**22-124904-A**

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**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

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**IN RE THE MARRIAGE OF:**

**NANCY KARANJA-MEEK,**

**Petitioner / Appellee,**

**and**

**AARON MARSHALL MEEK,**

**Respondent / Appellant.**

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

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# BRIEF OF THE APPELLEE

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Authorities:

## Nature of the Case

This is Husband's appeal from the trial court's decree divorcing him and Wife. During the marriage, the parties settled a lawsuit in Missouri for Husband's personal injury and Wife's loss of consortium, stemming from Husband's severe injury in an explosion. In July 2015, the parties entered into a settlement agreement under which each received separate awards structured this way: (1) a lump-sum payment for Husband and a separate lump-sum payment for Wife; and (2) a monthly annuity for Husband for the rest of his natural life and a separate monthly lifetime annuity for Wife, thought in a lower periodic amount than Husband's annuity.

In the divorce, Wife argued the annuities were the parties' separate, non-marital property, invoking the "analytical approach" Kansas courts use to determine whether a personal injury settlement is marital or non-marital. First a special master, and then the trial court, agreed the parties' annuities were their separate property. Husband now appeals, challenging this.

This Court should dismiss Husband's appeal. He did not make any of his arguments below, nor did he file a post-judgment motion objecting to any of the trial court's findings as inadequate or erroneous. The law of Kansas is that he therefore has waived the arguments he now seeks to make.

Alternatively, the Court should affirm the trial court's judgment. Viewing the record most favorably to its judgment, which Husband does 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.

## Statement of the Issues

**First issue:** Husband's argument that the trial court inadequately applied the analytical approach in determining Wife's annuity is her separate property and failed to find other facts he wishes it had, is not preserved for appeal, because he never made this argument before the trial court and did not file a post-judgment motion raising his objections to the judgment.

**Second issue:** The trial court properly applied the analytical approach and reasonably held Wife's annuity settlement for her Missouri loss of consortium claim is her separate property. Viewing the evidence most favorably to the trial court's decision, Wife's and Husband's annuities are separate and different, the purpose of Wife's is to compensate her for her own future losses separate and apart from Husband's personal injury or any loss to the marital estate, and Husband agreed to use the income from the annuity streams as the parties' separate income for calculating child support and maintenance.

## Statement of Facts

### A. Respondent's statement of facts violates Rule 6.02(a)(4).

An appellant's statement of facts must be "[a] concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal." Rule 6.02(a)(4). Respondent-Appellant Aaron Meek's ("Husband") statement of facts (Brief of the Appellant ["Aplt.Br."] 1-13) does not suffice.

Husband's statement of facts is replete with argument. It argues the case below "languished" (Aplt.Br. 4). It argues reports and orders were "scholarly" or applied research "loosely" (Aplt.Br. 5). It makes arguments for what it believes legal doctrines, such as the "analytical approach," are and how they should be applied (Aplt.Br. 5-6). It describes his view of case law (Aplt.Br. 6). It surmises what the record "seems to indicate" (Aplt.Br. 8). It argues there were "errors in the Special Master report" and argues the special master made an "important error" (Aplt.Br. 8). Finally, it presents a one-sided version of the evidence and arguments made below, which omits a great deal of contrary evidence on which the trial court was entitled to rely (Aplt.Br. 9-13).

Therefore, Petitioner-Appellee Nancy Karanja-Meek ("Wife") will present an actual concise and complete statement of the relevant facts in this appeal.

## B. Background to the proceedings below

Husband and Wife were married in 2009 (R1 at 9, 40, 101). Husband has a high-school level education, previously worked in construction, and at the time of trial worked on the farm the parties owned, though he said this was more of a hobby and did not make money (R9 at 121-22, 126, 133; R13 at 3-4). Wife is from Kenya, but came to the United States as a student, and met Husband while she was in school (R9 at 6). During the marriage, Wife obtained a Ph.D. in information systems, and at the time of trial she worked for the University of Kansas Medical Center as an information technology manager (R9 at 64-65).

At the time the parties married, Husband had three children from a prior relationship, who presently are adults (R9 at 157). During the marriage, Wife gave birth to two children, one in 2011 and one in 2015, and gave birth to a third child during the divorce proceedings below (R1 at 9, 40; R9 at 6-7, 35). At the time of trial, the children born of the marriage were ten, six, and three years old, respectively (R9 at 6-7).

## C. Husband's injury and settlement

In February 2013, Husband was severely injured in a gas explosion in Kansas City, Missouri (R12 at 148; R13 at 3-6).

Husband's medical records are in the record on appeal at R12 at 148-81. As a result of the explosion, Husband had a traumatic brain injury with mild and overall cognitive deficits that led to rapid eye movement, tremors, shaking, sensitivity to light, seizures, and personality changes (R9 at 52-55; R12 at 142, 148-81).

Husband said that due to his brain injuries, he cannot work (R9 at 121-22). But despite his statement that the injury made him unemployable, he never applied for disability compensation (R9 at 155).

Wife said Husband had 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). She said he became more aggressive and impulsive, which precipitated problems in the marriage (R9 at 53-54).

Wife said she took care of Husband for "a while" after the 2013 accident (R9 at 47-48). After his discharge from the hospital, he went to a rehabilitation center every day for two years and she attended each appointment (R9 at 52-53).

In December 2013, Husband and Wife filed a lawsuit in the Circuit Court of Jackson County, Missouri, stemming from Husband's injury, stating two personal injury claims in Husband's name and a loss of consortium claim in Wife's name (R1 at 93; R12 at 122; R3 at 16; R13 at 1-15). A redacted copy of their petition was admitted below as Exhibit 106 (R9 at 113, 116-17), and is in the record at R13 at 1-15. Additionally, the trial court took judicial notice of the Missouri case (R9 at 118). At trial, Husband acknowledged that his claim was for personal injury and Wife had a separate claim for her loss of consortium (R9 at 158).

In July 2015, Husband and Wife entered into a settlement agreement with the defendants in the Missouri lawsuit (R12 at 122; R13 at 16, 29). The settlement agreement and addendum were admitted at trial under seal as

Exhibits 107 and 108 (R9 at 114-16) and are in the record at R13 at 16 and 29, respectively. The agreement required confidentiality, so the trial court directed the parties not to discuss the specific amounts in the settlement agreement in making their arguments (R9 at 114-16). (Wife continues not to discuss them in this brief.) Both parties signed the settlement agreement and had knowledge of all material facts and circumstances (R9 at 33; R13 at 33). The settlement agreement stated it "will be governed by the laws of the State of Missouri" (R13 at 22).

The settlement was structured with separate lump sum payments to Husband and Wife at the time of settlement and "future periodic payments" to each of them thereafter, which the agreement laid out separately for Husband and separately for Wife (R13 at 29):

- A lump sum payment to Husband at the time of settlement (R13 at 29);
- A lump sum payment to Wife at the time of settlement (R13 at 29);
- Future periodic payments to Husband (R13 at 29):
    - An amount of money each month for ten years beginning September 2015 and ending in August 2025;
    - Double that first amount of money each month during Husband's life, guaranteed for 20 years beginning in September 2025 and ending in August 2045, and continuing thereafter for the rest of Husband's life, increasing 3% compounding annually each year beginning in September 2026; and
    - Three additional lump sum guaranteed payments in September 2025, September 2035, and September 2045 respectively.

- Future periodic payments to Wife (R13 at 29-30):
    - An amount of money each month for ten years beginning September 2015 and ending in August 2025, which was 1/6 less than the first ten-year amount for Husband;
    - Double that first amount of money each month during Wife's life, guaranteed for 20 years beginning in September 2025 and ending in August 2045, and continuing thereafter for the rest of Wife's life, increasing 3% compounding annually each year beginning in September 2026; and
    - Three additional lump sum guaranteed payments in September 2025, September 2035, and September 2045 respectively, each again 1/6 less than each of Husband's future lump sum guaranteed payments.

At trial, both parties confirmed these details of the payment structure contained in Exhibit 108 (R9 at 48-50, 137). Throughout this case, both parties have referred to the future periodic payments in the settlement as "annuities" or "annuity payments." Wife stated she believes the annuity payments to Husband were designed to compensate him, specifically, for his physical injuries and related losses (R9 at 85).

At the trial below, Husband insinuated for the first time that the settlement agreement was fraudulent, stating, "I believe there was a settlement in my name and somehow with [Wife] being caretaker, it was made into two different settlements" (R9 at 93). He said that at the time of entering into the settlement, "I was still getting over my injury and I was still

highly medicated, and [Wife] was making the decisions" (R9 at 153). He said he believed it was unfair that Wife would get money from a loss of consortium claim when she filed for divorce less than three years after the injury (R9 at 108). Still, he conceded he never tried to appeal the personal injury case or settlement or otherwise challenge its fairness in any way (R9 at 110).

Husband stated that if there was any discussion about the settlement and its terms with his attorneys at the time, he did not remember it (R9 at 159). He said he believed he was coerced or forced into the settlement, but he acknowledged he had not done anything since signing in 2015 to try and argue so in court (R9 at 159-60). On further questioning by his attorney, when asked, "You're not saying anybody forced you to do anything; you're just saying you don't think you were completely with it?" he answered, "Correct" (R9 at 166).

In its judgment, the trial court stated it "reject[ed] [Husband]'s contention that he was in any way coerced into the agreement at the time; nor does the Court believe that he was mislead [*sic*] or fraudulently induced into executing the agreement – as he indicated at trial" (R1 at 108 n.4). It stated it "f[ound] such testimony self serving and, at best, a dubious attempt to now relitigate the nature and extent of such settlement proceeds – in contravention of basic legal principles of res judicata and of fundamental interests of finality, justice, and certainty" (R1 at 108 n.4).

Wife said the parties' separate annuity payments cannot be divided or assigned to anyone else (R9 at 31). She said this was part of their being separate annuities in her and Husband's names, respectively, and not joint

ones (R9 at 33). Husband conceded the settlement he signed said the annuities cannot be "broken, distributed, divided, or assigned" (R9 at 96-97). Wife was further concerned that any division of the annuities might jeopardize the confidentiality of the settlement and put her and Husband in a bad position financially (R9 at 37-39). At the same time, Wife said nothing had changed since the settlement that would warrant any alteration of the agreement in any way (R9 at 41).

### D. Events between the settlement and the proceedings below

In June 2016, Husband and Wife purchased a farm together in La Cygne, Kansas, with each of them separately supplying $100,000 of the $200k purchase price (R9 at 8-10). Wife's share was purchased using her initial lump-sum payment from the settlement (R9 at 55-56). Later that month, Wife wired $31,000 to her family in Kenya to pay for hospital expenses for her father, to which she said Husband had agreed (R9 at 56-58; R12 at 22).

Before the divorce action, Wife paid for a $600 counseling session for her and Husband, which Husband walked out of (R9 at 35-36).

### E. Proceedings below

#### 1. Initial proceedings

In December 2017, Wife filed a petition for divorce in the District Court of Johnson County (R1 at 9).

To calculate temporary child support at the outset of the case, the parties stipulated to their incomes "as represented by Petitioner's Domestic Relations Affidavit and proposed child support worksheet" (R1 at 32), which

included the parties' separate annuities as their separate income (R9 at 27-28). Conversely, Wife did not list the annuities in her list of assets, stating in part that she did not want the amounts to be part of the public record due to the confidentiality requirements (R9 at 45; R12 at 15).

At a conference in December 2018, the parties noted a significant issue in the case was the treatment of their annuities (R1 at 60; R2 at 8). They were discussing a settlement but could not decide whether to include annuities as (1) income for maintenance analysis, or (2) property that is a part of the marital estate (R2 at 9-11). The court stated it believed the annuity payments should be considered income for child support calculation purposes (R2 at 21), as they had been (R1 at 32; R9 at 27-28).

**2. Special master**

In October 2020, when the parties still could not resolve this issue, on Husband's attorney's suggestion the court appointed a special master to hear evidence and make a recommendation on the annuity issue, due to its complexity (R3 at 6-9). The court entered a joint order the parties signed appointing the special master and giving him broad authority to resolve issues "including the division of assets" (R1 at 76-78). It instructed the special master to "make findings of fact and conclusions of law with respect to disputed issues including the division of assets, which the master must state in the report" and to make conclusions about the "proceeds stemming from" the 2013 lawsuit and subsequent settlement (R1 at 77).

At the pretrial conference August 17, 2021, the court noted the only outstanding issues for trial were property division and spousal maintenance

(R5 at 3-4). The parties and the court also discussed the special master's role in the case (R5 at 16-20). The special master said he believed his role to be helping the parties with discovery disputes and assisting them stipulate to property values, and stated he was writing a "kind of treatise" on personal injury awards and how courts treat them in divorce proceedings (R5 at 18-19).

In the pretrial order issued August 18, 2021, which counsel for Husband and counsel for Wife jointly submitted (R1 at 100), the court stated Wife argued the annuities are specific to each party and should not be considered marital property, and any income from annuities should be treated as separate income of the parties, including for maintenance purposes (R1 at 92-93). It stated Husband argues that because he was the injured party, he is entitled to the "vast majority or all" of Wife's annuities (R1 at 93-94). It stated Husband believed that "the gross inequity in the settlement payout should be taken into account in this divorce proceeding" (R1 at 94).

The pretrial order reflected the parties' agreement that Wife would pay Husband $1,677 per month in maintenance for 32.3 months beginning October 1, 2021 (R1 at 95). The court later noted this amount was calculated using monthly payments from the annuities as the parties' income (R1 at 108).

Later in August 2021, the special master issued his report, titled "Treatment and Apportionment of Personal Injury Awards During Dissolution of Marriage" (R12 at 109). He concluded the district court should apply an "analytic approach" to the settlement award to determine what part

of it is marital property and what part of it is separate property (R12 at 109-26). He stated that in his view, "applying the analytic approach in this case, wife's loss of consortium settlement would be compensating her for her loss of companionship, cooperation, aid, affection and sexual relations, as well as compensating her for her pain and suffering, and as such, would be designated as her separate property" (R12 at 124).

At a hearing, Husband objected to the special master's report, arguing it did not comport with the scope of the court's appointment order (R6 at 3-4). Instead, he argued it did not adequately make conclusions of law but was rather "a treatise on how personal injury settlements are handled across the nation in divorce cases" (R6 at 4). He also argued the special master did not fulfill his duty under the appointment order because the special master did not make findings of fact and conclusions of law (R6 at 4-5). The court disagreed, stating the special master was given discretion to make findings of fact and conclusions of law, but did not have to (R6 at 8).

**3. Further proceedings and trial**

Throughout the pendency of the divorce case, Husband never sought medical care (R9 at 41-43). He was covered by Wife's insurance during that time, so Wife would have been notified if he had been, and in fact he declined care from medical providers (R9 at 41-43). Husband conceded that at the time of trial he had not seen a doctor since before the parties separated, but claimed this was because Wife "was in control of all those things" (R9 at 98).

The case proceeded to a trial on the remaining issues, principally the characterization and treatment of Wife's annuity (R9). Before trial, the

parties filed proposed judgments (R11 at 116, 124). Wife argued that under Missouri law, her loss of consortium claim was separate and distinct from Husband's personal injury claim, her settlement was separate and apart from Husband's, and so under the analytical approach Kansas courts use to determine the marital quality of such a settlement, her annuity was "specific and individual to her and not subject to division" (R11 at 129). Conversely, Husband's proposed judgment argued that the "analytical approach" should mean both parties' annuities are marital property because Wife "filed her claim for loss of consortium and managed to finagle an equal settlement with her husband's" (R11 at 120).

Wife said she never has asked for any of Husband's annuity and was not doing so in the divorce (R9 at 34). She said one of the parties' children recently had been diagnosed with cancer, treatment for which was extremely costly, and which she was paying at least in part from her annuity (R9 at 39).

Husband said he wanted "things be clarified and that monies that were paid out for my life and wellbeing and loss of work," meaning Wife's annuity, "be redirected" to him (R9 at 90).

Wife said she believed Husband was spending excessively at the time of trial because his bank statements showed he was spending $8,000 per month, which she does not even spend while she lives with all three children (R9 at 39-40). Husband agreed his monthly spending exceeded the amount he received monthly in his operating account (R9 at 105-06). Husband said all his income was from his annuity (R9 at 122) and he received no income from the farm, which he said was just a hobby (R9 at 126).

**4. Judgment**

The court issued its judgment in January 2022 (R1 at 101-11). It ordered Wife to pay Husband monthly maintenance of $1,403 beginning December 1, 2021, for 32 months, which the parties had amended from their previous agreement (R1 at 102-03 n.3).

The court declared Wife's annuity her separate property not subject to division (R1 at 108). 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' annuity payments and Husband's disability from his injury in the explosion, no equalization payment was necessary as to either party (R1 at 109).

Husband did not file any post-judgment motion (R1 at 8). Instead, he timely appealed to this Court (R1 at 114).

## Argument and Authorities

**First issue: Husband's argument that the trial court inadequately applied the analytical approach in determining Wife's annuity is her separate property and failed to find other facts he wishes it had, is not preserved for appeal, because he never made this argument before the trial court and did not file a post-judgment motion raising his objections to the judgment.**

*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

In his sole issue on appeal, Husband argues the trial court made an "error of law" in its judgment because it "did not apply the analytical approach to the purpose of" Wife's annuity (Aplt.Br. 13-14). He argues, "The trial court announced it would use the required analytical approach, then failed to do so" (Aplt.Br. 17) and "went wrong" when it "focused on the settlement contract, not the basis for the settlement" (Aplt.Br. 19).

Husband's argument is not preserved for appeal. At no point below did he make the specific argument he now makes. Rather, in the only place he made a legal argument, his proposed judgment, he merely argued the "analytical approach" should mean both parties' annuities are marital property because Wife "filed her claim for loss of consortium and managed to finagle an equal settlement with her husband's" (R11 at 120).

Moreover, Husband never filed any motion to alter or amend the trial court's judgment, let alone one raising any of what he believes to be the inadequacies in the judgment that he now argues. But the law of Kansas is that while a challenge to the sufficiency of evidence to support the trial court's judgment does not require a post-judgment motion, under K.S.A. § 60-252 and Supreme Court Rule 165 an argument that the trial court's findings or conclusions are inadequate or legally erroneous *does* require an objection in a post-judgment motion, or else is waived. Therefore, Husband's argument on appeal, which does not allege insufficiency of any evidence but instead solely challenges an "error of law" due to what he argues are inadequate and legally erroneous findings and conclusions, is waived.

As well, Husband's argument fails to include any "pinpoint reference to the location in the record on appeal where the issue was raised and ruled on," or otherwise "why the issue is properly before the court," as Supreme Court Rule 6.02(a)(5) requires. This, too, is fatal to his appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (failure to follow Rule 6.02(a)(5) is fatal, dismissing appeal).

Therefore, as this, Husband's sole issue on appeal, is not preserved, the Court should dismiss his appeal. *State v. Sprague*, 303 Kan. 418, 433, 362 P.3d 828 (2015) (issue not preserved for appeal should be dismissed).

**B. To be preserved for appeal, an argument must be made in the trial court, an argument that the trial court's findings or conclusions in a judge-tried case are inadequate or legally erroneous must be raised in a post-judgment motion or else are waived, and in all cases Rule 6.02(a)(5) requires pinpointing where an issue was raised and ruled on, or otherwise why the issue is properly before the Court.**

It is well-established 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).

While there are exceptions to this rule, *see In re Est. of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008) (delineating exceptions to general rule against raising new issues for the first time on appeal), to invoke them Supreme Court Rule 6.02(a)(5) requires an appellant to explain in his opening brief why the issue should be considered despite raising it for the first time on appeal. Rule 6.02(a)(5) states in relevant part that "[e]ach issue must begin with … a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court." That rule is to be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015). Where an appellant's brief does not comply with Rule 6.02(a)(5), the Court cannot review the issue. *Daniel*, 307 Kan. at 430 (dismissing unpreserved issue for failure to explain under Rule 6.02(a)(5) why it should be reviewed).

Challenges to the adequacy or legal propriety of bench-tried judgments further require a post-judgment motion to be preserved for appeal. While K.S.A. § 60-252 requires no post-judgment motion to later "question the

sufficiency of the evidence supporting the" district court's findings, it is 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 a 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). 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).

Supreme Court Rule 165 further requires this. The Rule 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).

For example, when a party argued that a district court's findings dividing a marital estate improperly considered "fault" in doing so, but he did not raise this in a motion to alter or amend the judgment, his argument was not preserved for appeal. *See In re Marriage of Oliver*, No. 109,872, 2014 WL 802464 at *5-6 (Kan. App. Feb. 28, 2014) (unpublished).

This Court consistently has applied this rule and uniformly held that challenges to the legal reasoning or methodology in a trial court's divorce judgment are not preserved where the appellant did not file a post-judgment motion raising his objections. *See, e.g.*:

- *In re Marriage of English*, No. 124,408, 2022 WL 2904071, at *3-4 (Kan. App. July 22, 2022) (unpublished) (argument that trial court erred in considering length of parties' relationship in dividing marital estate was waived where appellant did not move to alter or amend judgment);
- *In re Marriage of Poggi*, No. 121,012, 2020 WL 5268841, at *3-4 (Kan. App. Sept. 4, 2020) (unpublished) (same re: argument that trial court erred in using extended-income formula to calculate child support);
- *In re Marriage of Rodrock*, No. 115,078, 2017 WL 2494704, at *4-5 (Kan. App. June 9, 2017) (unpublished) (same re: argument that trial court failed to divide $2.8 million of marital debt);
- *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 Friars*, No. 113,512, 2016 WL 2609622, at *4 (Kan. App. May 6, 2016) (unpublished) (same re: argument that trial court failed to correctly analyze the Kansas Child Support Guidelines);
- *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);
- *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);
- *In re Marriage of Munker*, No. 95,609, 2007 WL 3275894, at *6 (Kan. App. Nov. 2, 2007) (unpublished) (same re: argument that trial court applied improper method in dividing property and misapplied property division statute in doing so);
- *In re Marriage of Lauridsen*, No. 95,643, 2006 WL 2716064, at *5 (Kan. App. Sept. 22, 2006) (unpublished) (same re: argument that trial court inadequately applied property division statute in dividing property);
- *In re Marriage of Heideman*, No. 71,789, 1995 WL 18253237, at *1 (Kan. App. May 19, 1995) (unpublished) (same re: argument that trial court erred in considering length of parties' relationship in dividing marital estate); and
- *In re Marriage of Trickett & Hayes*, No. 70,704, 1994 WL 17121008, at *3 (Kan. App. Aug. 5, 1994) (unpublished) (same re: argument that trial court erred in modifying existing child support order without finding a material change in circumstances).

### C. Husband's sole issue on appeal is not preserved, because he never made his argument in his brief to the trial court, nor did he file a post-judgment motion objecting to what he now argues are the inadequacies and errors in the trial court's findings and legal conclusions, nor does his brief comply with Rule 6.02(a)(5) by pinpointing where his issue was raised and ruled on or otherwise why it is property before the Court.

Under these rules, Husband's sole issue on appeal is not preserved and the Court should dismiss his appeal.

First, Husband did not make the specific argument that he now makes in his brief at any time to the trial court. He argues "[t]he trial court did not apply the analytic approach as it said it would do" (Aplt.Br. 16), that it "announced it would use the required analytical approach, then failed to do so" (Aplt.Br. 17), and it "focused on the settlement contract, not the basis for the settlement" (Aplt.Br. 19). He argues "the framework of property ownership in marriage and its transmutation into marital property at the commencement of the divorce" makes the annuity marital property subject to division (Aplt.Br. 20). He argues part of this was that Husband "did not have independent counsel" from Wife in the settlement, and his "medical and mental situation was compromised" (Aplt.Br. 21). He argues the settlement was for more than "noneconomic" losses, and this should make the annuity marital property, too (Aplt.Br. 22-23). He argues that while Wife's annuity was not divisible, what the trial court should have done was order her to "pay to [Husband] a share of these post-maintenance awards" (Aplt.Br. 26).

Husband did not make any of these arguments below. In response to the special master's report, he only objected to the form of the report and whether the special master fulfilled his duties as ordered (R6 at 3-5). He did

not make any objection to the special master's conclusion (R12 at 124) that Wife's annuity should be designated her separate property, let alone for the reason he now advances. And at trial, the parties did not make opening or closing arguments (R9 at 166-68).

The sole place Husband made any argument about this was after trial, in his proposed judgment (R11 at 116). But there, while he offered three pages of proposed conclusions discussing case law, the sole reason he argued for concluding he should receive a share of Wife's annuity was this:

> Here, the Respondent was severely injured in the job-related accident in 2013. The Petitioner filed her claim for loss of consortium and managed to finagle an equal settlement with her husband's. This is anything but fair, just and equitable. The Court should consider the respective settlements as marital property and compensate the Respondent with a substantial share of the proceeds from the Petitioner's settlement.

(R11 at 120). Husband made no other argument anywhere in the record about this subject.

Unlike now, on appeal, Husband made no argument below about the basis for the settlement or how that should affect its disposition, about transmutation, about Husband's lack of independent counsel from Wife during the settlement, about economic versus noneconomic losses, or about the trial court's power to divide Wife's annuity. Therefore, Husband did not actually raise the issue in his brief before the trial court, and so it "cannot be raised on appeal." *Miller*, 289 Kan. at 224-25.

Second, Husband's brief violates Rule 6.02(a)(5) by failing to include in its argument a statement pinpointing where in the record either he raised the issue in his opening brief or it was ruled on or, if not, explaining why the

issue should be considered despite his not having raised it below. Even in his statement of facts, Husband does not mention any place in the record where he made any of the arguments in his brief (Aplt.Br. 1-13). This is because, of course, he did not.

This failure is equally fatal to Husband's appeal. *Godfrey*, 301 Kan. at 1044 (failure to comply with Rule 6.02[a][5] waives issue not otherwise preserved); *Daniel*, 307 Kan. at 430 (dismissing unpreserved issue for failure to explain under Rule 6.02(a)(5) why it should be reviewed).

Finally, none of Husband's arguments concern sufficiency of the evidence, and instead challenge the trial court's findings and conclusions as legally erroneous, but he failed to preserve any of those challenges in a post-judgment motion, as K.S.A. § 60-252 and Rule 165 require.

Husband's argument clearly does not challenge the lack of sufficient evidence to support any of the trial court's findings or conclusions. The words "sufficient" or "insufficient" do not appear anywhere in his brief, and the only discussion of "evidence" is as to the parties' counsel during the Missouri settlement (Aplt.Br. 21) or who the settlement was from (Aplt.Br. 24). And while at the very end of his argument he argues *he* introduced substantial evidence that would have supported an *opposite* conclusion (Aplt.Br. 28), that is not an argument that the evidence before the district court was insufficient to support the conclusion it *did* make. *Bradley*, 258 Kan. at 45-46 (argument about what evidence appellant introduced could have meant did not go to sufficiency of evidence, and instead was an argument about deficiencies in

the judgment that was not preserved because appellant did not file a post-judgment motion).

Instead, all of Husband's arguments challenge the adequacy or legal correctness of statements in the trial court's judgment – objections "on grounds other than sufficiency of the evidence" that are "basically complaints about the result." *Bradley*, 258 Kan. at 46, 50. He argues the trial court failed to correctly apply the analytical approach that he argues it should have (Aplt.Br. 16-17). He argues the trial court improperly "focused on the settlement contract, not the basis for the settlement" (Aplt.Br. 19). He argues the court failed to apply the doctrine of transmutation, which he believes it should have (Aplt.Br. 20). He argues the court should have "expresse[d] concern that the parties did not have independent counsel, and [Husband]'s medical and mental situation was compromised" (Aplt.Br. 21). He argues the court incorrectly found Wife's annuity was only for "noneconomic" losses (Aplt.Br. 22-23). He argues the court's result was "unfair" (Aplt.Br. 26).

As in all the decisions Wife cites above at pp. XXX, plainly all of these are arguments that the trial court's findings or conclusions are legally inadequate or erroneous. Therefore, per K.S.A. § 60-252 and Rule 165 Husband was required to file a post-judgment motion making the objections he now makes. As he concedes (Aplt.Br. 13), he did not file a post-judgment motion at all, and instead eleven days after the judgment just filed a notice of appeal. But this meant the trial court never heard any of his arguments he now puts forth why its judgment was incorrect at all – the "alleged

deficienc[ies]" he now proffers were never brought "to the attention of the district court," and so it could not "amend, clarify, or change its decision if necessary, *before* the parties go to the expense and delay of an appeal." *Bradley*, 258 Kan. at 49 (emphasis in the original).

Husband's failure to file a post-judgment motion raising the alleged inadequacies, omissions, and legal errors in the court's judgment he now argues means they are not preserved and "will not be considered on appeal." *Tucker*, 253 Kan. at 378. Rather, Husband makes his entire argument in his brief for the first time on appeal. He did not argue it *before* trial. He did not argue it *at* trial. He did not argue it in his proposed judgment. He did not present it in a post-judgment motion. And even now, in his brief, he does not pinpoint where it was raised and disposed of below or make any explanation why it should be raised for the first time on appeal, in violation of Rule 6.05(a)(5).

Therefore, Husband's sole point on appeal is not preserved, and this Court should dismiss his appeal. *Sprague*, 303 Kan. at 433 (issue not preserved for appeal should be dismissed).

**<u>Second issue:</u> The trial court properly applied the analytical approach and reasonably held Wife's annuity settlement for her Missouri loss of consortium claim is her separate property. Viewing the evidence most favorably to the trial court's decision, Wife's and Husband's annuities are separate and different, the purpose of Wife's is to compensate her for her own future losses separate and apart from Husband's personal injury or any loss to the marital estate, and Husband agreed to use the income from the annuity streams as the parties' separate income for calculating child support and maintenance.**[1]

*Standard of Appellate Review*

Husband challenges the district court's division of the marital estate. He states the standard of review is for abuse of discretion (Aplt.Br. 14). Citing no authority, however, he argues the only issue is "interpretation of the parties' settlement of the tort action" creating their annuities, which he argues "is an issue of law" giving this Court "*de novo* review" (Aplt.Br. 14). (This is despite arguing the trial court erred by relying on the settlement agreement (Aplt.Br. 19).)

Husband is wrong: review here is not *de novo*. Instead, 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).

As Husband cites (Aplt.Br. 14), there are three possible types of an abuse of discretion: a judicial action constitutes an abuse of discretion if it either is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of fact;

[1] This argument is an alternative to Issue 1, should this Court somehow find Husband's issue on appeal is preserved.

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)).

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).

So, Husband's argument that the trial court's treatment of Wife's annuity as her separate property was an abuse of discretion means that to prevail, he must show that viewing the record in the light most favorable to the trial court's decision, no reasonable person would agree with it.

* * *

**A. Summary**

To determine whether, in a divorce, a personal injury award or settlement is a party's separate property or property of the marital estate, the law of Kansas uses an "analytical approach" to examine the nature of the underlying loss and for what the particular award or settlement is to compensate the spouse who is receiving it. If the award compensates the party for an injury wholly during the marriage, such as when the award has been fully paid out during the marriage, it is marital property. If, on the other hand, the award compensates the party for post-dissolution losses, such as future losses, it is the party's separate property.

Under this approach, viewing the evidence in the light most favorable to the trial court's judgment, the trial court reasonably concluded within its discretion that the annuity Wife is receiving as settlement for her Missouri loss of consortium claim is her separate property, because it compensates her for future, ongoing losses post-dissolution. In Missouri, a loss of consortium

claim is its claimant's personal claim for a personal loss, not a derivative claim.

The parties' annuities are separate and apart in husband's and wife's separate names. They are in differing, individualized amounts. They have always gone to the parties' separate bank accounts. Wife testified her injury is ongoing, even to this day. And Husband agreed the amounts of the annuities should be considered the parties' separate income in the future for purposes of calculating the court's maintenance award to him and child support.

If Husband's issue on appeal is preserved, this Court should affirm the trial court's judgment.

### B. 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.

K.S.A. § 23-2802(c) requires that "[i]n making the division of property" in a divorce, the trial

> 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.

This statute does not presume that property will be divided equally upon a divorce. *In re Marriage of Brane*, 21 Kan. App. 2d 778, 783, 908 P.2d 625 (1995). Instead, the district court has discretion to consider all the

property, regardless of when it was acquired or its method of acquisition, to arrive at a just and reasonable decision. *Id.*; *see also In re Marriage of Bahr*, 29 Kan. App. 2d 846, 848, 32 P.3d 1212 (2001). Unless it can be said that "no reasonable [person] would take the view adopted by the trial court," its decision must be affirmed. *Sadecki*, 250 Kan. at 8.

While K.S.A. § 23-2801 generally deems all property owned by the parties at the time a divorce is filed to be marital property, under K.S.A. § 23-2601 some property remains the parties' separate property. It provides in relevant part:

> The property, real and personal, which any person in this state may own at the time of the person's marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to a person by descent, devise or bequest, and the rents, issues, profits or proceeds thereof, or by gift from any person shall remain the person's sole and separate property, notwithstanding the marriage, and not be subject to the disposal of the person's spouse or liable for the spouse's debts ….

*Id.*

"When determining whether personal injury settlements and workers compensation benefits are marital property" or separate property, American "courts apply two general approaches – the mechanical and the analytical." *In re Marriage of Buetow*, 27 Kan. App. 2d 610, 611, 3 P.3d 101 (2000) (citing *Parde v. Parde*, 258 Neb. 101, 108-10, 602 N.W.2d 657 (1999)). Under the mechanical approach, a minority rule among American courts, "personal injury awards are categorized entirely as marital property." *Id.*

Conversely, "the analytical approach," a majority rule among American courts, "evaluates the nature and underlying reasons for the compensation,"

and instead "the classification of the award depends upon the nature of the underlying loss." *Id.* 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.*

Beginning in *In re Marriage of Powell*, 13 Kan. App. 2d 174, 766 P.2d 827 (1988), Kansas courts have used the analytical approach (sometimes calling it the "analytic approach"). *Buetow*, 27 Kan. App. 2d at 612. That means not all personal injury awards and settlements are deemed marital property, and instead some are deemed separate property. *See, e.g.*, *id.*

In his brief, Husband principally relies 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), calling *Lash* "most on point here" (Aplt.Br. 19).

It is important to note that, unlike what Husband is advocating in this case, in both this Court *affirmed* a trial court's determination as to the personal injury award at issue as not being unreasonable or arbitrary, and therefore not 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.).

Husband's brief makes it seem that this Court in both *Powell* and *Lash* approved of dividing a personal injury award wholesale as marital property, when in fact it did no such thing in either. Instead, both decisions – and several other decisions Husband omits from his brief – make 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.

In *Powell*, the husband was paralyzed in an accident. 13 Kan. App. 2d at 175. He and his wife filed an action for his personal injury and for the wife's loss of consortium. *Id.* In a settlement, each party received a separate lump sum in unequal amounts, and the husband also received a monthly annuity for the rest of his life, subject to 3% annual increases. *Id.* Two years later, the parties divorced. *Id.* The cash funds were equally divided between the parties as marital property, but "[t]he annuity was assigned to" the husband separately. *Id.* at 175-76. Additionally, the annuity was used in calculating the husband's income to determine an award of maintenance to the wife. *Id.* at 181.

The wife appealed declaring the parties' personal injury lump sum awards – "the couple's cash assets" – as marital property, but notably did not

challenge the separate assignment of the annuity to the husband. *Id.* at 178. Using the analytical approach, this Court affirmed the trial court's decision, holding "*assets* arising from a personal injury settlement are subject to division in a divorce case." *Id.* at 180 (emphasis added). Therefore, it could not be said that "no reasonable person would agree with the trial court." *Id.*

The Court's decision in *Powell* does not support Husband's notion that a future annuity portion of a personal injury settlement always must be divided as part of the marital estate, let alone his argument in his brief that he should receive a portion of *his wife*'s separate annuity. To the contrary, the Court in *Powell* only dealt with the division of the lump sum award in the form of existing cash assets, holding that was properly divided between the parties, and the wife did not even challenge the assignment of the annuity to the husband as his separate property. Here, too, the parties' existing cash was divided between them as marital property. Effectively, what the trial court did in *Powell* was exactly what the trial court did here, and this Court affirmed. Husband's suggestion that *Powell* supports his position is in error. It does nothing of the sort.

*Lash* is equally unhelpful to Husband. There, the parties filed a medical malpractice suit due to complications with the wife's heart surgery and were awarded a settlement. 2008 WL 4966486 at *5. The decision does not mention any future payments such as an annuity, only a cash award that the parties "agreed to use … to pay off marital debts and make a down payment on a new house." *Id.* Despite this, by the time the divorce was filed seven years later, *id.* at *1, "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." *Id.* at *5. The trial court ordered those remaining proceeds from the sale of the house "66.1% to 33.9% in favor of" the wife. *Id.*

The wife appealed, arguing she should have received more of the proceeds from the sale of the home due to the even greater proportional difference in income between the parties as reflected in their child support worksheets. *Id.* This Court disagreed and affirmed the trial court's decision, holding the cash settlement was a marital asset and the trial court reasonably awarded more of its remainder to the wife because it "found that a greater portion of the settlement money was intended to compensate [the wife] for medical treatment and future medical expenses incident to her use of a pacemaker." *Id.*

So, as in *Powell*, the Court in *Lash* approved of giving one spouse the portion of a personal injury settlement intended compensate for losses extending past the divorce. Unlike the annuity in *Powell*, in *Lash* there was only a lump sum cash settlement that was a marital asset. Still, the Court approved of giving the wife a larger portion of that asset because it was intended to compensate her for losses and injury extending past the divorce.

Husband mentions *Buetow*, 27 Kan. App. 2d at 610, in passing (Aplt.Br. 19) but offers little discussion of it. (Conversely, the trial court specifically stated it had reviewed and considered *Powell*, *Lash*, and *Buetow* (R1 at 108).) In *Buetow*, the Court approved of declaring a spouse's entire settlement award to be his separate property not subject to division. *Id.* at 611-13.

In *Buetow*, the husband was injured in an accident while working for a railroad. *Id.* at 610. Two weeks later, his wife filed for divorce, which the trial court granted and divided the marital property, but reserved ruling on whether the husband's prospective award for his injury would be marital property subject to division. *Id.* The husband received a lump-sum cash disability payment under the Federal Employers Liability Act ("FELA"). *Id.* After hearing evidence, "[t]he trial court determined that the disability award was not part of the marital estate because it compensated [the husband] for 'his personal injury, disability, and loss which extended beyond filing for divorce.'" *Id.* at 610-11.

The wife appealed, arguing the husband's disability payment should have been divided as part of the marital estate, but this Court affirmed. *Id.* at 611-13. Citing *Powell*, *Parde* (on which this Court previously had relied in *Powell*), and other "analytical approach" decisions from throughout America, this Court held that because the trial court reasonably "determined that [the husband]'s FELA benefits compensated him for 'personal injury, disability, and loss which extended beyond filing for divorce,' the trial court properly excluded the disability award from the marital estate." *Id.* at 613.

The Supreme Court of Nebraska's decision in *Parde*, on which this Court relied in both *Powell* and *Buetow*, is directly on point, and specifically held, as the trial court did here and the trial court had in *Powell*, that the lump-sum cash portion of a personal injury settlement was marital property subject to division, but a future annuity was not, *reversing* the trial court's decision otherwise. 258 Neb. at 108-10.

In *Parde*, the husband worked for a railroad and was injured on the job three times during the marriage. *Id.* at 103. For the injury, in 1992 the husband received a settlement from the railroad under the FELA that included a lump-sum payment of $148,364.16, plus a future annuity of $98,750 to be paid in 2002. *Id.* In a divorce decree in 1997, the trial court found "the entire amount of the settlement, both cash and annuity, … should be considered marital property." *Id.* The husband appealed, arguing it was error to hold the annuity (but not the cash payment) was marital property, and instead it should have been excluded from the marital estate. *Id.* at 105.

The Nebraska Court of Appeals reversed the trial court's determination that the husband's future annuity was marital property, and the Supreme Court of Nebraska affirmed the intermediate appellate court's decision. *Id.* at 108-10. Reviewing case law nationwide, the Nebraska court adopted the analytical approach, holding:

> compensation for an injury that a spouse has *or will receive* for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.

*Id.* at 109-110 (emphasis added).

Applying this test, the court held the lump sum cash payment adequately compensated the marital estate for any losses it may have suffered due to the husband's injuries, and "the trial court abused its discretion in treating the $98,750 annuity as marital property and dividing it

between the husband and the wife." *Id.* at 110. The annuity was designed to compensate the husband for his future (i.e., post-divorce) injury and loss of earning capacity, and therefore was his separate, nonmarital property. *Id.*

Other courts throughout the country have agreed in similar circumstances and universally held that under the analytical approach, a spouse's future annuity compensates a future or ongoing injury lasting past the divorce is his or her separate, non-marital asset. *See, e.g.*,

- *In re Marriage of Diaz*, 2018 OK CIV APP 17, ¶¶ 9-14, 413 P.3d 544 (applying analytical approach, reversing trial court's decision that future annuity portion of husband's personal injury settlement was marital property, holding instead that it was compensation for future losses and so was husband's separate property);
- *Mistler v. Mistler*, 816 S.W.2d 241, 250-52 (Mo. App. 1991) (applying analytical approach, affirming trial court's decision that future annuity portion of husband's personal injury settlement was nonmarital property, as trial court reasonably could conclude the payments were attributable to the husband's post-divorce noneconomic and economic damages); and
- *Bandow v. Bandow*, 794 P.2d 1346, 1348-50 (Alaska 1990) (applying analytical approach, reversing trial court's decision that future annuity portion of husband's personal injury settlement was marital property subject to division and remanding for a determination of what portion was compensation for husband's future losses, which would be his separate, non-marital property).

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

Here, the trial court properly applied the analytical approach to determine Wife's future annuity is her separate, non-marital property. Viewing the evidence most favorably to its decision, it cannot possibly be said that no reasonable mind would disagree with its conclusion, and therefore it properly exercised its discretion. This Court should affirm its judgment.

In the course of his argument otherwise, Husband makes a series of incorrect statements. Repeatedly, he says Husband's and Wife's annuities are in "equal amounts" (Aplt.Br. 13, 17, 26). This is the sole argument he made below as to why he believed Wife's annuity should be divided as part of the marital estate (R11 at 120), but it is untrue.

While the total possible *funding* for the two annuities was equal, 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). Ultimately, Husband concedes this, noting "[o]nly time would tell how different their ultimate payments would total" based on how long they both live (Aplt.Br. 17). Plainly, each party has his or her own annuity, separate and different from the other's, which compensates each party for his or her respective, different injury.

Citing no authority, Husband says Wife's "claim was derivative from [Husband]'s claim" (Aplt.Br. 20). This is untrue (and an argument he never made below). 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), and Wife's counsel reminded the trial court (R11 at 126-27), 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) (citation omitted). Indeed, in Missouri,

> Settlement of the underlying personal injury claim by the injured spouse does not preclude the other spouse from maintaining an action for loss of consortium against the tortfeasors in a separate suit. However, the spouse seeking damages for loss of consortium is not entitled to recover merely because the tortfeasors were found to be liable for damages to the injured spouse. Such damages must be proved. **Damages are calculated separately from those that may have been awarded to the injured spouse and determined in relation to the unique damage suffered by the loss of consortium.**

*Id.* (internal citations omitted). Here, then, as a matter of governing Missouri law, Wife's damages for her loss of consortium claim, which is what her settlement award and annuity relieved, were separate, apart, and unique from those in Husband's personal injury claims. Husband's notion that Wife's damages were derivative from his personal injury damages has no basis in law.

The trial court determined that each of Husband's and Wife's separate annuities were separate property that should be set aside to each of them respectively (R1 at 108). The evidence plainly supported this, because Wife's

future annuity was to compensate her for her future losses occasioned by her loss of consortium.

The court noted the parties previously had agreed on these separate annuities and were represented by counsel in doing so (R1 at 108). Husband takes issue with the court's statement because it "expresses no concern that the parties did not have independent counsel, and Aaron's medical and mental situation was compromised" (Aplt.Br. 21). But he never brought that alleged omission to the court's attention, so it is waived. *See* above at pp. XXX. Moreover, the court specifically found Husband not credible in suggesting he was misled or defrauded into the agreement (R1 at 108 n. 4), and this Court cannot second-guess that finding. *Vandenberg*, 43 Kan. App. 2d at 704-05.

Regardless, the settlement agreements were signed by the parties' counsel (R13 at 28, 31), both parties plainly testified the parties were represented by counsel in the personal injury settlement (R9 at 33, 94), and Husband specifically said he was "sure" he had reviewed the settlement agreement with counsel (R9 at 94).

Husband also argues the trial court incorrectly applied the law of *res judicata* (Aplt.Br. 23-24). But the trial court plainly was not actually stating Husband's position was barred by *res judicata*, merely that it was unjust and inequitable (R1 at 108). The court noted that at the time, the parties had agreed the proceeds, including the annuities, were compensation for non-economic losses, and held it would be unfair to relitigate this now as an income-stream replacement or something else (R1 at 108). Husband takes

issue with this, too, pointing to tax law that personal injury awards can include both economic and non-economic damages (Aplt.Br. 22-23), though again he never made this argument to the trial court.

Husband also argues "the court ignored the framework of property ownership in marriage and its transmutation into marital property at the commencement of the divorce" (Aplt.Br. 20). But he never cited any of the statutes below that he now does for his transmutation argument, nor did he ever argue below that Wife's annuity transmuted into marital property. Regardless,

Husband's arguments are wrong: the law of Kansas, as explained above, is that personal injury settlements *are not* mechanically marital. The purpose of this Court's rejection of the mechanical approach all those years ago in *Powell* was to take personal injury settlements outside the general framework of statutorily marital or non-marital property and analyze them separately under the analytical approach. The trial court here did just that. (Husband also ignores that under his transmutation theory, his own annuity would be marital property subject to division. The trial court noted this in its judgment (R1 at 109), though Husband now simultaneously takes issue with that (Aplt.Br. 26).)

Next, Husband argues "a major portion of the award was for [his] future economic losses. Future economic losses that are separate property," and concludes, citing no authority, "Loss of consortium can't [*sic*] possibly be of similar value to a lifetime of disability" (Aplt.Br. 23). But Wife's loss of consortium settlement and annuity, separate and apart from Husband's

personal injury settlement and annuity, was her own award as a matter of Missouri law. *Thompson*, 207 S.W.3d 76, 112. There was no evidence that any part of Wife's separate award was for Husband's injury.

Regardless, the trial court plainly was correct. Its point was that Wife's annuity was compensation for her future losses occasioned by her loss of consortium, just as the annuity in *Powell*, the greater portion of the award given to the wife in *Lash*, and the disability payment in *Buetow*, on all of which the trial court stated it relied (R1 at 107). Husband is wrong that the trial court "focused on the settlement contract, not the basis for the settlement" (Aplt.Br. 19).

Characterizing Wife's damages as economic or non-economic is immaterial. The question is, whatever they are, whether the annuity was to compensate Wife for her future losses, as the trial court knew from its review of *Powell*, *Buetow*, and *Lash*. The evidence plainly supported that it was, as her injury and damages from her loss of consortium continued through the time of trial and into the future. And because Husband filed no post-judgment motion objecting to the trial court's findings as inadequate, "this [C]ourt will presume the trial court found all facts necessary to support its judgment." *O'Brien*, 294 Kan. at 361.

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). Citing neither any authority nor the record, Husband says "[Wife]'s loss was limited to consortium, and that factor was limited by [her] choice to file for divorce soon after the settlement," but this evidence plainly shows otherwise.

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, and viewing the evidence in the light most favorable to its decision, the trial court faithfully followed that approach.

The reasonableness of the trial court's decision is further illustrated by its reference to Husband's argument that Wife's income from her separate annuity should be considered her income for maintenance purposes (R1 at 108-09). As it noted, it would be "unfair, unjust, and inequitable to permit [Husband] to benefit from a significant award of spousal maintenance that was calculated based upon monthly payments from the annuity (as "income") while at the same time re-apportioning the amounts of those payments and re-directing that same "income" stream back to [Husband]" (R1 at 108).

Husband takes issue with this due to the amounts involved (Aplt.Br. 26-27), but the court's position was plainly sound and reasonable. It certainly is not something with which no reasonable person could agree. Husband cannot equitably argue out of one side of his mouth that Wife's annuity (but not his) should be marital property and divided to him, but with the other assert he also should receive an extra portion of that as maintenance because it also should be considered Wife's separate income – but *his* annuity should be treated differently. The trial court's observation that Husband is trying to eat his cake and have it, too, was spot on.

Viewing the evidence most favorably to the trial court's decision, the trial court properly applied the analytical approach and reasonably concluded within its discretion that Wife's future annuity was to compensate her for her future losses, making it her separate, nonmarital property. Husband's argument otherwise is in error. This Court should affirm the trial court's judgment.

## Conclusion

This Court should dismiss Husband's appeal. Alternatively, it should affirm the trial court's judgment.

Respectfully submitted,

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by /s/Jonathan Sternberg

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## Certificate of Service

I certify that on June 15, 2023, I electronically filed a true and accurate Adobe PDF copy of this brief 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

513 P.3d 504 (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 Jessica ENGLISH, Appellee,
and
Nicole English, Appellant.

No. 124,408
|
Opinion filed July 22, 2022.

Appeal from Leavenworth District Court; DAN K. WILEY, judge.

**Attorneys and Law Firms**

Jean Ann Uvodich, of Olathe, for appellant.

Jonathan Sternberg, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellee.

Before Isherwood, P.J., Schroeder and Warner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** District courts are granted broad discretion in how a marital estate should be apportioned. Nicole English now timely appeals the district court's division of the marital estate and the order compelling her to pay maintenance to Jessica English. Because Nicole failed to raise the issues she now complains of below, we exercise our discretion and decline to address her unpreserved arguments on appeal. Even if we were to consider them, we find the district court did not abuse its discretion in the manner it apportioned the marital estate, and we affirm.

FACTS

Jessica and Nicole married in 2014 following a long romantic relationship that started in 1996 after Jessica divorced her husband. The district court granted their divorce in 2021 and bifurcated the issues related to child custody, child support, and division of the marital assets. The parties resolved the child custody and support issues, leaving the district court with the task of making an equitable division of the marital estate including Jessica's request for maintenance.

Throughout the years of the relationship and marriage, both Jessica and Nicole individually and jointly bought and sold real estate. Nicole worked for the federal prison system and started an account with the system in 1991; she later added Jessica to the prison account in April 1997.

Nicole testified, given the rules of the federal buyback program, she and Jessica did not always have both of their names on the houses due to her frequent transfers within the prison system. However, both of their names were on a house Jessica purchased in 2012.

Nicole made deposits to a Thrift Savings Plan (TSP) when she started working for the federal prison system in 1991. Nicole did not remember the value of the account when she and Jessica began their relationship. She calculated the value of the TSP, for the purpose of splitting the property, at $146,880. Her figure was based on the amount added during their six years of marriage and divided in half.

Nicole also testified Jessica ran an eBay store but Nicole was not involved with the business. However, according to Nicole, Jessica put Nicole's name on the business and associated PayPal account without her permission.

Nicole testified she never thought she was married to Jessica until their actual wedding in 2014 and did not intend for her debts and assets to be combined from the time she and Jessica started their relationship until their divorce.

Jessica and Nicole each testified about their various installment debts. At some point in their relationship, Jessica and Nicole fell behind on their bills and made the choice to pay Nicole's debts first so that she would not lose her job.

Jessica testified that she was requesting maintenance because she was financially dependent on Nicole. She was also requesting 75 percent of their marital debts be assigned to Nicole because Nicole made around 75 percent of their combined total income. Jessica did work during different periods of the relationship. After their youngest child entered grade school, she began working more outside the home and owned an eBay store business.



 

***2** After the parties rested, the district court, referring to testimony Nicole gave earlier in the hearing, stated:

> "I don't think this case has a whole lot to do with same-sex marriage other than I will make this comment.
>
> "You—first off, you guys got a case that's a mess if you were heterosexual and—and difficult decisions for the Court. I will tell you this, that Kansas law makes it pretty clear that once a divorce is filed, all property becomes property of the marriage, and it's all capable of being divided, and then it becomes to an equitable decision by the Court. And although the Court may set aside marital property oftentimes to a party that brought it into the marriage, that's not a requirement in the law. The requirement is I do an equitable distribution. That's the first thing I will say. And so if this were a domestic partnership or something like that, it's still a case that's a mess.
>
> "But there is an overlay here with regard to the same-sex marriage, and that is the only difference is that in most states—certainly up until 2014, with a few exceptions—same sex [marriage] ... wasn't legal. And so that does have some kind of impact with regard to what the Court believes was the intent of the parties prior to that, to the extent that it affects their—whatever domestic partnership they may or may not have had prior to that date. But not withstanding that, everything else is no different than if you guys were, like you said, a heterosexual couple."

The district court in its division of property assigned all the parties' various bank accounts, cash, personal property, and debts. No value was assigned to Jessica's eBay store business because there was insufficient evidence to establish a value.

When analyzing how to divide the retirement accounts, the district court also noted it was considering maintenance along with the retirement accounts. The district court split the balance of Nicole's TSP equally as of March 6, 2020, with any appreciation or depreciation due to the market being apportioned appropriately. Contributions made by Nicole since that date would go solely to Nicole. The entirety of Nicole's Federal Employee Retirement System account was awarded to Nicole, but the value, which appears to be substantial, is unclear based on the record provided to us.

Finally, the district court ordered Nicole to pay Jessica $1,861 in maintenance beginning July 1, 2021, for 88 months, less the 15 months she had already paid under the temporary orders. The district court also determined, based on the allocation of assets and debts, Nicole received $12,478 less than Jessica did. To make the division of assets more equitable, the district court ordered Jessica to pay Nicole half of that amount—$6,239—and the amount paid for rent during the divorce proceeding for Jessica's benefit to arrive at $8,189 Jessica owed Nicole. The district court awarded that amount as a judgment to Nicole but ordered it to be paid by reducing Nicole's maintenance obligation by $341 for 24 months unless Nicole collected the judgment in another fashion.

## ANALYSIS

On appeal, Nicole does not specifically challenge how the district court assigned the marital estate to each of the parties other than complaining the district court erred by considering all of the assets of the marriage regardless of when they were acquired and, as such, the division including the maintenance order prejudiced her. She directly argues the district court (1) violated her constitutional rights under the Equal Protection Clause when it determined that the parties would have married earlier had they been able to do so; (2) committed misconduct or exhibited bias by treating the parties differently than it would treat parties in a heterosexual divorce; and (3) erred by "essentially finding" that the parties had entered into a common-law marriage at a date earlier than their 2014 marriage.

***3** Because issues one and two are similar, we will address them together.

*The District Court Did Not Exhibit Bias Against the Parties*

In her first two issues on appeal, Nicole argues the district court erred and showed bias when it based the ruling on its statement that "if the parties could have legally married they would have." This, Nicole argues, reflects the district court treated the parties differently than it would have treated a heterosexual couple because there would be no presumption a heterosexual couple would have married at an earlier date than they chose to get married on. In addition, Nicole argues the district court committed misconduct by doing so and improperly divided property acquired prior to the parties' marriage.

As we address Nicole's arguments, we note her brief fails to cite to the record to support her point, and her arguments are minimal and contain unsupported statements with limited



 

citations to caselaw and limited argument relying on her citations. See Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 35).

*Preservation*

Generally, issues not raised before the district court cannot be raised on appeal. *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). Constitutional grounds for reversal asserted for the first time on appeal also are not properly before the appellate court for review. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014).

*Discussion*

Jessica, in response to Nicole's brief, argues Nicole failed to raise either of her first two issues—violation of her constitutional rights or judicial bias or misconduct—before the district court. Jessica is correct. Nicole's brief fails to provide any record citation to show where she raised these issues below and that they were ruled on—which she is required to do under Rule 6.02(a)(5). In our review of the record, we have been unable to find anything to reflect Nicole argued her constitutional rights were violated or the district court exhibited bias or engaged in misconduct. Nor does Nicole argue any of the exceptions to the preservation rule should apply for us to consider either issue raised for the first time on appeal.

Because Nicole did not raise either issue before the district court, we find she is unable to do so on appeal, and we use our prudential authority to decline to review her unpreserved claims of error. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

*The District Court Did Not Err in Making an Equitable Division of the Marital Estate or in the Order Requiring Maintenance*

For her final issue—also raised for the first time on appeal—Nicole argues the district court erred by awarding maintenance based on the length of the parties' entire relationship instead of basing it solely on the time they were married. She also argues the district court's reference to common-law marriage was inconsistent with Kansas law. Like the first two issues, Nicole's briefing of this issue is largely lacking in coherent argument and supporting citations.

*Preservation*

Before the district court, Nicole contended she and Jessica were in a "short term marriage and future maintenance should not be awarded as the parties both have the ability to earn a living that is sufficient to pay their own bills." Nicole did not object to the district court's facts and findings, nor did she move for reconsideration. Our Supreme Court has held 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." *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 378, 855 P.2d 929 (1993).

***4** In *In re Marriage of Oliver*, No. 109,872, 2014 WL 802464, at *5 (Kan. App. 2014) (unpublished opinion), the appellant argued the district court improperly considered fault when dividing the parties' marital property. The appellant did not object before the district court, claiming the district court relied on the concept of fault, nor did the appellant file a motion to alter or amend the judgment. On appeal, the *Oliver* panel was "not persuaded that [the appellant] preserved the issues." 2014 WL 802464, at *6. We find the *Oliver* panel's holding persuasive.

Factually, the same situation exists here. Nicole did not object to the district court considering the length of the parties' relationship, nor did she move to alter or amend the judgment once the district court reached its decision. Nicole has failed to preserve her arguments; thus, we decline to address them. See *Gannon*, 303 Kan. at 733.

*Review of Nicole's unpreserved claims reflects no abuse of discretion.*

Even if we were to consider Nicole's arguments on appeal, we find she has not shown any error by the district court in the order dividing the marital estate or in setting the amount of maintenance.

A district court has broad discretion when adjusting the property rights of the parties involved in a divorce action. As a result, the district court's property division is reviewed for abuse of discretion. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). 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).



 

> "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." K.S.A. 2021 Supp. 23-2802(c).

Marital property is any property owned by the parties—including property acquired prior to the marriage. K.S.A. 2021 Supp. 23-2801(a). The district court is not required to evenly divide the property; instead, the primary consideration for the district court is how to divide the property in a just and reasonable manner. K.S.A. 2021 Supp. 23-2802(c)(10); *In re Marriage of Brane*, 21 Kan. App. 2d 778, 782, 908 P.2d 625 (1995).

Nicole does not argue the division of property was unjust or unreasonable—she instead focuses on her constitutional and misconduct arguments. But there is no evidence to suggest the district court was biased, committed misconduct, or violated Nicole's rights when it divided the property. Instead, we observe the district court treated Nicole and Jessica's divorce like it would treat any other—by following the law and dividing the property in a way it believed was just and reasonable.

The district court explicitly stated it considered the factors set out in K.S.A. 2021 Supp. 23-2802 to make the division of the marital estate. Nothing in the record suggests otherwise. Nicole fails to show the district court abused its discretion when it divided the marital estate. The district court's decision was not based on an error of law, an error of fact, and was not unreasonable. See *Biglow*, 308 Kan. at 893. Thus, we cannot find any abuse of discretion.

***5** Nicole also argues the district court erred in the amount it awarded for spousal maintenance because it considered the length of their relationship as opposed to the length of their marriage. Like the distribution of assets and debts, the district court has broad discretion to award spousal maintenance. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 483, 193 P.3d 504 (2008).

Under K.S.A. 2021 Supp. 23-2902(a), a district court "may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances." When considering whether to award spousal maintenance, the district court may consider factors similar to those set forth in K.S.A. 2021 Supp. 23-2802(c). See *In re Marriage of Hair*, 40 Kan. App. 2d at 484 (listing factors to consider when awarding maintenance) (citing *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 [1976]).

Here, the district court considered all the factors involved in this case. Based on the record before us, Nicole has failed to meet her burden to show the district court abused its discretion in its spousal maintenance award. The district court's decision was not based on an error of fact or law, and it was not unreasonable under the circumstances.

*Jessica's Request for Attorney Fees Is Denied*

After the parties' briefs were submitted, Jessica filed a motion requesting an award for attorney fees of $9,000 for the expense incurred in opposing Nicole's appeal. She asserts Nicole's arguments were not properly preserved for appeal, had no meritorious basis in fact or law, and Nicole's briefing misstated the controlling points of fact and law.

K.S.A. 2021 Supp. 23-2715 provides the district court may award costs and attorney fees in a divorce case as justice and equity may require. Under Supreme Court Rule 7.07(b)(1) (2022 Kan. S. Ct. R. at 51), we have discretion to award attorney fees in a case where the district court has authority to do so. Accordingly, we have authority to award attorney fees here. On appeal, whether and what amount of attorney fees to award "are for the appellate court alone to decide as part of its appellate jurisdiction." *Olsen v. Olsen*, 7 Kan. App. 2d 472, 476, 643 P.2d 1153 (1982). Based on our review of the parties' briefs, the arguments in Jessica's motion, and the accompanying documentation of her appellate attorney fees, we deny Jessica's request for an award of attorney fees because Nicole's arguments on appeal—while ultimately unpersuasive—are not so unavailing that an award of attorney fees would be just and equitable.

Affirmed.

**All Citations**

513 P.3d 504 (Table), 2022 WL 2904071

End of Document

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

142 P.3d 752 (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
Kristi Kay LAURIDSEN, Appellee,
and
Kent Arthur LAURIDSEN, Appellant.

No. 95,643.
|
Sept. 22, 2006.

Appeal from Montgomery District Court; Roger L. Gossard, judge. Opinion filed September 22, 2006. Affirmed in part and reversed in part.

**Attorneys and Law Firms**

Kent A. Lauridsen, appellant pro se.

Sally D. Pokorny, of Independence, for appellee.

Before JOHNSON, P.J., ELLIOTT and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Kent Arthur Lauridsen, proceeding pro se, appeals the district court's division of property, child support order, and custody and visitation order in the divorce action filed by Kristi Kay Lauridsen. We affirm in part and reverse in part.

Kristi filed the divorce petition on July 11, 2002, but the final hearing on the petition was not held until August 19, 2005. At least part of the 3–year delay in resolving the matter resulted from the parties' joint bankruptcy petition in March 2004.

The record does not contain any of the temporary orders for child support or maintenance. However, from the minute sheets we glean that the parties agreed to temporary child support of $1,124 per month and temporary maintenance of $1,372 per month. In October 2003, a temporary mediation agreement was filed, establishing joint legal custody of the two minor children with Kristi being the primary custodian. Kent had visitation every weekend, except for the fifth weekend. The agreement provided for a return to mediation after 6 months, although that apparently did not happen.

In January 2005, the parties agreed to terminate spousal maintenance. In July 2005, Kristi filed a motion to modify temporary support, citing to the termination of maintenance. Apparently, Kent agreed to increase temporary support to $1,508 per month for August and September 2005. Kristi contends the parties had not agreed on the effective date of the modification. Kent's attorney withdrew before an agreed order could be filed.

Kent appeared pro se at the August 19, 2005, divorce hearing. The district court ordered joint custody of the children with Kristi being the custodial parent. Kent was granted visitation every other weekend, alternate holidays, summer visitations, and one evening per week for 3 hours.

At the hearing, Kristi argued for a division of property which would include awarding her $15,853 as her share of the sale proceeds of certain restricted stock units (RSUs) and stock options (Options) which Kent had received as part of his employment. She also asked that the increased child support be retroactive to February 1, 2005, when her maintenance terminated. The court reserved ruling on a division of property and child support to permit Kent to submit further information.

Kent filed his pro se proposed division of marital property and a memorandum on September 6, 2005. He challenged Kristi's assertion that the income from the sale of RSUs and Options should be divided because they were earned and attributable to his postpetition employment. Kent also pointed out that a good portion of the stock sale proceeds was invested in the marital home with the plan to later recoup the equity in the residence.

In its October 7, 2005, memorandum decision, the district court ordered child support in the amount of $1,468 per month effective February 1, 2005. The district court determined that Kent was in arrears in the amount of $448 per month for 8 months or $3,584 through September 2005. The district court also found that the Options and RSUs flowed from Kent's employment during the marriage and while the couple lived together. The district court ordered Kent to pay Kristi $6,500 as her equitable and fair share of the $65,879 in proceeds



 

from sale of the stock paid to Kent during the marriage. The memorandum does not set forth a valuation date for any of the divided marital property.

***2** Inexplicably, a journal entry dated October 13, 2005, was filed, purporting to modify the temporary support to $1,508 per month with the issue of the amount of final child support to be determined at the final hearing. As noted, at that point, the final hearing had been conducted, and the district court had already made its decision on the final child support.

Kent timely appealed. In his pro se brief, Kent complains that (1) the district court erroneously included as marital property the RSUs and Options which were not earned until after the divorce petition was filed; (2) the district court erred in applying improper valuation dates to the marital property; (3) the district court retroactively increased his temporary child support obligation; and (4) the district court should have continued the parties' temporary custody and visitation arrangement.

*PROPERTY DIVISION*

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell,* 274 Kan. 984, 986, 58 P.3d 734 (2002). "Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. [Citations omitted.]" *Varney Business Services, Inc. v. Pottroff,* 275 Kan. 20, 44, 59 P.3d 1003 (2002).

However, Kent's argument is that the RSUs and Options were not marital property and, therefore, were not subject to division. He relies on K.S.A.2005 Supp. 23–201(b), which provides in relevant part:

> "All property owned by married persons, including the present value of any vested or unvested military retirement pay, ... shall become marital 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. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60–1610 and amendments thereto."

Therefore, to the extent our decision turns on statutory interpretation, our review is unlimited. *In re Marriage of Day,* 31 Kan.App.2d 746, 751, 74 P.3d 46 (2003).

Kent argues that the RSUs were not issued until after the divorce petition was filed and that the Options did not vest, and therefore had no value, until after the filing date. Therefore, pursuant to statute, those items were not marital property. Kristi counters with arguments that are, quite simply, unpersuasive.

Kent raises an intriguing question as to the extent unvested stock options constitute marital property subject to division, which would apparently be an issue of first impression in this State. One might also ponder whether one should be permitted to aver to a United States Bankruptcy Court that a marriage still exists in order to derive any marital advantage to be had in a bankruptcy proceeding, while contending in a State court divorce proceeding that the marriage has ceased to exist for purposes of acquiring marital property. However, we need not consider either question, because the record does not support Kent's assertion that his Options had no value prior to the July 11, 2002, filing date of the divorce petition.

***3** Kent and Kristi continued to file joint income tax returns during the pendency of the divorce, and their 2003 and 2004 returns were admitted into evidence at trial. Both returns include attachments entitled, "Statement of Taxable Income," from Kent's employer, which describe W–2 income from restricted/nonqualified transactions. Two of the four items on the 2003 W–2 recite a grant date of October 22, 2001, indicating that Kent obtained the property before the divorce petition was filed. Both items on the 2004 W–2 show the same grant date of October 22, 2001, *i.e.,* prepetition.

Interestingly, all four of the transactions involving the prepetition items reflect a price per share tax basis of $8.4350. That per share price is multiplied by the number of shares involved in the particular transaction, and the total is then



 

subtracted from the value of the stock on the transaction date to yield the amount on which taxes must be paid, *i.e.,* the profit. In other words, the transactions were reported as if Kent's stock options had a value of $8.4350 per share when he acquired them on October 22, 2001. The four transactions involved a total of 3000 shares with a tax basis, or acquisition value, of $25,305.

Kent's employer reported to the Internal Revenue Service that stock options worth $25,305 were granted to Kent prior to the filing of the divorce petition. Therefore, even if we accept Kent's arguments on the application of K.S.A.2005 Supp. 23–201(b), the marital estate included stock or stock options with a value of at least $25,305. Certainly, then, no reasonable person could find an abuse of discretion in awarding Kristi approximately one-fourth of the tax basis value of those stock options.

*VALUATION DATE*

Next, Kent argues that the district court chose a valuation date for the property to be divided which did not conform with the permissible dates set by statute. He contends that we should review the issue as the de novo review of the interpretation of statutes, citing *Pieren–Abbot v. Kansas Dept. of Revenue,* 279 Kan 83, 88, 106 P.3d 492 (2005).

K.S.A. 60–1610(b) provides that "[u]pon request, the trial court shall set a valuation date to be used for all assets at trial, which may be the date of separation, filing or trial as the facts and circumstances of the case may dictate." However, nothing in the record reflects that anyone requested the district court to set a valuation date. At trial, the valuation date was not discussed, and the court did not recite that it was setting a valuation date. Kent did not seek any posttrial relief under K.S.A. 60–260. In short, the issue is not properly before us. See *Board of Lincoln County Comm'rs v. Nielander,* 275 Kan. 257, 268, 62 P.3d 247 (2003) (issues not raised before district court cannot be raised on appeal).

Kent also complains that the district court miscalculated the total Options and RSUs receipts as $65,879, when the actual amount was $62,895. The difference is attributable to including a 2002 tax return as a stock option disbursement. Again, Kent did not complain at the district court level. Further, given the minimal amount awarded to Kristi, we perceive that the miscalculation, even if correct, would not have changed the outcome.

*RETROACTIVE CHILD SUPPORT*

***4** Kent challenges the district court's ruling that its October 7, 2005, final determination of child support would be effective retroactively to February 1, 2005. In some instances, the amount of child support is subject to an abuse of discretion standard. *In re Marriage of Karst,* 29 Kan.App.2d 1000, 1001, 34 P.3d 1131 (2001), *rev. denied* 273 Kan. 1035 (2002). Here, however, the issue is resolved via statutory interpretation, subject to unlimited review. See *In re Marriage of Day,* 31 Kan.App.2d at 751.

K.S.A. 60–1610(a)(1) provides, in relevant part:

> "The court may modify or change *any prior order,* including any order issued in a title IV–D case, within three years of the date of the original order or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstance need not be shown. The *court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed* with the court." (Emphasis added.)

Kristi filed her motion to modify the temporary support order on July 7, 2005. Clearly, the district court did not have the statutory authority to backdate the modification of the existing support order any earlier than August 7, 2005. Kristi's contention that temporary support orders are amenable to unlimited retroactive modification is simply contrary to the plain language of the statute. Moreover, her reliance on *Edwards v. Edwards,* 182 Kan. 737, Syl. ¶ 2, 324 P.2d 150 (1958), which predated the enactment of K.S.A. 60–1610(a)(1), is similarly unavailing.

Given Kristi's July 2005 modification motion, the district court could have made its $1,468 monthly support order effective for the months of August and September 2005. However, Kent concedes that he agreed to pay $1,508 for those 2 months and did, in fact, pay that amount for August. Kristi's brief refers us to the October 13, 2005, journal entry purporting to modify the temporary child support to $1,508 per month, albeit at that point the court had already set the final support at $1,468 retroactive to February 1, 2005. We are unclear as to the purpose of this after-the-fact journal entry

and are concerned that it would be filed at all, when a prepared journal entry was not signed by Kent's counsel at the time of the agreement.

Nevertheless, we will hold Kent to his concession that he owes $1,508 for August and September 2005. Therefore, the district court's child support order of $1,468 per month is effective prospectively from and including October 2005. Support for the months of August and September 2005 is to be computed at the agreed amount of $1,508. The temporary support for July 2005 and preceding months shall be at the amount originally ordered, *i.e.,* $1,124 per month. We reverse the district court and remand with directions to effect child support orders in conformance with this opinion.

*CHILD CUSTODY AND PARENTING TIME*

***5** Kent challenges the district court's denial of his shared custody request and the setting of his visitation. An appellate court utilizes an abuse of discretion standard of review when reviewing a district court's child custody determination. *In re Marriage of Rayman,* 273 Kan. 996, 999, 47 P.3d 413 (2002). "Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. [Citations omitted.]" *Varney,* 275 Kan. at 44. The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Molina v. Christensen,* 30 Kan.App.2d 467, 470, 44 P.3d 1274 (2001).

Kent requested shared custody, alternating each week with each parent. He contends the district court, in denying the request, improperly presumed that it was in the best interests of the children to be with their mother. The record does not support this argument. The district court opined that, unless the parties both agree and really want shared custody, such an arrangement does not work. The evidence of discord between the parties would support a finding that shared custody was not a viable alternative in this case.

Kent also complains about the absence of findings by the district court. Specifically, he contends that the district court obviously did not consider the statutory factors set forth in K.S.A. 60–1610(a)(3)(B), because it made no findings on those factors. However, Kent did not object to inadequate findings.

> " '[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.' *Hill v. Farm Bur. Mut. Ins. Co .,* 263 Kan. 703, 706, 952 P.2d 1286 (1998)." *Gilkey v. State,* 31 Kan.App.2d 77, 77–78, 60 P.3d 351, *rev. denied* 275 Kan. 963 (2003).

Finally, Kent complains that the district court ignored the fact that the mediated visitation schedule had worked successfully for 2 years. However, we note that Kent did not argue for a continuation of the existing plan, but rather sought to change to an alternating week shared custody plan. Further, one might question the success achieved by the prior arrangement. Nevertheless, the district court's parenting time order was reasonable and in no respects an abuse of discretion.

*ATTORNEY FEES*

As a final matter, we address the issue of Kristi's request for attorney fees. Her counsel followed the procedure to seek attorney fees under Supreme Court Rule 5.01 (2005 Kan. Ct. R. Annot. 32) and Supreme Court Rule 7.07(b) ( 2005 Kan. Ct. R. Annot. 56). The request contends that Kent's appeal is frivolous, that the district court's decision was based on substantial and competent evidence, and that the appellant's income is more than appellee's income.

***6** We find that Kent's appeal raised credible arguments. Indeed, as evidenced by our reversal on the issue, the district court clearly erred in awarding retroactive child support. Given that Kristi's counsel specifically requested the erroneous retroactive modification, we find that an award of attorney fees to Kristi would be particularly inappropriate on that point. Kristi's motion for attorney fees is denied.

Affirmed in part and reversed in part.

**All Citations**

142 P.3d 752 (Table), 2006 WL 2716064

End of Document

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



 

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Court of Appeals of Kansas.

In the MATTER OF the MARRIAGE OF
Leslie Lynn (Hayes) TRICKETT, Appellee,
AND
Kelly Frederick HAYES, Appellant.

No. 70,704
|
Opinion filed August 5, 1994.

Appeal from Johnson District Court; LARRY MCCLAIN, judge.

**Attorneys and Law Firms**

Barry R. Grissom, of Overland Park, for appellant.

Kathleen L. Sloan, of Moriarty, Erker & Moore, of Overland Park, for appellee.

Before ROYSE, P.J., GREEN, J., and STEVEN R. BECKER, District Judge, assigned.

MEMORANDUM OPINION

GREEN, J.:

***1** This suit involves a child support obligation that was increased by the trial court from $500 to $625 per month. Kelly F. Hayes contends the trial court lacked jurisdiction to increase the child support. In addition, Kelly contends the trial court erred because the petitioner, Leslie Lynn (Hayes) Trickett, failed to present any evidence of a material change of circumstances that would justify the raising of Kelly's child support obligation.

On February 4, 1992, the district court of Brazoria County, Texas, granted Leslie and Kelly a divorce. After awarding Leslie the residential custody of the parties' minor child, Lacy Lynn Hayes, the district court ordered Kelly to pay Leslie child support of $500 per month.

Having moved from Texas in August of 1991, Leslie and Lacy were living in Johnson County, Kansas, when the divorce became final. Kelly, however, remained a resident of Texas.

On August 7, 1992, Leslie filed a petition in Johnson County to establish jurisdiction for the purposes of increasing child support and enforcing certain other provisions of the Texas divorce decree.

On September 4, 1992, Kelly answered the petition, denying Leslie's allegations and submitting to personal jurisdiction of the court. Later, Kelly filed a motion to dismiss Leslie's claim for modification of child support, contending the trial court lacked subject matter jurisdiction over the claim. Following extensive brief writing by both parties and a hearing, the trial court on October 27, 1993, determined it had jurisdiction over the child support issue, but determined it lacked jurisdiction to enforce certain property division provisions under the Texas divorce decree.

Before addressing Kelly's lack of jurisdiction argument, we note our standard of review is unlimited because determining whether a trial court has jurisdiction is a question of law. *Hutchinson Nat'l Bank & Tr. Co. v. Brown*, 12 Kan. App. 2d 673, 674, 753 P.2d 1299, *rev. denied* 243 Kan. 778 (1988).

Kelly argues the trial court does not have subject matter jurisdiction to modify the Texas child support order. Both parties, however, agree that Kansas law is well settled on when a trial court has jurisdiction to enforce a parent's duty to support a child. For example:

> "A parent's duty to support may be enforced in civil proceedings in at least three ways. Depending upon the circumstances of the individual case, the proper remedy may be: (1) proceedings under K.S.A. [1993] Supp. 60-1610(a); (2) proceedings under K.S.A. 23-451; or (3) an action to enforce the common-law duty of support. [Citation omitted.] It is a fundamental proposition that Kansas district courts have been granted all original jurisdiction not otherwise provided by law. K.S.A. 20-301. The power to enforce the common-law duty of support of minor children is within the *parens patriae* jurisdiction of

the district court." *Boyce v. Boyce*, 13 Kan. App. 2d 585, 588, 776 P.2d 1204, *rev. denied* 245 Kan. 782 (1989).

Kelly argues that before a trial court may assume jurisdiction to enforce the common-law duty of support, there must first be a showing of a breach of the duty on his part. He contends that because he is in full compliance with the Texas child support order, no showing can be made that he has breached his common-law duty of support.

***2** A review of Kansas case law does not support Kelly's argument that a showing of nonsupport is necessary before a trial court can invoke its *parens patriae* jurisdiction. In *Warwick v. Gluck*, 12 Kan. App. 2d 563, 566, 751 P.2d 1042 (1988), this court, after finding the trial court had subject matter jurisdiction under its *parens patriae* authority, affirmed the trial court's refusal to increase the child support order of a foreign jurisdiction because of a lack of personal jurisdiction over the father. In reaching our decision in *Warwick*, we made no requirement that a finding of past due child support was necessary before the trial court could invoke its *parens patriae* jurisdiction.

Similarly, in *Keller v. Guernsey*, 227 Kan. 480, 488, 608 P.2d 896 (1980), the court imposed no requirement of a finding of past due child support upon a trial court invoking jurisdiction to entertain an action to enforce a parent's duty to support his or her children. See also *Dipman v. Dipman*, 6 Kan. App. 2d 844, 845-46, 635 P.2d 1279 (1981) (Trial court had jurisdiction to hear a nonresident father's action to decrease a foreign jurisdiction's child support order as long as it had personal jurisdiction over the parties.).

Thus, we find no showing of nonsupport is necessary before a trial court invokes jurisdiction to enforce a parent's common-law duty of support. Accordingly, the trial court had jurisdiction under its *parens patriae* jurisdiction to entertain Leslie's motion for modification of child support.

Kelly also argues the trial court lacked subject matter jurisdiction under K.S.A. 38-1301, the Uniform Child Custody Jurisdiction Act (UCCJA). However, an examination of the record shows Leslie never attempted to assert jurisdiction under the UCCJA. Further, the law is clear that the UCCJA does not confer upon a Kansas court subject matter jurisdiction to determine child support obligations. *Warwick*, 12 Kan. App. 2d at 566.

In the alternative, Kelly argues the trial court abused its discretion in exercising jurisdiction contrary to the principles of comity and the "clean hands" doctrine. In addressing the principles of comity, our court has stated:

> "Judicial comity is a principle by which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Comity is not binding on the forum state, but is a courtesy extended to another state out of convenience and expediency." *Boyce*, 13 Kan. App. 2d at 587.

Thus, it is within the trial court's discretion to determine whether it will decline jurisdiction under the principles of comity. "Judicial discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Stayton v. Stayton*, 211 Kan. 560, 562, 506 P.2d 1172 (1973).

Kelly argues the trial court abused its discretion because it refused to follow *Boyce*, which he contends is virtually indistinguishable from the facts here. In *Boyce*, we affirmed the trial court's dismissal of an action to enforce a common-law duty of support under the principles of comity and the clean hands doctrine.

In *Boyce*, we said:

> "An action to enforce a parent's common-law duty to support is equitable in nature. *Burnap v. Burnap*, 144 Kan. 568, 569, 61 P.2d 899 (1936). Therefore, the equitable doctrine of 'clean hands' discussed in *Perrenoud* should also apply to actions to enforce the common-law duty of support. If the plaintiffs in this case are acting in bad faith by invoking the jurisdiction of the Kansas courts, then the court could refuse to exercise its jurisdiction.
>
> ***3** "We conclude that, based upon principles of comity and the equitable 'clean hands' doctrine, the trial court did not abuse its discretion in refusing to exercise jurisdiction. This action was filed only three months after the Nebraska court denied the motion for child support. In the petition for support, plaintiffs did not refer to the previous judgment of the Nebraska court. Plaintiffs, disappointed by the Nebraska judgment, should not be allowed to move into this state and file a new action for support. To allow

> such conduct would only encourage 'forum shopping' and disregard of the judicial proceedings of other states, in violation of the principles of comity." 13 Kan. App. 2d at 590-91.

However, the facts here are distinguishable from *Boyce*. Unlike *Boyce*, Leslie had not filed a previous action to modify child support in Texas, nor did she omit reference to her Texas divorce decree in her petition before the trial court. Consequently, we conclude the trial court did not abuse its discretion in entertaining Leslie's action.

Finally, Kelly argues the trial court erred in modifying the existing child support order without finding a material change in circumstances. However, "[a] point not raised before or presented to the trial court cannot be raised for the first time on appeal." *Diversified Financial Planners, Inc. v. Maderak*, 248 Kan. 946, 948, 811 P.2d 1237 (1991). Furthermore, 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, omission 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, Syl. ¶ 3, 855 P.2d 929 (1993). Because Kelly failed to argue to the trial court that a material change of circumstances was needed before the trial court could modify the Texas child support order, we will not consider this issue for the first time on appeal.

Affirmed.

**All Citations**

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