paid to do that. It wasn't included in the temporary orders, you did it. And so I'm not going to award you any compensation or consideration for doing that."

The district court's decision not to award Caleb for his labor and management of the property is supported by the evidence presented at the trial. And the fact that the division of marital property was nearly equal negates Caleb's concern that the district court's decision was unreasonable or based on an error of fact.

In sum, Caleb claims that the totality of these alleged errors showed that the district court failed to make a just and reasonable division of the marital estate. He claims that he "lost at virtually every turn" and bemoans that the district court favored Julie over him in the distribution. But the district court's division of the property was—after the $19,110 equalization payment—almost exactly equal. Moreover, none of the decisions Caleb challenges were based on an error of fact or law, nor can it be said that any was arbitrary or unreasonable. The district court's division of Caleb and Julie's marital property may not have come out exactly as Caleb would have preferred, but it cannot be said that it was not just and fair. Thus, we conclude the district court did not abuse its discretion in dividing their estate.

CROSS-APPEAL

In her cross-appeal, Julie argues that the district court should not have permitted Caleb to keep the rental income from the Pittsburgh home that accrued between the trial and the date of the decision, which totaled about $6,200. Caleb counters that Julie failed to preserve this issue by not filing a postjudgment motion challenging the district court's ruling under K.S.A. 60-252(b).

Before reaching the merits of Julie's claim, this court must determine whether she sufficiently preserved the issue for appellate review. At the hearing on Caleb's motion to alter or amend, Julie notified the district court that Caleb had withdrawn $6,200 from an account associated with the rental business at the Pittsburgh home within days after the issuance of the order assigning that property to her, and she requested he be ordered to return the funds. The district court ultimately ruled that Caleb could keep the money he had withdrawn from the rental account. In its order, the district court clarified that Julie would receive "all rents, royalties and income received from 801 E. 10th, Pittsburg, Kansas" going forward, but that Caleb could keep the rental income he withdrew from the account that had accrued during the prior year.

Julie did not move to alter or amend the order under K.S.A. 60-252, challenging the district court's decision on the matter. By not raising the issue below, Julie failed to properly preserve this issue for appeal. See *Green v. Geer*, 239 Kan. 305, 311, 720 P.2d 656 (1986) ("In the absence of an objection, omissions in findings will not be considered on appeal."). Thus, we agree with Caleb's assertion that Julie failed to properly preserve this issue for appellate review.

***8** But even if we overlook the preservation issue, we find that Julie fails to meet her burden of showing the district court abused its discretion in its order on the rental income from the Pittsburgh property. While Julie may have a legitimate claim to recover all the rental income from the Pittsburgh property, the district court was not required to make this order. Instead, the district court considered the totality of the circumstances and ordered that Julie would receive all rental income going forward, allowing Caleb to keep the funds he withdrew from the rental account. We are unable to find the district court abused its discretion in making this order. See *Gannon*, 305 Kan. at 868 (party asserting district court abused its discretion has the burden of showing such abuse of discretion).

APPELLATE ATTORNEY FEES

Caleb timely filed a motion with this court under Kansas Supreme Court Rule 7.07(b) (2023 Kan. S. Ct. R. at 52) and K.S.A. 2022 Supp. 23-2715 seeking to recover attorney fees that he expended to litigate this appeal. Julie opposed Caleb's motion and asked this court to award attorney fees on her behalf under Supreme Court Rule 7.07(c), which addresses appeals taken frivolously or only for the purpose of harassment or delay.

A Kansas court cannot "award attorney fees unless a statute authorizes the award or there is an agreement between the parties allowing attorney fees." *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 162, 298 P.3d 1120 (2013). This court exercises unlimited review over the question of law of whether a party is entitled to their attorney fees. See *In re Estate of Oroke*, 310 Kan. 305, 317, 445 P.3d 742 (2019).

K.S.A. 2022 Supp. 23-2715 allows a divorce court to award costs and attorney fees "to either party as justice and equity require." Supreme Court Rule 7.07(b) allows this court to award attorney fees for services rendered on appeal in a case in which the district court had authority to award attorney fees. Here, Caleb has not prevailed on any of his claims on appeal. Under these circumstances, we find it inappropriate to grant any portion of his request for appellate attorney fees.

Turning to Julie's request, this court may order a party to pay the attorney fees and costs of the other party if it finds that the party has filed an appeal "frivolously, or only for the purpose of harassment or delay." Supreme Court Rule 7.07(c) (2023 Kan. S. Ct. R. at 52). An appeal is frivolous if there is no justiciable question, and it is readily recognized as devoid of merit in that there is little prospect that it can ever succeed. *McCullough v. Wilson*, 308 Kan. 1025, 1037, 426 P.3d 494 (2018). Although Caleb's appeal is not meritorious, it cannot be said that it was frivolous or filed for the purpose of harassment or delay. As a result, we deny Julie's request for appellate attorney fees under Supreme Court Rule 7.07(c).

Affirmed.

All Citations

540 P.3d 408 (Table), 2023 WL 8499235