18-119021-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN RE THE MARRIAGE OF:

DANA RAYMOND TOWLE, Petitioner / Appellant,

vs.

LOUISE C. LÉGARÉ, Respondent / Appellee,
and
MATHIEU BONIN, Respondent-Substitute Party / Appellee.

On Appeal from the District Court of Wyandotte County
Honorable Timothy Dupree, District Judge
District Court Case No. 2015-DM-002778

CORRECTED BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Kan. #25902
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
DANA RAYMOND TOWLE

ORAL ARGUMENT REQUESTED

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Nature of the Case

This is Husband's appeal in an action for legal separation. Wife answered his petition but filed no counterpetition. She then was diagnosed with terminal cancer. Husband later moved to voluntarily dismiss his petition, which the court granted, and he filed for divorce in Missouri. But while Wife's counsel had notice of the dismissal order, no motion to dismiss actually was on file because it had not been correctly e-filed.

Months later, Wife moved to set aside the dismissal, arguing the lack of a motion was fatal to it. She also filed a counterpetition without leave of court. Husband conceded a motion had been necessary, and orally moved to dismiss instead. Through a new judge, the court first *sua sponte* allowed Wife to file her counterpetition late, and then denied Husband's oral motion.

The parties then orally negotiated a separation agreement, and at a hearing each testified to it. The court made a docket entry approving an agreement, but on both parties' request it ordered Wife's counsel to submit a journal entry detailing the agreement.

Months later, with no journal entry yet submitted, Wife died. Husband then moved to dismiss the action, arguing it abated on her death without a journal entry. The court denied this. Over Husband's objection, it granted the request of Wife's Son from a prior relationship to be substituted for her.

On Son's counterpetition, after a further hearing the then court held there was an enforceable legal separation agreement between Husband and Wife and enforced it against Husband and in Son's favor. It entered a journal entry memorializing what it said was that agreement. Husband appeals.

Statement of the Issues

First issue: The trial court abused its discretion in denying Husband's March 2017 oral motion to dismiss his petition for legal separation without prejudice and instead thwarting it by first *sua sponte* granting Wife leave to file a counterpetition out of time. As Wife's counterpetition was filed without leave and out of time under K.S.A. §§ 60-207(a), 60-212(a)(1), and 60-213, Husband moved to dismiss his petition before Wife obtained leave to file her counterpetition out of time, and Wife faced no legal prejudice from granting Husband's oral motion to dismiss, under K.S.A. § 60-241(a)(2) there were no grounds for the trial court to exercise its discretion to do anything other than permit Husband to dismiss his petition without prejudice.

Second issue: The trial court erred in denying Husband's motion to dismiss the action after Wife's death. Under K.S.A. § 60-258, as a journal entry is required for there to be a judgment in a case, no journal entry yet had been entered at the time of Wife's death, and the law of Kansas is that an action for legal separation abates upon the death of one party before judgment, even if an oral separation agreement already had been approved, the trial court lacked jurisdiction to proceed once Wife died.

Third issue: The trial court abused its discretion in substituting Wife with Son, rather than the administrator or executor of Wife's estate. Under K.S.A. § 60-225(a), if a claim or defense survives a party's death, only the administrator or executor of that party's estate, rather than her heirs, can be substituted for that party.

Statement of Facts

A. Background

Petitioner/Appellant Dana Towle ("Husband") and Respondent/Appellee Louise Légaré ("Wife") were married in June 1986 or July 1987 in Union, Missouri (R. 1 at 16, 19, 39, 66). Wife originally was from Montreal, Quebec (R. 1 at 38). During the marriage, the parties accumulated significant assets, including real estate in Kansas, Missouri, and Quebec (R. 7 at 6).

No children were born of the marriage (R. 1 at 16, 19), but Wife had a son from a previous relationship before the marriage, Respondent-Substitute Party/Appellee Mathieu Bonin ("Son") (R. 3 at 42; R. 4 at 14; R. 6 at 80). At the time of the proceedings below, Son lived in Quebec (R. 1 at 113, 133).

B. Proceedings below

1. Initial proceedings and Husband's voluntary dismissal

In November 2015, Husband filed a petition for legal separation in the District Court of Wyandotte County, alleging he was a resident of Edwardsville and the parties' marriage relationship had been destroyed (R. 1 at 16). The case was assigned to the Honorable Daniel Duncan, District Judge (R. 1 at 27). Wife timely answered, admitting she lived in Edwardsville for more than 90 days but denying Husband had, and admitting the marriage relationship was destroyed (R. 1 at 19). Wife did not include any counterpetition for legal separation or other counterclaim (R. 1 at 19-20).

In May 2016, Husband and Wife agreed to a temporary order to allow the parties to live separately during the action, which the court entered (R. 1 at 22-23). Among other things, the order provided Husband would continue

to pay Wife's living expenses, Wife would continue to possess the parties' Edwardsville residence, and no party would be dispossessed of any property without a joint written agreement or court approval (R. 1 at 23).

In June 2016, Wife "was diagnosed with advanced lung cancer (Stage 4, metastatic)" (R. 1 at 38).

On October 26, 2016, Husband's counsel electronically filed a motion to dismiss his petition for legal separation without prejudice, attaching a proposed order (R. 2 at 5-6). But because the word "proposed" was in the title of the proposed order, court staff rejected the filing and directed Husband's counsel to correct it (R. 2 at 6). The next day, Husband's counsel refiled the now correctly-titled "order but failed to refile the motion" (R. 2 at 6). Husband's counsel later told the court that court staff only told him to correct and refile the proposed order, not the motion (R. 2 at 9-10).

"[E]ither [Husband's counsel] misunderstood the instruction or were given the wrong instruction, whichever way, but … there was not a motion" to dismiss filed (R. 2 at 6). None appears in the record (R. 1 at 3). Wife's counsel stated she never received notice of such a motion (R. 2 at 10-11).

On October 27, Judge Duncan granted Husband's motion to dismiss without prejudice, and then on October 31 signed a docket entry dismissing the case (R. 1 at 27-29). Wife's counsel admitted these orders were entered into the e-filing system and served on her (R. 2 at 10). But she later claimed she "believed this matter had been dismissed in error" (R. 1 at 35).

Husband then filed an action for dissolution of the marriage in the Circuit Court of Jackson County, Missouri (R. 1 at 287; R. 2 at 19; R. 3 at 22).

2. Wife's setting aside of dismissal and granting Wife leave to file counterpetition

On March 2, 2017, Wife moved the court under K.S.A. § 60-260(b) to set aside the October 2016 dismissal order (R. 1 at 31). She argued that because Husband had not filed a motion to dismiss, the order violated K.S.A. §§ 241(a) and 207(b), and so had to be set aside as "the result of surprise, excusable neglect, misrepresentation or misconduct by an opposing party" (R. 1 at 33-35). Wife also argued the dismissal had been Husband's ruse,

> knowing that [her] medical condition prevents [her] from easily participating in the litigation process, knowing that a delay in the entry of the final division of assets herein and [her] untimely death would allow [him] to receive all of the parties' assets herein thereby unjustly enriching [him], and knowing that due to the advanced nature of [her] terminal cancer [she] cannot file a new Petition and wait the statutorily required time for entry of a Decree.

(R. 1 at 35-36).

Wife attached a three-week-old letter from a physician, which attested to her condition and stated she "desire[d] to return to her family and home in Canada for her remaining months of life" and "it is of the most urgent necessity that she gets her divorce settled so that she has funds to move, get medical care, and live with her family that can support and care for her" (R. 1 at 38). Citing this, Wife argued "[i]t is in the interest of substantial justice that this Court set aside its Dismissal Order entered herein as it is necessary for Respondent to complete the division of the parties' assets and return to her son prior to her death" (R. 1 at 36).

Husband opposed Wife's request to set aside the dismissal (R. 1 at 51). He denied many of her allegations (R. 1 at 51-56) but admitted he had not

correctly filed a motion to dismiss (R. 1 at 52). But he argued this was not grounds to set aside the dismissal for various reasons (R. 1 at 56-57).

Before the trial court heard Wife's motion to set aside the order of dismissal, without that order having been set aside, and without requesting or obtaining leave of court, on March 6, 2017 Wife filed what she titled a "Counter Petition [*sic*] for Legal Separation" (R. 1 at 39).

On March 27, the court, now through the Honorable Timothy Dupree, District Judge, heard Wife's motion to set aside the order of dismissal (R. 2). No one testified, and the court heard arguments of counsel (R. 2). It found Husband had not filed a motion to dismiss, so Judge Duncan had not had authority under § 60-241 to grant a voluntary dismissal (R. 2 at 14-15).

In response, Husband immediately made an oral motion to dismiss the action (R. 2 at 19). Wife argued Husband now could not obtain this, reasoning that she believed the setting aside of the dismissal related back to the previous October, and she now had filed a counterclaim (R. 2 at 20). Husband responded that the counterclaim was out of time regardless, and Wife would need leave of court to file it at this point (R. 2 at 20-21). Wife disputed that this was so, arguing her counterclaim was immediately timely without leave (R. 2 at 21-22). Husband argued that a counterclaim only could be filed in an answer, and at this point Wife was out of time to amend her answer without leave (R. 2 at 22-23).

Wife never requested to file her counterclaim out of time, but the court asked her, "assuming the requirement would be 21 days after the petition, what would your arguments be … as far as being given the opportunity to file

your counterclaim out of time?" (R. 2 at 24). She responded that the parties had been negotiating, had expected to resolve the case, but had not, and so she needed to file a counterpetition (R. 2 at 24-25).

The court held it was "not 100 percent sure that there is a deadline or requirement for the counterclaim to be filed" but "assuming arguing though [*sic*] that there is a timeframe the Court is going to find that there is an exception under the circumstances of this case" "if it's necessary for appellate purposes" and "allow the respondent to file their counterclaim out of time" "as of today, not as of March the 6th" (R. 2 at 28-30). It said it recognized this still "may prejudice the respondent in this case due to her health; however, the Court has nothing to do with that" (R. 2 at 30).

The court then denied Husband's oral motion to dismiss (R. 2 at 34). Husband's counsel asked to withdraw the motion to dismiss "so that we can proceed on our petition", and the court agreed that "for purposes of today's hearing your … motion to dismiss is withdrawn … [f]or journal entry purposes" (R. 2 at 34). It set the case for trial on April 18, 2017 (R. 2 at 38). Husband then filed an answer to Wife's counterpetition (R. 1 at 66).

The court's docket entry recounted the hearing as, "Court grants motion to set aside dismissal. Petitioner makes oral motion to dismiss, then withdraws the motion. Court grants withdrawal of oral motion. Respondent moves to file counterclaim out of time. Court grants the same, over objection. Court gives Petitioner 21 days to answer counterclaim" (R. 7 at 4).

3. April 2017 hearing

When the case came on for trial in April 2017, the parties announced they had reached an agreement as to their legal separation (R. 3 at 5).

Husband testified and orally confirmed the division of assets and debts to which the parties had agreed, and that he would pay Wife maintenance (R. 3 at 9-18). He stated he agreed to pay a $227,000 equalization payment to Son, if that is who Wife designated as her heir (R. 3 at 18). He stated he agreed to dismiss his Missouri case, which still was pending, within ten days (R. 3 at 22). Wife also confirmed this property division in Exhibit 101 (R. 3 at 36-37). The parties reduced the division to writing in Exhibit 101, which is in the record at R. 7 at 6, and which the court accepted (R. 3 at 36-38).

The court said it would "do simply a short docket sheet of today's hearing. It won't lay out anything, but I will attach [Exhibit 101] to be filed with the docket sheet" (R. 3 at 40). The court asked, "Do we need to make any specific findings concerning the legal separation of this matter?" and Wife's counsel stated, "I don't think that we need to do findings regarding the legal separation" but that there should be "detailed findings or proposed journal entry [*sic*] regarding" certain property "as well as the maintenance payments" (R. 3 at 40-41). Husband's counsel agreed (R. 3 at 41).

Wife also stated she wanted Son to receive the $227,000 equalization payment if she passed away, and then to Son's son, her grandson, after the grandson reached 25 years of age, and requested that "the documents" reflect this (R. 3 at 41-43). Her counsel told her she was not sure "we can effectuate

everything that you want here" and the two of them could discuss "the legality of that" later (R. 3 at 42-43).

The court then stated it accepted the parties' agreement, found the agreement was "made in fair negotiations" and "equitable and is fair" (R. 3 at 43). It stated it was "going to adopt the agreement of the parties as its own and make that the order of the court" "effective today" (R. 3 at 43-44).

The court then said, "I'm just going to do a docket sheet saying the Court adopts the agreement of its own and basically that the Court's Order per journal entry and attached exhibit, and so then I guess you-all [*sic*] can get together and get an actual journal entry filed" (R. 3 at 45). It said,

> You can make it however you want it, and, if you want to attach a copy of this to the journal entry, and just have the parties sign it after this is attached to it or make this supplemental to it and then make it as detailed as you would like.
>
> I mean, pretty much this is my order and whatever you-all [*sic*] agree to as long as it's consistent with this whatever format you put it in, doesn't make me any big bit of difference.

(R. 3 at 45-46).

Counsel for both parties discussed wanting to list all the maintenance payments out and detailing each property with the legal description (R. 3 at 46). Wife's counsel requested ten days to file the proposed journal entry, and the court responded,

> That's fine, however long it takes. What we're going to do is do a docket sheet today. Essentially, I'll attach this to it, and we'll have a record. My order is effective as of today.
>
> So even if she, God forbid, passes prior to the journal entry, the order is effective when given. So we'll just wait on that.

(R. 3 at 46-47).

The court then entered a docket entry stating,

> Parties reach agreement and presents Testimony [*sic*] of agreement. Respondent introduces Exhibit 101, which is an agreed spreadsheet of all property owned by the Parties.
>
> After hearing all testimony and the agreements of the parties the court finds the agreement to be fair and equitable. The Court adopts the agreement, and makes it the court's order. Respondent to prepare J.E. of today's hearing. Respondent's Exhibit 101, attached hereto, is adopted as entire property list [*sic*] of the parties.

(R. 7 at 5).

Husband dismissed the Missouri case after the April 2017 hearing (R. 6 at 27, 38).

4. Wife's death, denial of Husband's motion to dismiss, and substitution of Son for Wife

By July 1, 2017, Wife's counsel had not filed any proposed journal entry (R. 1 at 7-8). That day, Wife died (R. 1 at 72, 106-07).

In a letter to the court on July 5, Husband's counsel reported that he and Wife's counsel had agreed he would draft the journal entry and forward it to her, which he had done on May 8 but never heard back (R. 1 at 72). Invoking K.S.A. § 60-258 and two appellate decisions, Husband argued "the failure to have a signed journal entry at the time of the death of one of the parties, resulted in the parties still being married and the court being unable to enter a journal entry following the death of one of the parties" (R. 1 at 72-73). He asked the court to "take no further action on this matter and dismiss this matter due to the passing of" Wife (R. 1 at 73).

On July 14, Husband filed proof of Wife's death, attaching a certified death certificate (R. 1 at 106-07). Five days later, he moved to dismiss the action, arguing that under § 60-258, the failure to have a journal entry on file at the time of Wife's death meant the legal separation action abated at that time, so the action had to be dismissed (R. 1 at 109-10). Wife opposed this, though without making any specific counterargument (R. 1 at 111).

On August 31, Wife's counsel and Husband appeared at a hearing over Husband's motion to dismiss (R. 4 at 5).

Before hearing arguments on that motion, as a "preliminary matter" Wife's counsel made "an oral motion under K.S.A. 60-225(a) to substitute [Son] as a successor or a representative of [Wife]'s interests" (R. 4 at 6). Counsel said she "was retained by [Son] on July 31st of 2017 and I think the statute is very clear that once an oral -- once a motion for substitute of party [*sic*] is made by the successor or representative, that the Court must grant that motion" (R. 4 at 6).

Husband opposed this, arguing that the action and Wife's claim extinguished on her death, so no one could be substituted for her at all, and even if it did not only Wife's estate could be substituted for Wife under § 60-225(a) (R. 4 at 6-8). Son confirmed at a hearing in November 2017 that he was not Wife's executor (R. 6 at 91). Wife's counsel disputed that only Wife's estate could be substituted in, arguing that "[a] motion for substitution may be made by any party or by the decedent's successor or representative", the statute "doesn't … specifically provide that there has to be an estate open", and "given that [Son] is [Wife's] son and that the opposing party in this

litigation would have been her spouse, I don't know who else would be an appropriate successor or representative" (R. 4 at 8-9).

The court granted Wife's counsel's motion and stated it would "allow [Son] to be substitute party [*sic*] over the objection … of" Husband (R. 4 at 12).

The court then took up Husband's motion to dismiss (R. 4 at 13). First, Husband initially took the stand, and on the court's and his counsel's questioning he acknowledged that he had testified at the hearing back on April 18 that he and Wife had reached an agreement (R. 4 at 19-20). On questioning by Wife's counsel, now representing Son, Husband also acknowledged that he made total payments to Wife of $5,000 per month both before and after April 18, paid her credit card bills before and after April 18 (R. 4 at 20-23).

Husband then argued the case had to be dismissed because the court lost jurisdiction on Wife's death without a journal entry (R. 4 at 23, 26). Son opposed this, arguing that a journal entry is a record of judgment but is not the judgment itself, it was clear from the April 2017 hearing that there was an oral binding agreement placed on the record and that the court adopted, and the court's docket entry was sufficient to constitute a judgment form that also qualified as the entry of a judgment (R. 4 at 32, 36, 41). Husband disputed this, arguing the docket sheet "in no way can it be treated as a journal entry or a judgment entry when the Court's directing that [a journal entry] be prepared" (R. 4 at 39).

The court denied Husband's motion to dismiss (R. 4 at 45). It stated, "I do believe the docket sheet as referred to by counsel in his arguments, it does, in fact, contain the requisite information that a journal entry will contain absent the specific details" (R. 4 at 42). It "note[d] that this Court itself expedited matters and moved other hearings and cases out of the way because of [Wife]'s illness to try to bring a final conclusion to this matter prior to her death" (R. 4 at 43). It stated, "what this Court expected was a more thorough, more exhaustive journal entry" (R. 4 at 45). Finally, it stated, "in hindsight, perhaps we did not do it according to the rule of law and if that be the case, then the Court of Appeals will make the right decision and I'll be reversed and [Husband] will have the benefit of the law" (R. 4 at 45).

Son's counsel then offered just to submit a proposed journal entry memorializing the agreement but replacing Wife's name with Son's (R. 4 at 48). The court agreed and ordered her to submit it "within 72 hours" (R. 4 at 49). It noted that Husband's "notice of appeal" then would "need to be timely made" (R. 4 at 49).

5. Further proceedings

No proposed journal entry was submitted within 72 hours, nor was one proposed at all by mid-September 2017 (R. 1 at 8-9).

Instead, on September 14, Son filed what he titled a "Counter Petition [*sic*] for Enforcement of Marital Settlement Agreement", alleging counts against Husband for "breach of contract", "unjust enrichment", and "equitable estoppel", collectively alleging Husband had breached the April separation agreement and Son, as Wife's successor, was owed damages, attorney fees, and costs for this (R. 1 at 113-20). Husband denied and opposed all of this,

arguing among other things that there was no enforceable agreement once Wife died without a journal entry having been entered (R. 1 at 144-56).

That same day, despite the court already having denied Husband's motion to dismiss (R. 4 at 45), Son filed suggestions in opposition to it (R.1 at 123). Alternatively, he sought the court to enter a "judgment form nunc pro tunc" "to correct any error necessary to give the court's order and judgment full force and effect as of April 18, 2017 as ordered on April 18, 2017" (R. 1 at 129-32). Husband opposed all of this (R. 1 at 133-43).

The court took these matters up at a hearing on November 15, 2017 (R. 6). First, it denied Son's request for a nunc pro tunc entry, stating that while it had intended the April 18 docket entry to be a final decision, it had been ignorant of the law requiring a journal entry or judgment form, the docket entry was not a journal entry or judgment form but "was a trial docket or what we call here in Wyandotte County a docket sheet", it "expected another document that would have the title journal entry on the document", and if the docket entry was final the court still had not given any notice of the right to appeal that entry (R. 6 at 12-14). But it also again refused to dismiss the case due to Wife's death and instead took up Son's request to enforce a settlement agreement (R. 6 at 14).

The court then heard testimony from Husband and Son (R. 6 at 14, 80).

Husband did not dispute his testimony at the April 18 hearing (R. 6 at 16-21). He confirmed that since the April 18 hearing, he had taken care of the properties assigned to him in Exhibit 101, Wife had resided in one of the Canadian properties assigned to her in Exhibit 101 until her death, he had

paid her credit card bills and paid her maintenance and paychecks, and he had dismissed his Missouri action for dissolution of marriage (R. 6 at 21-38).

But Husband also stated that it was not his "understanding that every single little detail [of the agreement] was laid out in front of this court" at the April 18 hearing, and instead "[l]ots of details still missing [*sic*]", which "would be filled in and" be reduced to writing, but that never happened because he and his attorneys proposed a full written agreement in the form of a journal entry but Wife and her counsel never approved it or submitted it to the court (R. 6 at 44-45, 55-56, 75, 78). Son testified that while he had contact with Husband after the April 18 hearing and before Wife's death, Husband never told him "there were documents that needed to be signed by" Wife "to finalize" anything (R. 6 at 88). But Son also stated Husband never told him there had been an agreement reached with Wife, nor had he ever seen Exhibit 101 or an agreement (R. 6 at 92-93, 97, 100).

The court found there was a meeting of the minds between Husband and Wife at the April 18 hearing, they made an agreement there, "all the items that the parties had, all the property was testified to on that date", and so it would "grant [Son's] motion and enforce this agreement between the parties" (R. 6 at 135). It directed "that a journal entry reflecting the agreement be prepared", and that the journal entry include "not only Exhibit 101" but also "every item that was testified to" in the April 18 hearing (R. 6 at 136). It held it was "relying on the fact that this was, in fact, a settlement agreement" and on the decision in *In re Estate of Loughmiller*, 229 Kan. 584, 629 P.2d 156 (1981) (R. 6 at 136).

By February 2018, no journal entry yet had been prepared (R. 1 at 12). So, on February 14, 2018, Husband moved for a mistrial or alternatively to dismiss Son's counterpetition, setting it for hearing March 16 (R. 1 at 12, 240).

Then, on February 27, Son's counsel submitted a proposed journal entry, which the court signed without amendment (R. 1 at 263, 276; App. at A1). It denied Husband's July 2017 motion to dismiss (R. 1 at 281; App. at A6). It granted Son's counterpetition to enforce and stated it therefore "enter[ed] judgment in accordance with said agreement" (R. 1 at 281; App. at A6). It then stated what property and debts Husband and Wife were to receive, ordered Husband to pay Wife an equalization payment of $227,000 payable over 15 years at 2% annual interest ending in a balloon payment of five years' worth, ordered Husband to pay Wife nonmodifiable "maintenance (alimony)" of $5,000 per month until "November 2026 or upon the death of either party", and ordered Husband to dismiss his Missouri action (R. 1 at 282-87; App. at A7-12). Another copy of Exhibit 101 was attached (R. 1 at 289; App. at A14).

Husband then timely appealed to this Court (R. 1 at 293).

Argument and Authorities

First issue: The trial court abused its discretion in denying Husband's March 2017 oral motion to dismiss his petition for legal separation without prejudice and instead thwarting it by first *sua sponte* granting Wife leave to file a counterpetition out of time. As Wife's counterpetition was filed without leave and out of time under K.S.A. §§ 60-207(a), 60-212(a)(1), and 60-213, Husband moved to dismiss his petition before Wife obtained leave to file her counterpetition out of time, and Wife faced no legal prejudice from granting Husband's oral motion to dismiss, under K.S.A. § 60-241(a)(2) there were no grounds for the trial court to exercise its discretion to do anything other than permit Husband to dismiss his petition without prejudice.

Standard of Appellate Review

"Whether a voluntary dismissal should be granted under K.S.A. 60–241(a)(2) is within the sound discretion of the trial court. Unless the defendant will suffer some plain legal prejudice other than the prospect of a second action, the dismissal should be allowed." *Estate of Nilges v. Shawnee Gun Shop, Inc.*, 44 Kan.App.2d 905, 908, 242 P.3d 1211 (2010) (citing *Gideon v. Bo-Mar Homes*, 205 Kan. 321, 325, 469 P.2d 272 (1970)). "It is no bar to dismissal that plaintiff may obtain some tactical advantage thereby, or that the defendant may lose the defense of a period of limitation." *Gideon*, 205 Kan. at 326, 469 P.2d 272 (internal citation omitted).

A judicial action also constitutes an abuse of discretion if it is based on an error of law. *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011). Whether an exercise of judicial discretion is based on an error of law is a question of law subject to unlimited review. *State v. Garcia*, 295 Kan. 53, 61, 283 P.3d 165 (2012).

* * *

Record Location Where Raised

Husband's oral motion to dismiss is at R. 2 at 19. The trial court's *sua sponte* suggestion that Wife could be given the opportunity to file a counterpetition out of time is at R. 2 at 24. Husband's opposition to that is at R. 2 at 26-28. The court's order allowing Wife to file a counterpetition out of time is at R. 2 at 28-30. The court's order denying Husband's oral motion to dismiss is at R. 2 at 34.

* * *

The law of Kansas is that a petitioner's motion for voluntary dismissal under K.S.A. § 60-241(a)(2) must be granted unless the respondent shows legal prejudice, and the prospect of a second suit or a tactical advantage to the petitioner are insufficient. Otherwise, denying the petitioner's motion is an abuse of discretion. And a counterclaim cannot defeat a voluntary dismissal unless it is properly filed before the petitioner files his motion to dismiss. Husband moved under § 60-241(a)(2) to dismiss his petition before Wife sought or obtained leave to file a counterpetition out of time. Nonetheless, without Wife showing any legal prejudice, the court denied Husband's motion. This was an abuse of discretion.

A. Under § 60-241(a)(2), a district court only has discretion to deny a motion to voluntarily dismiss a petition if the respondent can show legal prejudice, and the prospect of a second suit or a tactical advantage to the petitioner are insufficient.

K.S.A. § 60-241(a)(2) provides that after an opposing party serves an answer or a motion to dismiss,

> an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

Because this statute mirrors Fed. R. Civ. P. 41, when interpreting it decisions construing that federal rule "are persuasive and would appear to have more than usual weight as authority." *Gideon*, 205 Kan. at 325, 469 P.2d 272.

While § 60-241(a)(2) leaves whether to grant a dismissal to "the sound discretion of the court", the law of Kansas is that "unless the defendant will suffer some plain legal prejudice, the dismissal should ordinarily be granted." *Patterson v. Brouhard*, 246 Kan. 700, 705, 792 P.2d 983 (1990). This is because the statute's provision authorizing the trial court to condition the terms of the dismissal allows the trial court to "alleviate any harm to the [opposing party] which might result from dismissal …." *Id.* (quoting *Cheek v. Hird*, 9 Kan.App.2d 248, 251, 675 P.2d 935 (1984)).

Because of these principles, "dismissal is more of a right of the plaintiff, subject to the impositions of reasonable conditions." *Estate of Nilges*, 44 Kan.App.2d at 908, 242 P.3d 1211. So, if that required "plain legal prejudice" is absent, then the district court abuses its discretion in denying the motion to dismiss. *Gideon*, 205 Kan. at 326, 469 P.2d 272.

To constitute the "plain legal prejudice" necessary to defeat the motion to dismiss, the "mere prospect" of another lawsuit, a "tactical advantage" to the plaintiff, and even the opposing party "los[ing] the defense of a period of limitation" all are insufficient. *Id.* Instead, the question is "whether the

dismissal would be conducive to the fair administration of justice; whether undue expense, inconvenience, or prejudicial consequences to defendants would be involved; and whether reasonable terms and conditions are just to the rights of the defendants." *Patterson,* 246 Kan. at 706, 792 P.2d 983.

Under these principles, all the only four published Kansas appellate decisions reviewing the merits of decisions on motions under § 60-241(a)(2) have resulted in the motion being granted. In two, the Court affirmed the trial court's decision to grant the dismissal. *See Cheek*, 9 Kan.App.2d at 248, 675 P.2d 935; *Burke v. Schroth*, 4 Kan.App.2d 13, 601 P.2d 1172 (1979); *see also Am. States Ins. Co. v. Int'l Educ. Servs., Inc.*, No. 90208, 2003 WL 22345480 (Kan. App. 2003) (unpublished) (App. at A15). In the other two, the Court reversed the trial court's decision denying the motion. *See Estate of Nilges*, 44 Kan.App.2d at 908, 242 P.3d 1211; *Gideon*, 205 Kan. at 321, 469 P.2d 272.

In *Estate of Nilges*, the plaintiffs brought a wrongful death claim against the defendant in Kansas. 44 Kan.App.2d at 906, 242 P.3d 1211. They also had filed the same wrongful death claim in Missouri, filing the Kansas action only in response to a dismissal for lack of personal jurisdiction in Missouri, which was being appealed, hoping to take advantage of Kansas's savings provisions should their Missouri action ultimately fail. *Id.* at 907. Shortly after filing the Kansas action, before any discovery had been undertaken, and after the defendant answered and moved to dismiss for failure to state a claim, the plaintiffs moved to dismiss their petition without prejudice under § 60-241(a)(2). *Id.* After the defendant objected, the trial

court denied their motion and instead granted the defendant's motion to dismiss with prejudice. *Id.*

This Court reversed, holding "that because the defendant would have suffered no legal prejudice had the trial court sustained the plaintiffs' motion for an order dismissing their action without prejudice", it "abused its discretion in denying the motion." *Id.* at 906. There were no

> grounds on which the defendant could claim to be prejudiced in its substantial rights. First, this suit had not proceeded beyond the initial stages of action and was barely a month old when the plaintiffs sought voluntary dismissal of their action without prejudice. Second, the record shows that no counterclaim was advanced by the defendant against the plaintiffs. Third, the record further discloses that no discovery or pretrial conference had been conducted in this case.

Id. at 910. And the plaintiffs' refiling the Kansas action or proceeding with the Missouri action could not be the necessary prejudice, as "the filing of a second lawsuit" is not sufficient. *Id.* at 909. Therefore, the Court "reverse[d] and remand[ed] with directions that the trial court vacate the judgment … and enter an order dismissing the action without prejudice …." *Id.* at 906, 912.

The Supreme Court reached the same result in *Gideon*, 205 Kan. at 321, 469 P.2d 272. The plaintiffs sued two defendants seeking statutory penalties for usurious interest. *Id.* at 322. Eight months after one of the defendants answered, one month after the other defendant answered, and after some discovery had taken place, the plaintiffs moved under § 60-241(a)(2) to dismiss their petition without prejudice. *Id.* at 323-24. The defendants opposed the motion, and after argument the trial court denied it.

Id. at 324 Instead, it granted the defendants summary judgment. *Id.* (Though the Supreme Court's decision does not explain why, it appears that the law of Kansas at the time allowed oral summary judgment motions. *Id.*)

Just as this Court did in *Estate of Nilges*, the Supreme Court reversed, holding "the defendants would suffer no cognizable 'legal prejudice' had the district court sustained the plaintiffs' motion for an order of dismissal without prejudice, and that it abused it discretion [*sic*] in not so ruling." *Id.* at 328. "[N]o other interests intervened by means of third party proceedings, nor was a counterclaim advanced by either defendant against the plaintiffs." *Id.* at 326. "[A] pretrial conference had not been had …." *Id.* Only minor discovery had been taken, and only between the plaintiffs and one defendant. *Id.* "[I]t cannot be said that" the proceedings had "reached an advanced stage." *Id.* Therefore, the Court "remanded with directions that the district court vacate the judgment heretofore entered and enter an order permitting the plaintiffs to dismiss their action without prejudice …."

Conversely, unlike in *Estate of Nilges* or *Gideon*, in the only Kansas decision affirming the denial of a motion to dismiss under § 60-241(a)(2), *Corl v. Kan. Heart Hosp.*, the motion came two and a half years after the plaintiff filed his medical malpractice case, after extensive discovery by the defendants, including expert discovery and depositions, and while the pretrial conference had not yet occurred, the parties had exchanged pretrial questionnaires. No. 95774, 2007 WL 2410113 at *5 (Kan. App. 2007) (unpublished) (App. at A20). Moreover, the plaintiff had not diligently pursued his case, as during that two-and-a-half years he had not conducted

any written discovery or taken any depositions. *Id.* The Court agreed with the district court that "granting [the plaintiff]'s motion to dismiss without prejudice would prejudice the defendants because the case had been pending for 3 years, it had already been either set for trial or was in the finalization process, and discovery had been completed." *Id.* at *1 (App. at A17-18).

B. The district court abused its discretion in denying Husband's oral motion at the March 2017 hearing to voluntarily dismiss his petition, because Wife could not show any requisite legal prejudice.

This case is like *Estate of Nilges* and *Gideon*, not *Corl.* Denying Husband's oral motion to dismiss under § 60-241 at the March 2017 hearing was an abuse of discretion. The Court should reverse the trial court's judgment and remand this case with directions to enter an order dismissing the action.

Husband made his initial motion to dismiss in October 2016, nine months after Wife's answer (R. 1 at 19, 27-29; R. 2 at 5-6). Wife's counsel admitted she received the order in October 2016 dismissing the case (R. 1 at 35; R. 2 at 10). There had not yet been any discovery or any pretrial conference (R. 1 at 2-3; R. 2 at 32). All that had occurred was the entry of the parties' agreed temporary order back in May 2016 (R. 1 at 22).

Then, given the October 2016 dismissal, nothing further happened in the case at all until March 2017, when Wife sought to set the dismissal aside (R. 1 at 2-3). Instead, Husband filed for dissolution of the marriage in Missouri (R. 1 at 287; R. 2 at 19; R. 3 at 22; App. at A12). But in the Kansas case, by March 2017 there still had been no discovery, no pretrial conference, and nothing in the case besides Wife's answer and Wife's motion to set aside

the prior dismissal (R. 1 at 2-3). (Wife's untimely counterpetition is addressed *infra* at pp. 26-31.)

So, in March 2017, when (1) Husband conceded he had not correctly filed a motion to dismiss with notice to Wife back in October 2016 (R. 1 at 52), (2) the trial court held at the March 27 hearing that this meant it had not had any authority under § 60-241 to grant a voluntary dismissal without prejudice (R. 2 at 14-15), and (3) Husband then immediately made an oral motion to dismiss his petition (R. 2 at 19), Wife "would have suffered no legal prejudice had the trial court sustained [Husband]'s motion for an order dismissing [his] action without prejudice." *Estate of Nilges*, 44 Kan.App.2d at 906, 242 P.3d 1211.

As in *Estate of Nilges*, there were then no "grounds on which [Wife] could claim to be prejudiced in [her] substantial rights." *Id.* at 910. Husband's action "had not proceeded beyond the initial stages of action and" – not counting the time during which the parties believed it had been dismissed – was barely eight months "old when [Husband] sought voluntary dismissal of [his] action without prejudice." *Id.* And "no discovery or pretrial conference had been conducted …." *Id.* As in *Gideon*, "it cannot be said that" the proceedings had "reached an advanced stage." *Id.*

Indeed, not once at the March 27 hearing did Wife identify any way in which she would be prejudiced by granting Husband's motion to dismiss, let alone the requisite legal prejudice necessary to defeat Husband's motion (R. 2). All she said, without specification, was "the ramifications for my client, if this matter is to be dismissed, are extraordinary given her terminal cancer"

(R. 2 at 11-12). For example, she did not show that filing a counterpetition in the Missouri action or otherwise proceeding there would be ineffective.

But there was a pending dissolution proceeding in Missouri, and Wife's cancer diagnosis had been in June 2016 (R. 1 at 38). Even the court recognized that denying Husband's dismissal and allowing Wife to proceed in Kansas equally could "prejudice [Wife] due to her health" (R. 2 at 30).

Any tactical advantage Husband would have received, or the necessity of pursuing the second action in Missouri, were not capable of being the requisite "legal prejudice". *Gideon*, 205 Kan. at 326, 469 P.2d 272. What Wife could not and did not show was how the dismissal – which everyone thought had been in effect since October 2016 anyway – would not "be conducive to the fair administration of justice" or would impose on her "undue expense, inconvenience, or prejudicial consequences" that could not be alleviated by "reasonable terms and conditions" in the order. *Patterson,* 246 Kan. at 706, 792 P.2d 983.

Nonetheless, the trial court denied Husband's oral motion to dismiss (R. 2 at 34). But under these circumstances, the law of Kansas is and must be that Husband essentially had a "right" to the voluntary dismissal, *Estate of Nilges*, 44 Kan.App.2d at 908, 242 P.3d 1211, and as Wife could not show "plain legal prejudice" from it, the district court abused its discretion in denying his oral motion to dismiss. *Gideon*, 205 Kan. at 326, 469 P.2d 272.

The Court should reverse the trial court's judgment and remand this case with directions to enter an order dismissing the action below.

C. Wife's counterpetition was no bar to Husband's oral motion to dismiss, because the counterpetition she filed was an untimely nullity under K.S.A. §§ 60-207(a), 60-212(a)(1), 60-213, and 60-215(a)(2) or (d), and Husband made his oral motion to dismiss before Wife either sought or obtained leave to file her counterpetition out of time.

Section 60-241(a)(2) does provide that a counterclaim can defeat a motion to dismiss under it, as in that circumstance "the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication."

Below, invoking this provision, Wife also argued Husband's oral motion to dismiss should be denied because she had "filed a counter[petition]" (R. 2 at 18). Not citing any authority, she argued her counterpetition was immediately timely without leave (R. 2 at 21-22). The court agreed with her and said it was "not 100 percent sure that there is a deadline or requirement for the counterclaim to be filed" (R. 2 at 28).

But despite that Wife never asked for leave to file it out of time, and even though Husband already orally had moved to dismiss his petition, the Court *sua sponte* ruled that if it was out of time "there is an exception under the circumstances of this case", so Wife's counterclaim would be deemed filed that day (R. 2 at 28-30).

All of this was without merit. The law of Kansas is that Wife's counterpetition was long out of time, what she had filed March 6 was legally a nullity, and as a matter of law it could not defeat Husband's oral motion to dismiss made *before* Wife sought or obtained leave to file her counterpetition out of time.

Contrary to Wife's and the court's suggestion, the law of Kansas is that a counterclaim only can be filed in a pleading (typically an answer), and Wife could not file a new pleading in March 2017 without leave. K.S.A. § 60-213 refers to a counterclaim being filed in a "pleading". For compulsory counterclaims,

> **[a] pleading** must state as a counterclaim any claim that, at the time of its service the pleader has against an opposing party if the claim: (A) Arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

Id. at (a)(1) (emphasis added). For permissive counterclaims, "**[a] pleading** may state as a counterclaim against an opposing party any claim that is not compulsory." (Emphasis added). But either way, the statute only authorizes a counterclaim to be stated in a "pleading".

Under K.S.A. § 60-207(a), the law of Kansas only recognizes seven pleadings:

> Only these pleadings are allowed: (1) A petition …; (2) an answer to a petition; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party petition; (6) an answer to a third-party petition; and (7) if the court orders one, a reply to an answer.

K.S.A. § 60-212 then sets strict time limitations for these pleadings. "A defendant must serve an answer … [w]ithin 21 days after being served with the summons and petition …." *Id.* at (a)(1)(A)(i). And "a party must serve an answer to a counterclaim … within 21 days after being served with **the pleading** that states the counterclaim …." *Id.* at (a)(1)(B) (emphasis added).

Otherwise, K.S.A. § 60-215 provides that "a party may amend its pleading only with the opposing party's written consent, or the court's leave", *id.* at (a)(2), or also my file a "supplemental pleading setting out any transaction, occurrence or event that happened after the date of the pleading to be supplemented" if "the court" "permit[s]" this "[o]n motion and reasonable notice …." *Id.* at (d). But an amended or supplemental pleading "filed without leave of court or consent of" the opposing party is "a nullity." *Stanley v. Parker*, 139 Kan. 515, 32 P.2d 197, 197 (1934); *see also State v. Radke*, 168 Kan. 334, 338, 212 P.2d 296 (1949).

All these statutes, §§ 60-207, 60-212, 60-213, and 60-215, mirror federal rules, respectively Fed. R. Civ. P. 7, 12, 13, and 15, so Kansas courts look to federal decisions interpreting those federal rules for guidance. *See, e.g.*, *State v. Phelps*, 226 Kan. 371, 378, 598 P.2d 180 (1979) (using federal Rule 7 decision and secondary source to apply § 60-207); *Purdum v. Purdum*, 48 Kan.App.2d 938, 995, 301 P.3d 718 (2013) (same re: federal Rule 12 materials to apply § 60-212); *U.S. Fidelity & Guar. Co. v. Maish*, 21 Kan.App.2d 885, 890, 908 P.2d 1329 (1995) (same re: federal Rule 13 materials to apply § 60-213); *King v. Pimentel*, 20 Kan.App.2d 579, 584, 890 P.2d 1217 (1995) (same re: federal Rule 15 materials to apply § 60-215), *overruled on other grounds by Whaley v. Sharp*, 301 Kan. 192, 197-99, 343 P.3d 63 (2014).

Applying these statutes' federal analogues, the U.S. Court of Appeals for the Eighth Circuit concisely described the status and timing of a counterclaim: "A [counter]claim must be stated in a pleading. *See* Fed.R.Civ.P. 12(b) and 13(g). At the same time, it is not itself a pleading. *See*

Fed.R.Civ.P. 7(a)." *In re Cessna Distrib. Antitrust Litig.*, 532 F.2d 64, 67 n.7 (8th Cir. 1976). Rather, in a two-party case, the "pleading" under § 60-207 in which a counterclaim belongs is the answer. *In re Miracle*, 208 Kan. 168, Syl. ¶ 6, 490 P.2d 638 (1971) ("an answer does not require a reply unless the answering pleading sets up a counterclaim denominated as such").

Accordingly, Wife's counsel and the trial court were wrong: any counterclaim had to be in her answer, and otherwise she required leave of court or Husband's consent to file one. And her counterpetition filed with the trial court on March 6, 2017 (R. 1 at 39), nearly 14 months after service of process on her and the filing of her answer (R. 1 at 2), was long out of time. It was an amendment to her previous answer (or possibly a supplemental pleading, as it did not answer Husband's petition) filed without leave of court or Husband's consent. It was a nullity. *Parker*, 139 Kan. at 515, 32 P.2d 197; *Radke*, 168 Kan. at 338, 212 P.2d 296.

And the counterpetition was filed by itself, not attached to a motion for leave. Indeed, at the time it was filed, the October 2016 order dismissing the case had not yet been set aside and still was in effect. And even at the March 2017 hearing, Wife never actually made any request to file her counterclaim out of time, but just incorrectly argued it was timely because of her erroneous belief that there was no time limitation in which to file a counterpetition. Instead, the court brought up the possibility of filing a counterclaim out of time *sua sponte* after Husband had made his oral motion to dismiss (R. 2 at 24).

The law of Kansas therefore is that Wife's counterpetition, for which leave was not obtained until after Husband had moved for a voluntary dismissal, was a nullity that could not defeat his motion to dismiss. "A plaintiff's ability to have his action dismissed with impunity pursuant to [§ 60-241(a)] is foreclosed only when the defendant has filed a counterclaim *prior to the dismissal* of the action." *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (citing Fed. R. Civ. P. 41(a)(2)).

Conversely, when the counterclaim is filed *after* the plaintiff's motion to dismiss, it does not foreclose the motion to dismiss. *United States v. Prof'l Air Traffic Controllers Org.*, 449 F.2d 1299, 1300 (3d Cir. 1971). And this is equally true when the defendant seeks leave to file a counterclaim out of time *after* the plaintiff's motion to dismiss. *B&J Mfg. Co. v. D.A. Frost Indus., Inc.*, 106 F.R.D. 351, 353 (N.D.Ohio 1985) (for this reason, granting plaintiff's motion to dismiss and denying defendant's motion to add counterclaim); *Chinook Research Labs., Inc. v. United States*, 22 Cl.Ct. 853, 854-55 (1991) (same).

Even seeking leave to file a counterclaim out of time *before* the plaintiff's motion to dismiss cannot defeat the plaintiff's motion to dismiss unless leave to file has been granted by then, because a motion for leave is not a "pleading", and § 60-241(a)(2) requires that the "defendant **has pleaded** a counterclaim". *Id.* at 855 n.1 (citing *S.C. Johnson & Sons, Inc. v. Boe*, 187 F.Supp. 517, 520 (E.D.Pa. 1960) (granting plaintiff's motion to dismiss served several weeks after defendant sought "leave to file" a

counterclaim, which was not a pleading, and so plaintiff's motion to dismiss preceded any "pleaded" counterclaim)) (emphasis added).

Here, with only Wife's untimely null counterpetition filed without leave of court or Husband's consent (R. 1 at 39), with Wife never actually moving to file her counterpetition out of time – either in writing or orally, and *before* the trial court granted Wife leave to file her counterpetition out of time (R. 2 at 28-30), Husband orally moved to dismiss his petition without prejudice (R. 2 at 19). Under § 60-241(a)(2), as at that time Wife had not yet "pleaded a counterclaim", no counterclaim, let alone Wife's untimely null counterpetition she never had sought leave to file out of time, foreclosed Husband's motion to dismiss. The trial court abused its discretion in denying Husband's motion.

D. Husband's "withdrawal" of his oral motion to dismiss his petition after the court already had granted Wife leave to file her counterpetition out of time, and with the court denying his oral motion to dismiss, did not waive his claim that the whole action should have been dismissed.

If Wife argues that Husband withdrew his oral motion to dismiss, waiving the issue for appeal, *see, e.g.*, *Blankenship v. City of Caney*, 149 Kan. 320, 87 P.2d 625, 630 (1939) (appellant's voluntary withdrawal of motion for new trial waived allegations of error that needed to be preserved in that motion), it would be without merit.

First, the trial court's docket sheet for the March 2017 hearing does not correctly record what occurred, per the transcript. It states, "Court grants motion to set aside dismissal. Petitioner makes oral motion to dismiss, then withdraws the motion. Court grants withdrawal of oral motion. Respondent moves to file counterclaim out of time. Court grants the same, over objection"

(R. 7 at 4). In reality, after the court set aside the October 2016 dismissal (R. 2 at 14-15) and Husband orally moved to dismiss his petition (R. 2 at 19), without Wife asking for it the court then suggested it could allow her to file a counterpetition out of time (R. 2 at 24), and then *sua sponte* granted that leave (R. 2 at 28-30).

Wife's counsel argued this meant that while Husband could dismiss his petition, the court could not dismiss her now-filed counterpetition (R. 2 at 22). Faced with the prior dismissal being set aside, Wife being allowed to file a counterpetition out of time, and his motion to dismiss only preventing him from litigating his own petition for legal separation in the now-reinstated action, Husband was left with little choice how to proceed (R. 2 at 34). Effectively, as his counsel stated, the court's improper actions had created "a procedural nightmare" by making his motion to dismiss moot, and he now needed to be able to "proceed on [his] petition" (R. 2 at 34).

The court itself understood this, too. It stated, "the Court is denying the motion to dismiss" but "for purposes of today's hearing your … motion to dismiss is withdrawn … [f]or journal entry purposes" (R. 2 at 34).

The court's entire procedure was wrong, and Husband called the court's attention to it, explaining how he had the right to his oral dismissal, the counterpetition was untimely and did not defeat his right to his oral dismissal, and he only was withdrawing his motion – effectively involuntarily – because the court forced him to when it allowed Wife's counterpetition. At that point, with the circumstances the court changed, he could not risk being disallowed from proceeding on his petition.

Under these circumstances, the withdrawal of Husband's oral motion to dismiss – *after* the court *sua sponte* had granted Wife leave to file a counterpetition out of time, and with Husband objecting to the entire procedure the court used – does not waive his claim that the trial court erred in denying his oral motion to dismiss.

Here, what Husband had sought by his oral motion to dismiss was a dismissal of the whole action, as at that time only his petition (already dismissed for five months) had been on file, and no counterpetition had been timely filed, nor had Wife sought leave to file a counterpetition out of time. When the trial court improperly changed this by ignoring Husband's pending motion to dismiss and allowing Wife to file a counterpetition out of time so as to defeat Husband's motion, turning Husband's motion into one in which the whole action would not be dismissed, but instead Husband was facing the dismissal of his petition alone and the loss of his ability to proceed on his petition, he *then* withdrew his motion, with the trial court noting it was denying it (R. 2 at 34).

"Waiver is an intentional relinquishment of a known right …." *First Nat'l Bank of Omaha v. Centennial Park, LLC*, 48 Kan.App.2d 714, 727, 303 P.3d 705 (2013). Husband's withdrawal under these court-changed circumstances was not an intentional relinquishment of his original request to have the whole action dismissed.

The trial court abused its discretion in denying Husband's oral motion to dismiss. This Court should reverse the trial court's judgment and remand with directions to enter an order dismissing the action below.

<u>Second issue:</u> The trial court erred in denying Husband's motion to dismiss the action after Wife's death. Under K.S.A. § 60-258, as a journal entry is required for there to be a judgment in a case, no journal entry yet had been entered at the time of Wife's death, and the law of Kansas is that an action for legal separation abates upon the death of one party before judgment, even if an oral separation agreement already had been approved, the trial court lacked jurisdiction to proceed once Wife died.

Standard of Appellate Review

"[W]hether jurisdiction exists is a question of law subject to unlimited review." *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013).

* * *

Record Location Where Raised

Husband's proof of Wife's death and motion to dismiss are at R. 1 at 106-07 and 108-10, respectively. Husband's argument over it is at R. 4 at 23-31 and 39. The court denied it at the August 2017 hearing (R. 4 at 45) and again at the November 2017 hearing (R. 6 at 14), and again in its journal entry (R. 1 at 281; App. at A6).

* * *

The law of Kansas is that an action for legal separation between husband and wife abates and must be dismissed if one party dies before the entry of a final judgment, even if the trial court already has orally approved a separation agreement. And under K.S.A. § 60-258, entry of a journal entry or judgment form is a required prerequisite for there to be a final judgment. In this legal separation action, Wife died before the trial court entered any journal entry or judgment form. Nonetheless, the trial court denied Husband's motion to dismiss the action. This was error.

A. An action for legal separation between husband and wife abates and must be dismissed if one party dies before entry of a journal entry or judgment form under K.S.A. § 60-258, even if the trial court already orally has approved a separation agreement.

K.S.A. § 60-258 provides in relevant part that "No judgment is effective unless and until a journal entry or judgment form is signed by the judge and filed with the clerk."

The Legislature first inserted this language in this statute in 1976. *State v. Dubish*, 234 Kan. 708, 714, 675 P.2d 877 (1984). Previously, the statute had allowed entry of judgment "by direction of the judge" as long as "the clerk shall make a notation of the judgment on the appearance docket …, and such notation shall constitute the entry of judgment, and no journal entry or other document shall be required to render the judgment effective." *Id.* (quoting § 60-258(b) (1975)).

Reviewing this change in *Dubish*, the Supreme Court held, "The new statute's language is clear. *No judgment is effective unless and until a journal entry or judgment form is signed by the trial judge and filed with the clerk of the court.*" *Id.* (emphasis in the original).

The question in *Dubish* was whether a criminal defendant and the victim of aggravated sodomy were married when the crime occurred. *Id.* at 711-15. At the time, the aggravated sodomy statute precluded conviction for activities between a husband and wife. *Id.* at 711-13. The sodomy there occurred on October 4, 1982, but the journal entry and decree of divorce was not entered until October 15. *Id.* at 713. The Supreme Court therefore concluded that under § 60-258, the divorce did not take effect until October

15, 1982, so the defendant and the victim were still married when the sodomy occurred. *Id.* at 714-15. It reversed the defendant's aggravated sodomy conviction. *Id.* at 720.

The rule in Kansas, both before and after the 1976 amendment of § 60-258, is that "[a] divorce action is purely personal and ends on the death of either spouse." *Wear v. Mizell*, 263 Kan. 175, 180, 946 P.2d 1363 (1997); *see also Adamson v. Snider*, 131 Kan. 284, 291 P. 744, 745 (1930) ("The principal point to be determined in an action for divorce is the marital status of the parties, and after the death of one of them that is no longer open to litigation"). As one California court put it a century ago, this is because once one of the spouses involved in a divorce dies, the result of the action "is already accomplished by the death of one of the parties." *Gloyd v. Super. Ct. in and for L.A. Cty.*, 44 Cal.App. 39, 43, 185 P. 995 (1919).

Section 60-258 tempers this rule to mean that an action for divorce remains open until the trial court enters a journal entry or judgment form, and if one of the parties dies before that occurs, even if the trial court orally had accepted a marital settlement agreement and divorced the parties, the action abates and must be dismissed. *See generally In re Marriage of Wilson*, 245 Kan. 178, 777 P.2d 773 (1989).

In *Wilson*, at the divorce hearing the parties verbally agreed on a property settlement, child custody, child support, and maintenance. *Id.* at 178-79. The court then "orally granted a divorce to each party and accepted the parties' stipulation as to their agreement on the balance of the issues" and directed the wife's counsel "to prepare the journal entry." *Id.* at 179. But

nine hours before the court entered that journal entry, the husband died. *Id.* The wife then requested to be relieved from the decree. *Id.*

The district court agreed, set aside the journal entry, and dismissed the action, holding that under § 60-258 the parties still were married at the time of the husband's death and so the journal entry was void. *Id.* The administrator of the Husband's estate appealed. *Id.* at 178.

This Court affirmed in a divided opinion, and then the Supreme Court unanimously affirmed this Court's majority. *Id.* Following and citing *Dubish*, the Supreme Court held:

> The 1976 amendment unequivocally states that no judgment is effective until a journal entry or the judgment form is signed and filed. A journal entry was requested by the trial court herein. The decision of the trial court could not become effective prior to its filing by the express language of K.S.A. 60-258. If the decision of the trial court granting the divorce could not become effective prior to the filing of the journal entry, then it was ineffective prior to that time. [The husband] died prior to the trial court's approval of, and the filing of, the journal entry. At the time of his death, [the husband] was lawfully married to [the wife]. His death terminated that marriage. Accordingly, there was no marriage for the decree of divorce to terminate at the time the journal entry reflecting the judicial termination was filed. [The wife] was [the husband]'s widow at the time the journal entry was signed and filed. We must conclude that the majority opinion of the Court of Appeals correctly affirmed the trial court's setting aside of the journal entry granting a decree of divorce.

Id. at 180-81.

Moreover, the Supreme Court held that the parties' oral agreement to the division of property and debts, orally approved by the trial court, was not separately effective absent that journal entry:

> Although separation agreements are authorized by statute, K.S.A. 60-1610(b)(3), division of property and apportionment of debt are not necessary where the parties are not divorced. K.S.A. 60-258 renders the divorce decree ineffective in this case; therefore, the agreement incorporated therein must also be ineffective. If there is no divorce, there is no division of marital property.

Id. at 181 (quotation marks and citation omitted).

Accordingly, just as the Supreme Court suggested in *Wilson*, these principles apply to legal separation cases just as they do to divorce cases, and legal separation cases equally abate on one party's death. While no Kansas decision, published or unpublished, directly addresses this, all other states' decisions to have addressed it uniformly hold so. *See*:

- *Cregan v. Clark*, 658 S.W.2d 924, 927 (Mo. App. 1983) ("Suit for marriage dissolution *or for legal separation* abates upon death of one of parties *before* final judgment", emphasis added);
- *Trinosky v. Johnstone*, 149 N.M. 605, 608, 252 P.3d 829 (App. 2011) (denial of wife's motion to dismiss legal separation action that was pending when husband died was not justified; holding that abatement-on-death doctrine applies equally to divorce and legal separation cases);
- *Briggs v. Briggs*, 692 N.Y.S.2d 924 (1999) (separation agreement ineffective where husband died before entry of written decree accepting it); and
- *Aetna Life Ins. Co. v. Bunt*, 110 Wash.2d 368, 372 n.1, 754 P.2d 993 (1988) ("Although a petition for legal separation had been filed prior to [the husband]'s death, the general rule is that a dissolution action abates upon the death of one of the spouses").

Kansas decisions since *Wilson* only have continued to confirm that the time of a spouse's death in relation to the entry of a journal entry or judgment form is a bright-line test for the abatement of a divorce action: if the death comes before the journal entry is entered, the case abates; if after, the case does not. *See, e.g.*, *Wear*, 263 Kan. at 180, 946 P.2d 1363 (where wife died before journal entry, divorce action abated); *In re Marriage of Gilchrist*, No. 91029, 2004 WL 1716204 at *3 (Kan. App. 2004) (unpublished) ("trial court lost subject matter jurisdiction over the divorce case when [the wife] died", so the husband could not seek to set aside the judgment and relitigate child support and other issues) (App. at A32-33); *Great Plains Trust Co. v. Wallins*, No. 99,483, 2008 WL 5135043 at *3 (Kan. App. 2008) (unpublished) (where husband died before journal entry entered in parties' divorce, divorce case ended) (App. at A26).

And this makes sense: a journal entry is required because until that time the trial court's oral decision still can be modified. Per § 60-258,

> [t]he law in Kansas is clear that a case is not final until there is no possibility of further court action. The effective date of a journal entry is when it is signed by the trial judge and filed with the clerk of the district court. A journal entry containing findings of fact and conclusions of law takes precedence over and may differ from the trial court's oral pronouncement from the bench. A judgment that has been orally pronounced but that lacks a journal entry is therefore not a final judgment.

Valadez v. Emmis Commc'ns, 290 Kan. 472, 482, 229 P.3d 389 (2010) (internal citations omitted; citing *Wilson*, *supra*) (as defamation actions abate with death and plaintiff died after jury verdict in his favor but before entry of journal entry, plaintiff's defamation action abated).

B. The trial court erred in refusing to dismiss the parties' action for legal separation, because regardless of the trial court's approval of the parties' oral agreement, for which it court requested a journal entry, Wife's death before the entry of that journal entry abated the action.

The same as in *Wilson*, *Wear*, *Gilchrist*, and *Great Plains* is true here: as Wife died before a journal entry was filed, this legal separation action abated and had to be dismissed. The trial court erred in holding otherwise.

At the April 2017 hearing, the court found the parties' oral agreement was "in fact made in fair negotiations" and "was equitable and is fair" (R. 3 at 43). It stated it was "going to adopt the agreement of the parties as its own and make that the order of the court" "effective today" (R. 3 at 44).

But the court and the parties all readily recognized that more than just that was required to execute the agreement. Both parties agreed there had to be "detailed findings or proposed journal entry [*sic*] regarding" certain property "as well as the maintenance payments" (R. 3 at 40-41, 46). Wife's counsel told Wife she was not sure "we can effectuate everything that you want" concerning to whom Husband's payments would be made in the event of her death, and they could discuss "the legality of that" later (R. 3 at 42-43).

Accordingly, the court told the parties, "I'm just going to do a docket sheet saying the Court adopts the agreement of its own and basically that the Court's Order per journal entry and attached exhibit, and so then I guess you-all [*sic*] can get together and get an actual journal entry filed" (R. 3 at 45). It told them they could make the journal entry "however you want it", but "just have the parties sign it … and then make it as detailed as you

would like" (R. 3 at 45-46). Then, on Wife's counsel's request (R. 3 at 46), the court ordered her "to prepare J.E. of today's hearing" (R. 7 at 5).

While the court stated it thought this was sufficient to mean that if Wife "passes prior to the journal entry, the order is effective when given" (R. 3 at 47), it later acknowledged that this was incorrect. At the August 2017 hearing, it admitted it had "expected … a more thorough, more exhaustive journal entry" and agreed its earlier thought may have not been "according to the rule of law" (R. 4 at 45). Then, at the November 2017 hearing, it acknowledged that its thought had been entirely wrong: that it had been ignorant of the law requiring a journal entry or judgment form, that the docket entry was not a journal entry or judgment form but "was a trial docket or what we call here in Wyandotte County a docket sheet", that it "expected another document that would have the title journal entry on the document", and that the docket entry could not have been final because Husband would not have had a right to appeal from it (R. 6 at 12-14).

But Wife died July 1, 2017, before any journal entry had been entered (R. 1 at 7-8, 72, 106-07).

The law of Kansas is that, per the unequivocal language of § 60-258, the parties' legal separation action abated at that point and had to be dismissed. Denying Husband's motion to dismiss was error.

Wilson is directly on point. Regardless of the trial court "orally grant[ing] a [separation] to each party and accept[ing] the parties' stipulation as to their agreement", it still had directed Wife's counsel "to prepare the

journal entry." 245 Kan. at 179. But Wife died before that journal entry was entered. *Id.* So, just as in *Wilson*, § 60-258

> unequivocally states that no judgment is effective until a journal entry or the judgment form is signed and filed. A journal entry was requested by the trial court herein. The decision of the trial court could not become effective prior to its filing by the express language of K.S.A. 60-258. If the decision of the trial court granting the [legal separation] could not become effective prior to the filing of the journal entry, then it was ineffective prior to that time. [Wife] died prior to the trial court's approval of, and the filing of, the journal entry. At the time of [her] death, [Husband and Wife were not legally separated]. [Her] death terminated that marriage. Accordingly, there was no marriage for [any journal entry] to [separate thereafter].

Id. at 180-81.

And just as in *Wilson*, the parties' oral agreement, which they both acknowledged left a considerable amount of detail and resolution for the written journal entry, was not separately effective absent that journal entry. *Id.* at 181. While § 60-1610(b)(3) authorizes separation agreements, a journal entry still was required under § 60-258. *Id.* This makes sense, considering that "[a] journal entry … takes precedence over and may differ from the trial court's oral pronouncement from the bench. A judgment that has been orally pronounced but that lacks a journal entry is therefore not a final judgment." *Valadez*, 290 Kan. at 482, 229 P.3d 389.

Just as in *Wilson*, the action immediately abated upon Wife's death. The trial court erred in holding otherwise.

Below, the trial court suggested that in *In re Estate of Loughmiller*, 229 Kan. 584, 629 P.2d 156 (1981), this Court held otherwise. This is untrue.

Loughmiller is inapposite. There, without filing a legal separation action and before filing a divorce, the parties took it upon themselves to enter into and execute a written postnuptial agreement, and then it was undisputed that they carried it out to the letter. *Id.* at 593. Thereafter, a divorce action was filed, but the husband died during the proceedings. *Id.* A probate court held that the written agreement was invalid, because under a statute then in effect the agreement had to be approved by a court, and it never was. *Id.* at 591.

The husband's estate appealed, arguing that under decisions predating that statute, where parties execute a complete written post-nuptial property settlement outside of court, and then carry it out, it is effective without court approval. *Id.* at 591-92. This Court agreed, holding that, under the unique "circumstances of th[at] case, where the contract was executed and the intent of the parties was carried out, the trial court's approval of the agreement was unnecessary to establish its validity." *Id.* at 592.

Unlike in *Loughmiller*, the agreement in this case was oral, not written, specifically required trial court approval (which was the purpose of the April 2017 hearing), and left various details up in the air pending a final memorialization in writing to be signed by both parties, which the trial court specifically requested. Effectively, unlike in *Loughmiller*, the oral agreement, while deemed fair and equitable by the trial court, never actually was executed. This case is about an oral separation agreement in a judicial proceeding, not an extrajudicial written agreement. *Loughmiller* has nothing to do with this case.

Instead, as in *Wilson*, the agreement in this case was just an oral agreement made during a proceeding that required memorialization in a journal entry. And just like in *Wilson*, that never happened before Wife's death. Therefore, the action abated upon Wife's death.

Below, Son also briefly invoked *In re Marriage of Takusagawa*, 38 Kan.App.2d 401, 166 P.3d 440 (2007), for the proposition that "Kansas law allows for oral separation agreements" (R. 1 at 123). Obviously, it does. But as in *Takusagawa*, which did not involve either party's death, it requires the trial court entering an ultimate written judgment approving that agreement. *Id.* at 401. There, though not arguing that the journal entry memorializing the parties' separation agreement did not reflect the actual agreement, the wife refused to sign it claiming her assent to the agreement had been made under duress or coercion; its terms were unfair, unjust, and inequitable; and it violated the statute of frauds as to those portions transferring land title. *Id.* at 401-02. This Court disagreed with her on all points. *Id.*

But the point is that here, unlike in *Takusagawa*, there was no journal entry memorializing the agreement at all. Like *Loughmiller*, *Takusagawa* has nothing to do with this case.

The law of Kansas is that, just as in *Wilson*, *Wear*, *Gilchrist*, and *Great Plains*, because Wife died before entry of a journal entry, the parties' legal separation action abated and had to be dismissed. The trial court erred in holding otherwise. This Court should reverse the trial court's judgment and remand with instructions to dismiss the action below.

<u>Third issue:</u> The trial court abused its discretion in substituting Wife with Son, rather than the administrator or executor of Wife's estate. Under K.S.A. § 60-225(a), if a claim or defense survives a party's death, only the administrator or executor of that party's estate, rather than her heirs, can be substituted for that party.

Standard of Appellate Review

Generally, "the trial court has discretion to determine" a motion for substitution under K.S.A. § 60-225. *Graham*, 297 Kan. at 855, 305 P.3d 585. "But … an abuse of discretion necessarily results when the district court applies incorrect legal standards in the exercise of its discretion." *Id.* "In turn, the determination of the correct legal standards to apply in the exercise of discretion involves statutory interpretation which is a question of law over which appellate courts have unlimited review." *Id.*

* * *

Record Location Where Raised

Wife's "oral motion under K.S.A. 60-225(a) to substitute [Son] as a successor or a representative of [Wife]'s interests" is at R. 4 at 6. Husband's objection that only Wife's estate could be substituted is at R. 4 at 6-7.

* * *

The law of Kansas is that if a party's claim or defense is not extinguished by that party's death and a motion to substitute is made for that party under K.S.A. § 60-225(a)(1), only the administrator or executor of that party's estate can be substituted in for that party. The party's heirs, even if undisputed, cannot be the substitutes. Nonetheless, here, the trial court substituted Wife's son for Wife, rather than the administrator or executor of Wife's estate. This was an abuse of discretion.

K.S.A. § 60-225(a)(1) provides in relevant part that "If a party dies and the claim is not extinguished,[1] the court must on motion order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative."

The uniform law of Kansas is that "the proper party" to be substituted under this statute is not someone who claims to be the party's heir, even if that claim is not disputed, but instead only the administrator or executor of the party's estate. *See*:

- *Presbury v. Pickett*, 1 Kan.App. 631, 42 P. 405, 405-06 (1895) (sole heir of a deceased person could not maintain deceased person's action on promissory note; action only could be brought "in the name of the personal representative of the deceased");
- *Rexroad v. Johnson*, 4 Kan.App. 333, 45 P. 1008, 1009 (1896) (when party dies during suit, to determine who should be substituted question is the same as "who would have been the property party to bring the suit if it had been commenced after the death of the plaintiff"; in action for replevin, only plaintiff's estate administrator, not his heirs, could be substituted for him after his death; "the attempted revivor in the name of the heirs of Rexroad is a nullity. The action must be revived in the name of the administrator of the estate of John Rexroad");
- *Howe v. Mohl*, 168 Kan. 445, 449-50, 214 P.2d 298 (1950) ("As a general rule the title to all choses in action belonging to an intestate at the time

[1] As Husband explained in his second issue on appeal, *supra*, the law of Kansas is that Wife's death extinguished the parties' action for legal separation.

of his death vests, not in his heirs or distributees, but in his administrator, and actions to enforce or collect the same must be brought by him, rather than by the heirs or distributes"; where plaintiff died during property damage action, only his representative, not his heir, could be substituted for him);

- *Cory v. Troth*, 170 Kan. 50, 52-53, 223 P.2d 1008 (1950) (same re: personal injury action);
- *Janzen v. Troth*, 170 Kan. 152, 156-57, 223 P.2d 1011 (1950) (same); and
- *Shinkle v. Union City Body Co.*, 94 F.R.D. 631, 637-38 (D.Kan. 1982) (same; citing *Cory* and *Howe*; "Kansas law requires that a survival action must be maintained by the personal representative of the decedent and cannot be prosecuted by a decedent's heirs").

The reason for this is that it is a probate court's statutory role to determine who inherits a decedent's property, not a trial court in an original action. As this Court explained 120 years ago, "the legislature intended to provide a manner for the settlement of the estate of a deceased person, and [the probate and succession statutes] provid[e] the only manner in which a legal settlement of such an estate can be made." *Presbury*, 1 Kan.App. 631, 42 P.2d at 405.

> The danger of adopting any different rule is that in the settlement of the estates of deceased persons, unless a court having the power to pass upon the question has determined who are the parties to whom the estate should be distributed, the risk of ascertaining such parties is imposed upon any one indebted to the estate, with the attendant danger of involving the debtor in litigation with rival claimants.

Id. at 406; *see also Great Plains Trust Co.*, 2008 WL 5135043 at *3 (explaining these principles in more detail, collecting cases from throughout United States) (App. at A26).

Accordingly, a party's death during an action does not effect "an assignment as to enable his heirs to bring the action[.]" *Howe*, 168 Kan. 445, 449, 214 P.2d 298. Rather, when "a cause of action … survive[s] the death of [a party to it,] it survive[s] to his personal representative[,] not to his heirs, and the latter cannot maintain the action." *Id.* at 450.

In this case, after Wife's death, Son orally moved the trial court "under K.S.A. 60-225(a) to substitute [Son] as a successor or a representative of [Wife]'s interests" (R. 4 at 6). He argued this was proper because no estate yet was open, he was Wife's only heir besides Husband, and he did not "know who else would be an appropriate successor or representative under the statute" (R. 4 at 8-9).

In opposition, Husband explained that only Wife's estate could be substituted for Wife under § 225(a), not Son (R. 4 at 6-7). And Son confirmed at the November 2017 hearing that he was not in fact the executor or administrator of Wife's estate (R. 6 at 91).

Nonetheless, the trial court granted Son's motion and allowed him "to be substitute party [*sic*] over the objection … of" Husband (R. 4 at 12).

Per all the decisions discussed above, the trial court was wrong. Even if the unfinished action for legal separation somehow survived Wife's death (and it did not), under § 60-225(a)(1) as a matter of law only the administrator or executor of Wife's estate, which Son admitted he was not,

was "the proper party" to be substituted in for Wife, not her heirs. The trial court applied the incorrect legal standard in the exercise of its discretion under § 60-225(a)(1), and so abused its discretion in allowing Son to be substituted in for Wife.

Son's suggestion that this was proper because no estate yet was open for Wife – that "I don't know who else would be an appropriate successor or representative under the statute" (R. 4 at 9) – does not change this. It is incumbent on the party seeking substitution of a deceased party to ensure that there is a proper legal representative in place. *Long v. Riggs*, 5 Kan.App.2d 416, 418-19, 617 P.2d 1270 (1980), *overruled on other grounds by Graham*, 297 Kan. at 858-59, 305 P.3d 585. "Proceedings for the appointment of a personal representative should have been instituted shortly after the death, and the motion for substitution made even before the suggestion of death." *Id.* This is part of "due diligence" in effecting the substitution. *Graham*, 297 Kan. at 859, 305 P.3d 585.

It was up to a probate court to determine who Wife's heirs were, if any, not the trial court in this case. The only party the trial court could substitute for Wife was the administrator or executor of Wife's estate, not Son, who admitted that no estate was open and he was not the executor.

The trial court erred in holding otherwise, and accordingly abused its discretion in substituting Son for Wife. Son lacked standing to continue Wife's action, and every action that Son took – and decision that resulted – was void as a matter of law. The Court should reverse the trial court's judgment and remand with instructions to dismiss the action below.

Conclusion

This Court should reverse the district court's judgment and remand with instructions to dismiss the action below.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Kan. # 25902
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

RITCHIE & SOPER PC

By: /s/Stephanie L. Schutt
STEPHANIE L. SCHUTT #24933
The Clocktower Building
12B Westwoods Drive
Liberty, MO 64068
Telephone: (816) 792-5100
Facsimile: (816) 792-5147
stephanie@ritchiesoperlaw.com

COUNSEL FOR APPELLANT
DANA TOWLE

Certificate of Service

I certify that on August 22, 2018, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

Ms. Amanda Kivett
The Kivett Law Firm, LLC
1310 Carondelet Drive, Suite 303
Kansas City, Missouri 64114
Telephone: (816) 942-1900
Facsimile: (816) 942-2671
amanda@kivettlaw.com

Counsel for Appellees

/s/Jonathan Sternberg
Attorney

Appendix

ELECTRONICALLY FILED
2018 Feb 23 PM 4:04
CLERK OF THE WYANDOTTE COUNTY DISTRICT COURT
CASE NUMBER: 2015-DM-002778

Court: Wyandotte County District Court

Case Number: 2015-DM-002778

Case Title: Dana Raymond Towle, Petitioner vs. Louise C Le Gare, Respondent

Type: Journal Entry

SO ORDERED.

/s/ Honorable Judge Timothy Dupree, District Court Judge

I hereby certify the above and foregoing to be a True and correct copy, the original of which is filed and entered record in this court.
CLERK DISTRICT COURT
WYANDOTTE CO., KS
DATE 2/23/18
by _____, deputy.

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

In the Matter of the Marriage of:

DANA TOWLE
and
LOUISE LEGARE

Case No. 2015DM2778
Court No. 3
K.S.A. Chapter 23

NOTICE OF SERVICE OF PROPOSED JOURNAL ENTRY PURSUANT TO KANSAS SUPREME COURT RULE 170

NOW on the 21st day of February 2018, the proposed Journal Entry attached hereto and incorporated herein by reference as "Exhibit A" was served upon Petitioner, pursuant to Kansas Supreme Court Rule 170, by delivering the same via electronic transmission to:

Stephanie Schutt
12B Westwoods Drive
Liberty, MO 64068
Via Email: Stephanie@ritchiesoperlaw.com
ATTORNEY FOR PETITIONER

Respectfully submitted,
The Kivett Law Firm, LLC

By: /s/Amanda Kivett
Amanda B. Kivett, KsBar 22579
1310 Carondelet Drive, Ste. 303
Kansas City, MO 64114
Phone: (816) 942-1900
Fax: (816) 942-2671
amanda@kivettlaw.com
ATTORNEY FOR RESPONDENT

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the above and foregoing was emailed on the 21st day of February 2018 to:

Stephanie Schutt
12B Westwoods Drive
Liberty, MO 64068
Via Email: Stephanie@ritchiesoperlaw.com

/s/Amanda Kivett
Amanda Kivett

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

In the Matter of the Marriage of:

DANA TOWLE	Case No. 2015DM2778
and	Court No. 3
LOUISE LEGARE	K.S.A. Chapter 23

JOURNAL ENTRY

NOW THIS 15th day November 2017, the above matter comes before the Court for hearing on all pending matters. Petitioner, Dana Towle, appears in person and through his attorney Stephanie L. Schutt. Respondent, Mathieu Bonin, as substitute party for Louise Legare, appears in person and through attorney Amanda Kivett.

WHEREUPON, the statements of counsel and the testimony of Petitioner and Respondent are heard; the Court reviews various exhibits submitted by the Petitioner and Respondent; and the parties rest.

THE COURT, after hearing the testimony of the parties, examining the exhibits admitted into evidence, reviewing its file, and being otherwise well and duly advised in the premises, makes the following findings:

1. This Court has personal jurisdiction over the parties and this action.

2. On November 16, 2015, Petitioner filed his Petition for Legal Separation (Separate Maintenance).

3. On October 27, 2016, this Court entered an Order dismissing this matter without prejudice.

4. On March 2, 2017, Respondent Legare filed Respondent Legare's Motion to Set Aside Order of Dismissal.

5. On March 6, 2017, Respondent Legare filed her Counter Petition for Legal Separation.

6. On March 27, 2017, this matter came before the Court for hearing on Respondent Legare's Motion to Set Aside the Order of Dismissal. After being advised of the positions of the parties and hearing argument of the attorneys, the Court found that the Order of Dismissal shall be set aside. Petitioner subsequently made an oral motion to dismiss, then withdrew said motion. Respondent Legare was granted leave to file her Counter-Petition for Separate Maintenance (Legal Separation), previously filed herein on March 6, 2017. This matter was set for dispositional hearing on April 18, 2017.

7. On April 18, 2017, this matter came before the Court for final hearing. On that date, Petitioner appeared in person and with counsel Stephanie L. Schutt and Craig D. Ritchie. Respondent Legare appeared via telephone and through counsel Amanda Kivett. The parties announced they had reached an agreement on all issues and presented testimony of the Agreement. Respondent Legare introduced Exhibit 101, the agreed spreadsheet of all property owned by the parties.

8. After hearing all testimony and the agreements of the parties, the Court accepted the agreement of the parties. The Court found the agreements were in fact made in fair negotiations, that the agreement is fair and equitable, and that the parties negotiated in good faith. The Court adopted the agreement of the parties as its own and made it the order of the Court.

9. On July 1, 2017, Respondent Legare died.

10. On July 19, 2017, Petitioner filed his Motion to Dismiss.

11. On August 31, 2017, this matter came before the Court for hearing on Petitioner's Motion to Dismiss. Counsel for Respondent made an oral motion for substitution of party. The Court granted Respondent's oral motion and named Respondent's adult child, Mathieu Bonin, as substitute party for Respondent, Louise Legare. Counsel for Petitioner and Counsel for Respondent made argument regarding Petitioner's Motion to Dismiss.

12. On September 14, 2017, Respondent Bonin filed Respondent Bonin's Counter Petition for Enforcement of Marital Settlement Agreement and Respondent Bonin's Suggestions in Opposition to Petitioner's Motion to Dismiss, or in the Alternative, Respondent's Motion for Judgment Form Nunc Pro Tunc. On that same date, this matter came before the Court for hearing. The Court granted Respondent Bonin's oral motion to file Respondent Bonin's Counter Petition for Enforcement of Marital Settlement Agreement out of time. The Court granted Petitioner's oral motion for continuance.

13. Petitioner's Motion to Dismiss filed July 19, 2017 is hereby denied.

14. Respondent Bonin's Motion for Judgment Form Nunc Pro Tunc filed September 14, 2017 is hereby denied.

15. Respondent Bonin's Counter Petition for Enforcement of Marital Settlement Agreement filed September 14, 2017 is hereby granted as this Court finds that the agreement reached by Petitioner and Respondent Legare, which was presented to the Court and placed on the record on April 18, 2017, is a valid enforceable contract between the parties. As such, the Court hereby enters judgment in accordance with said agreement.

16. Petitioner and Respondent Legare were bona fide residents of the County of Wyandotte, State of Kansas for at least 60 days immediately preceding the filing of this Petition. Petitioner presently resides in Edwardsville, Wyandotte County, Kansas.

17. Petitioner and Respondent Legare were married on June 12, 1986, in Union, Missouri. Said marriage is registered in Franklin County, Missouri.

18. More than sixty (60) days have passed since the filing of the Petition for Separate Maintenance (Legal Separation).

19. Petitioner and Respondent Legare are incompatible, one with the other, and because of the incompatibility, their marriage relationship has been destroyed and the parties are entitled to a legal separation.

20. Neither Petitioner nor Respondent Legare is now in the military service of the United States, as defined by the Soldiers or Sailors Relief Act, as amended.

21. There were no children born of the marriage of Petitioner and Respondent Legare. Respondent Legare is not now pregnant.

22. Petitioner and Respondent Legare shall divide their property and debts as stated on the record, shown in exhibit 101, attached hereto and incorporated herein by reference, and stated in this Decree.

23. Petitioner shall receive as his sole and separate property free of any claim thereto by Respondent:

a. Property located at 920 South 110th Street, Edwardsville, Kansas, legally described as 2-1 E1/2 NEl/4 S OF LINE DESC AS FOLL: BEG

1661.81FT S OF NE COR; W 20FT, SW, NW, & W -1504.12FT TOW LN E1/2 NE1/4 CO., with an assigned value of $191,760.00;

b. Eight percent share of the office building located at 4444 North Belleview, Kansas City, Missouri with an assigned value of $80,000;

c. Country Club Bank Savings Account held in Petitioner's sole name;

d. Petitioner's share in the Surgicenter of Johnson County, with an assigned value of $250,000;

e. Three percent share in Creakwood Surgicenter, with an assigned value of $180,000 subject to the limitations set forth herein. At the time of the sale of Petitioner's interest in Creakwood Surgicenter, the taxes due and owing as a result of the sale, the costs associated with the sale, and the first $180,000.00 profit from the sale shall be set aside to Petitioner. Any remaining profit from the sale beyond the agreed upon value of $180,000.00 shall be split equally between Petitioner and Respondent Legare or Petitioner and Respondent Legare's heir. Respondent Legare's interest shall survive her death.

f. Txoribat, LLC at an assigned value of $100,000;

g. 2010 GMC Yukon. VIN: 1GKKVTED6BJ409872 at an assigned value of $27,000;

h. 2009 Subaru Forester VIN: 1F2SH63609G727407 at an assigned value of $3,086;

i. 1993 F150 VIN: 1FTEFL4Y9SLA48060 at an assigned value of $500;

j. Petitioner's IRA account with an assigned value of $385,227, which was liquidated during the pendency of this matter.

24. Petitioner shall be solely liable for the following debts incurred during the course of this marriage:

a. Mortgage on the property located at 4444 N. Belleview, Kansas City, Missouri and held by Country Club Bank in the amount of $115,347;

b. Loan on the Surgicenter of Johnson County and held by Country Club Bank in the amount of $998;

c. Loan on the airplane owned by Txoribat, LLC and held by Country Club Bank in the amount of $89,646;

d. Bank of America credit card debt in the amount of $49,643;

e. American Express credit card debt in the amount of $53,531;

f. Chase credit card debt in the amount of $29,149;

g. 2015 and 2016 property tax due and owing on the property located at 920 South 110th Street, Edwardsville, Kansas in the amount of $6,410;

h. 2015 income tax due and owing to the Internal Revenue Service in the amount of $74,754;

i. Loan on the 2010 GMC Yukon and held by Chase Auto Finance in the amount of $32,495;

j. 2015 income tax due and owing to the State of Missouri in the amount of $3,705;

k. Any and all income taxes which may become due and owing for the tax year of 2016, estimated at $60,000.

25. The Respondent shall receive as her sole and separate property free of any claim thereto by Petitioner:

a. Property located at 5944 Second Avenue, Montreal, Quebec, Canada, with an assigned value of $145,700;

b. One third of a vacant lot located at Chersey, Quebec, Canada, with an assigned value of $9,400;

c. Money market accounts held at Bank Midwest in Respondent Legare's name;

d. Checking account held at Bank Midwest in Respondent Legare's name;

e. Respondent Legare's Ameritrade IRA with an assigned value of $1,402;

f. Bank account held at Banque de Montreal in Respondent Legare's name.

26. Each party shall, within 30 days of the date of this Decree, execute all documents necessary to cause said property to transfer to the receiving party. In the event that a party is unwilling or unable to execute the necessary documents to effectuate said transfers, this Decree shall be deemed an appropriate instrument through which to cause the transfer of said property when the Decree has been filed.

27. Petitioner shall pay to Respondent as and for property equalization payment the sum of Two Hundred Twenty-Seven Thousand Dollars ($227,000.00). Said sum shall be payable over the course of fifteen (15) years, shall incur interest at 2% per annum, and shall result in a balloon payment where the full amount will become due and owing within five (5) years. So

long as Petitioner makes monthly payments pursuant to the above, execution upon said judgment shall be stayed. If Petitioner fails to make payment, Respondent may call for the due note and ask for the full amount. Should Respondent Legare die prior to Petitioner paying the $227,000 equalization payment in full, upon Respondent Legare's death, Petitioner shall make all remaining payments to Respondent Legare's son, Mathieu S. Bonin, or to any other heir she designate. Respondent's interest shall survive her death.

28. Petitioner shall pay to Respondent as and for a maintenance (alimony) payment the sum of Five Thousand Dollars ($5,000.00) per month payable directly to Respondent. This amount shall be payable through a Two Thousand Dollar ($2,000.00) gross salary payment by Dana Towle, MD, PC by the 15th of each month, a Two Thousand Five Hundred Dollar ($2,500) limit on the Chase credit card and a Five Hundred Dollar ($500.00) limit on the American Express credit card. In the event that one or all of the mechanisms for payment of maintenance, namely the Chase credit card, American Express credit card, or Dana Towle, MD, PC, ceases to exist, Petitioner shall pay $5,000 per month in the maintenance payments directly to Respondent. Petitioner shall also pay for and provide for Respondent Legare's cellular telephone (including her iPad) and Respondent Legare's health insurance premiums and deductibles. The paychecks for November and December of 2016 in the amount of $2,000 each shall be paid to Respondent Legare within 15 days of April 18, 2017. The paychecks for January, February, and March, 2017 shall be payable within 90 days of April 18, 2017. The April 2017 paycheck, in the amount of $2,000, shall be paid by May 15, 2017, and each month thereafter, the payments will always be made by the 15th of the month.

29. The maintenance payable by Petitioner to Respondent Legare shall be nonmodifiable and shall end with the final payment in November 2026 or upon the death of either party.

30. No maintenance shall be payable by Respondent Legare to Petitioner.

31. Petitioner shall dismiss the action for legal separation currently pending in the Circuit Court of Jackson County, Missouri, case number 1616-FC10248, within 10 days of the date of the dispositional hearing on this matter at Petitioner's own cost.

32. Costs of this action shall be assessed against Petitioner in the form of the filing fee previously paid.

33. Each party shall be responsible for his or her own attorney fees associated with this action.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED the Court adopts its findings as set out in paragraphs 1-33, above as the findings and the order of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, and this order shall be final judgment pursuant to K.S.A. 60-254(b), effective upon the filing of this instrument with the Clerk of this Court.

IT IS SO ORDERED.

_____

Judge of the District Court

Submitted by:

THE KIVETT LAW FIRM, LLC

By: /s/Amanda Kivett
AMANDA B. KIVETT #22579
1310 Carondelet Drive, Suite 303
Kansas City, MO 64114
Telephone: (816) 942-1900
Facsimile: (816) 942-2671
E-mail: amanda@kivettlaw.com
ATTORNEY FOR RESPONDENT

Approved as to Form & Content:
RITCHIE, SOPER & SCHUTT, LLC

By: _____
STEPHANIE L. SCHUTT #24933
The Clocktower Building
12B Westwoods Drive
Liberty, MO 64068
Telephone: (816) 792-5100
Facsimile: (816) 792-5147
E-mail: stephanie@ritchiesoperlaw.com
ATTORNEYS FOR PETITIONER

ASSETS	**HUSBAND**	WIFE
920 S. 110th St., Edwardsville, KS	$191,760.00	
5944 2nd Ave., Montreal		$145,700.00
3rd of Chersey Quebec lot		$9,400.00
4444 N Belleview, KCMO	$80,000.00	
Country Club Saving	X	
Bank Midwest MM #8868		X
Bank Midwest Checking #3122		X
Bank Midwest MM #5821		X
Banque of Montreal		X
Creekwood Surgicenter	$180,000.00	
Surgicenter of JoCo	$250,000.00	
Txoribat LLC	$100,000.00	
2010 SUV	$27,000.00	
2006 Forester	X	
2009 Forester	$3,086.00	
1993 F150	$500.00	
Dana 401k - Ameritrade		$1,402.00
Dana IRA	$385,227.00	
TOTAL ASSETS	$1,217,573.00	$156,502.00
DEBTS		
Belleview Mortgage	$115,347.00	
Surgicenter	$25,998.00	
Txoribat Airplane Loan	$89,964.00	
BOA CC	$49,643.00	
AMEX CC	$52,531.00	
Chase CC	$25,149.00	
Edwardsville Property Tax	$6,410.00	
2015 Income Tax	$74,754.00	
Chase Auto	$32,495.00	
Mo Income Taxes	$3,705.00	
2016 Income Taxes	$60,000.00	
Healthcare Resort		
TOTAL DEBTS	$535,996.00	
ASSETS MINUS DEBTS	$681,577.00	$156,502.00
TOTAL ASSETS MINUS DEBTS	$838,079.00	
Half	$419,039.50	
Minus assets in possession	$681,577.00	
Difference	**$(262,537.50)**	

77 P.3d 1288 (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.

AMERICAN STATES INSURANCE COMPANY, Appellee,
v.
INTERNATIONAL EDUCATION SERVICES, INC. (IES), Appellant.

No. 90,208.
|
Oct. 10, 2003.
|
Review Denied Dec. 23, 2003.

Synopsis

Insurer brought declaratory judgment action against company, disclaiming a duty to defend or indemnify company, which was not a named insured on policy issued to its principal, against claim by injured employee. After company was granted summary judgment against employee, insurer filed motion to voluntarily dismiss declaratory judgment action. The District Court, Kearny County, Thomas F. Richardson, J., granted motion, and company appealed. The Court of Appeals held that insurer was entitled to voluntarily dismiss action.

Affirmed.

West Headnotes (1)

[1] Pretrial Procedure
Counterclaim or Other Request for Affirmative Relief, Effect Of

Insurer was entitled to voluntarily dismiss its declaratory judgment action disclaiming a duty to defend or indemnify company, which was not a named insured on policy issued to its principal, against claim by injured employee, after company was granted summary judgment against employee; company did not file any counterclaims against insurer or demonstrate that plain legal prejudice would result from dismissal.

Cases that cite this headnote

Appeal from Kearny District Court; Thomas F. Richardson, judge. Opinion filed October 10, 2003. Affirmed.

Attorneys and Law Firms

Kenneth L. Cole, of Woelk & Cole, of Russell, for appellant.

Arthur S. Chalmers, of Hite, Fanning & Honeyman, L.L.P., of Wichita, for appellee.

Before RULON, C.J., ELLIOTT and MARQUARDT, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** International Education Services, Inc. (IES) appeals the trial court's grant of American States Insurance Company's (American) motion for voluntary dismissal of its suit and the denial of IES's claim for attorney fees. We affirm.

In 1996, IES, a Kansas corporation, sought insurance coverage from American. American refused to insure IES, but issued a policy to Charles and John Sellens effective August 21, 1996.

Bryan Groth, an employee of IEC, was injured when the scaffolding he was standing on collapsed. Groth filed a petition against IES, Charles Sellens, Paula Sellens, and Zelma Coyne alleging that they failed to supply safe work implements and a safe workplace.

IES, through its officer Charles Sellens, asked American to defend against Groth's lawsuit. American claimed that it was not responsible for IES's defense because only Charles Sellens was a named insured on the policy and the policy language did not cover bodily injury sustained

by an employee of the insured in the course of his or her employment.

American filed a declaratory judgment petition seeking a determination that it had no duty to indemnify or defend IES against the claims made by Groth. IES was eventually granted summary judgment against Groth. American then filed a motion to dismiss its declaratory judgment action, arguing that the suit was moot after summary judgment was granted to IES.

IES argued that the declaratory judgment action was not moot because (1) Groth's appeal period had not yet expired; (2) IES had incurred legal fees in defending against Groth's lawsuit; and (3) the responsibility for those legal expenses remained unresolved. American replied that IES had failed to show plain legal prejudice would result if the requested dismissal were granted.

The trial court granted American's motion to dismiss, finding that the resolution of the Groth case in IES's favor made the present case moot. The trial court rejected IES's request for attorney fees because the "issue has never been scheduled before the Court, raised in any sort of motion by the Defendant or prosecuted in any way." IES filed a timely notice of appeal.

The dismissal of an action by the plaintiff is allowed only by order of the court and "upon such terms and conditions as the judge deems proper." K.S.A.2002 Supp. 60-241(a)(2).

The dismissal without prejudice lies in the sound discretion of the trial court. *Cheek v. Hird,* 9 Kan.App.2d 248, 251, 675 P.2d 935 (1984). A defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's action unless the defendant asserts a counterclaim against the plaintiff. *Harrison v. Long,* 241 Kan. 174, 179, 734 P.2d 1155 (1987).

IES's argument that the trial court should not be allowed to dismiss an action over the objection of the opposing party because the plaintiff does not wish to proceed is not supported by caselaw or statute. IES was given the opportunity to file any claims against American within 14 days of the dismissal of the case. IES did not file a counterclaim or demonstrate that plain legal prejudice would result from the dismissal of the case. Despite the fact that the decision was based on the alleged mootness of the declaratory judgment, the trial court did not abuse its discretion when it allowed American to voluntarily dismiss its lawsuit. If a trial court reaches the right result, its decision will be upheld even though it relied upon the wrong ground or assigned erroneous reasons for its decision. *Bergstrom v. Noah,* 266 Kan. 847, 875-76, 974 P.2d 531 (1999).

***2** Affirmed.

All Citations

77 P.3d 1288 (Table), 2003 WL 22345480

165 P.3d 320 (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.

Michael K. CORL, Appellant,
v.
KANSAS HEART HOSPITAL and
Darrell J. Youngman, D.O., Appellees.

No. 95,774.
|
Aug. 24, 2007.

Appeal from Sedgwick District Court; Mark A. Vining and Karl W. Friedel, judges. Opinion filed August 24, 2007. Affirmed.

Attorneys and Law Firms

Michael S. Holland II and Michael S. Holland, of Holland and Holland, of Russell, for the appellant.

Gregory S. Young and Brian L. White, of Hinkle Elkouri Law Firm, L.L.C., of Wichita, for the appellee, Kansas Heart Hospital.

Mark R. Maloney and G. Andrew Marino, of Gilliland & Hayes, P.A., of Wichita, for the appellee, Darrell J. Youngman, D.O.

Before RULON, C.J., MCANANY and BUSER, JJ.

MEMORANDUM OPINION

MCANANY, Judge.

***1** Michael K. Corl appeals the decision of the district court denying his original motion to voluntarily dismiss his claim of medical malpractice without prejudice and other rulings.

On December 5, 2002, Corl filed a petition with the district court alleging that the defendants, Kansas Heart Hospital (Hospital); Darrell J. Youngman, D.O.; Thomas Ashcom, M.D.; Brian Tackitt, R.N.; and Lanny Crupper, R.N. were negligent in the performance of the care and treatment provided to him on or around December 15, 2000.

Defendants Ashcom, Tackitt, and Crupper are no longer parties to the lawsuit. Ashcom was dismissed with prejudice on May 9, 2005. Tackitt and Crupper were dismissed without prejudice on September 30, 2004.

The first discovery conference was held on February 24, 2003. Corl disclosed at the end of April 2003 that Dr. Alexander Duncan would serve as his expert witness regarding causation and the standard of care. On October 20, 2003, the district court stayed the lawsuit as the result of the overseas military deployment of one of the defendants. After the stay was lifted, a second discovery conference was held on May 26, 2004. Corl's deadline for disclosing additional expert witnesses was November 19, 2004.

Pretrial questionnaires were exchanged by the parties between May 20, 2005, and June 2, 2005.

On June 1, 2005, Corl filed a motion to dismiss without prejudice. While the motion was pending, the pretrial conference was continued. This was Corl's first attempt to have his medical malpractice claim dismissed without prejudice. Corl sought the dismissal without prejudice for the following reasons: "discovery questions and discovery remaining to be taken in the above-entitled case and the contemplated delay in scheduling this matter for jury trial, and plaintiff's departure from the State of Kansas."

Corl moved to Bushnell, Nebraska. On May 25, 2005, Corl's attorney informed the court that he was going to seek to have the case dismissed so that he could refile in federal court due to Corl's move to Nebraska. The motion to dismiss without prejudice was mailed the next day.

The district court denied this motion on June 10, 2005, stating that "prejudice would result to defendants if motion were granted without [the] ability of [the district court] to ensure that reasonable conditions necessary to protect against that prejudice would be enforceable." At the hearing on Corl's motion, the court stated that Corl did not have a right to a dismissal without prejudice. Instead, the court indicated that it would weigh and balance certain factors.

Specifically, the district court noted that Corl had chosen the forum in which to file his suit. Furthermore, the lawsuit had been on file since 2002. Finally, the court must by statute administer the rules of procedure "to secure the just, speedy and inexpensive termination of every action and proceeding."

In weighing these factors to determine possible prejudice to the defendants, the district court was struck by the lack of control it would have to ensure prior rulings made in the case would be followed if the case were dismissed without prejudice. Ultimately, the court wanted discovery in the case to be halted, the pretrial questionnaires to "control the case," and "the opinions of the experts be locked and no additional reports be allowed." The district court would have no "hammer" to ensure that its rulings would be followed, if Corl refiled the case in federal court. Also, requiring the payment of defendants' attorney fees would not protect their right to a "just, speedy and inexpensive determination of the issues." In sum, the court determined that granting Corl's motion to dismiss without prejudice would prejudice the defendants because the case had been pending for 3 years, it had already been either set for trial or was in the finalization process, and discovery had been completed.

***2** On June 20, 2005, Corl filed a motion with the district court to endorse an additional expert witness. In support of the motion, Corl argued that his designated expert witness for issues regarding standard of care and causation, Dr. Duncan, had represented to Corl that he was qualified to testify under Kansas law prior to his being retained. Dr. Duncan continued to assert his qualifications before and after his March 30, 2005, deposition. Furthermore, on April 4, 2005, Corl sent a letter to Dr. Duncan requesting specifically to know whether he was qualified to testify in accordance with Kansas law. Dr. Duncan informed Corl that he was qualified.

However, defense counsel expressed doubts about Dr. Duncan's qualifications and contacted his employer to determine whether he was qualified to provide expert testimony under Kansas law. In order to conduct this discovery, the district court granted the defense a continuance from the July 24, 2005, trial date. As a result of the requests by defense counsel, Dr. Duncan informed Corl that he would only testify concerning causation and not the standard of care. Corl sought to have the court designate Dr. Daniel Wohlgelernter as the expert witness for the standard of care.

On June 20, 2005, the district court denied Corl's motion to endorse an additional expert witness. The court stated that the case had already undergone full discovery. Furthermore, the expert witnesses had been "designated and established for a significant period of time."

At the hearing on Corl's motion, the district court stated that if it granted the motion, it would essentially be saying "bring in a new [expert] and we'll start this whole process all over again." Corl had "picked a horse" and had been standing by that "horse" as his expert since April 2003. The issue of whether an expert qualified under the 50 percent rule is typically an issue in medical malpractice cases. Thus, Corl should have investigated whether his designated expert met the requirements.

The district court further stated that its main complication concerning the addition of an expert witness was whether the previously designated expert, Dr. Duncan, was still willing to serve as an expert in the case. At that point, the court was unwilling to state Dr. Duncan was not qualified to serve as an expert witness if he chose to testify on Corl's behalf. Thus, the court felt that it was "premature" to state that Corl would require an additional expert witness to prove his claim.

The district court entered the pretrial conference order on July 18, 2005.

On August 11, 2005, Corl filed a second motion to dismiss without prejudice with the district court. In support of his motion, Corl stated that Dr. Duncan had formally withdrawn as an expert witness by correspondence dated August 1, 2005. As a result of Dr. Duncan's withdrawal, Corl lacked required expert testimony on causation and the standard of care. Corl further stated that his case would be prejudiced unless he was granted the opportunity to retain expert witnesses able to testify concerning those matters.

***3** On November 11, 2005, Dr. Youngman filed a motion to strike Dr. Duncan from the pretrial order. Dr. Youngman argued that Dr. Duncan did not qualify as an expert witness under Kansas law because he had not spent at least 50 percent of his time in the 2 years prior to the alleged negligence in active clinical practice. Furthermore,

Dr. Youngman asserted that Dr. Duncan failed to allow permissible discovery of his qualifications. Instead, Dr. Duncan chose to withdraw. On November 18, 2005, the district court granted the motion to strike Dr. Duncan as Corl's expert witness.

On November 18, 2005, the district court also denied Corl's second motion to dismiss without prejudice. The court stated that Corl's first and second motions to dismiss were substantively and substantially the same. As a result, the lack of any "substantive or material changes in facts, circumstances or applicable law" since the court's denial of the first motion to dismiss without prejudice led the court to deny Corl's second motion.

After denying Corl's second motion to dismiss, the district court dismissed Corl's lawsuit with prejudice. As a result of Dr. Duncan's withdrawal and the court's subsequent striking of Dr. Duncan in response to defendants' motion, Corl was left without expert testimony concerning causation and the standard of care. Without expert testimony, Corl was no longer able to show a prima facie case of negligence. Thus, the court held that Corl's case failed as a matter of law.

Our first issue to resolve is whether the district court erred in denying Corl's original motion to dismiss without prejudice.

On June 1, 2005, Corl filed a motion to voluntarily dismiss without prejudice under K.S.A. 60-241, which allows for the dismissal of a plaintiff's action by order of the court. K.S.A. 60-241(a)(2). The court's dismissal is subject to "such terms and conditions as the judge deems proper." K.S.A. 60-241(a)(2). Whether a motion to voluntarily dismiss should be granted is within the sound discretion of the district court. *Patterson v. Brouhard,* 246 Kan. 700, 705, 792 P.2d 983 (1990).

A plaintiff's motion to voluntarily dismiss should typically be granted unless the defendant will suffer some plain legal prejudice. 246 Kan. at 705. Allowing the court to condition the terms of a voluntary dismissal helps to alleviate any prejudice that may be suffered by the defendant. *Cheek v. Hird,* 9 Kan.App.2d 248, 251, 675 P.2d 935 (1984). Prior to granting a motion to dismiss, however, the court is required to "weigh the equities of the case and the rights of the parties bearing in mind the benefits or injuries which may result to the respective sides in the controversy if a dismissal is granted." 9 Kan.App.2d at 251 (citing *Gideon v. Bo-Mar Homes, Inc.,* 205 Kan. 321, 327-28, 469 P.2d 272 [1970]). The "mere prospect" of another lawsuit is not sufficient to deny plaintiff's motion. *Gideon,* 205 Kan. at 326. Nor is it a requirement that the motion be denied if "plaintiff may obtain some tactical advantage...." 205 Kan. at 326.

***4** In deciding whether a plaintiff's motion to voluntarily dismiss should be granted, the district court is required to "consider whether the dismissal would be conducive to the fair administration of justice; whether undue expense, inconvenience, or prejudicial consequences to defendants would be involved; and whether reasonable terms and conditions are just to the rights of the defendants." *Patterson,* 246 Kan. at 706. Here, Corl argues that the defendants would not have suffered any legal prejudice if the district court had granted his motion to voluntarily dismiss. Corl further asserts, however, that the court's denial has "deprived [him] of his substantive right to have the merits of his claim adjudicated by an impartial jury." Relying on *Gideon,* Corl states that his right to have the merits of his claim adjudicated "outweighed whatever minor prejudice defendants might incur, if any ." Furthermore, Corl contends that he should not be faulted for the unforeseen withdrawal of his expert witness. Thus, Corl argues that his case should be remanded to the district court with orders that the summary judgment be vacated and the voluntary motion to dismiss with proper conditions be granted.

When interpreting K.S.A. 60-241, decisions construing Federal Civil Procedure Rule 41 "are persuasive and would appear to have more than usual weight as authority." *Gideon,* 205 Kan. at 325. In *Cheek,* this court cited four factors that have been identified in cases interpreting Rule 41 as justifying the denial of a plaintiff's motion to voluntarily dismiss. The cited factors include "defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation of the need for a dismissal, and the fact that a motion for summary judgment has been filed by defendant. [Citation omitted.]" 9 Kan.App.2d at 252; see also *Caplinger v. Carter,* 9 Kan.App.2d 287, 291, 676 P.2d 1300, *rev. denied* 235 Kan. 1041 (1984) (a voluntary motion to dismiss may be denied if extensive discovery has occurred, the plaintiff has continually delayed, and disposition by summary judgment would be appropriate).

Other possible factors include the diligence of the plaintiff in seeking a dismissal, the current stage of the litigation, and the duplication of expenses likely to result from a second lawsuit. *103 Investors I, L.P. v. Square D Co.*, 222 F.Supp.2d 1263, 1271 (D.Kan.2002), *aff'd in part and rev'd in part on other grounds* 372 F.3d 1213 (10th Cir.2004). However, satisfying these factors is not conclusive as they are merely a guide to the district court. 222 F.Supp.2d at 1271 (citing *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 357-58 [10th Cir.1996]). As previously stated, whether to grant a motion to dismiss is ultimately left to the judicial discretion of the court, which "should endeavor to secure substantial justice to both parties." *Gideon,* 205 Kan. at 326.

***5** Corl's original motion to voluntarily dismiss without prejudice was filed on June 1, 2005, nearly 2 1/2 years after the case was originally filed on December 5, 2002. In the intervening time, discovery conferences were held on February 24, 2003, and May 26, 2004, after the case was stayed on October 20, 2003, due to the military deployment of one of the defendants. Dr. Duncan was designated as Corl's expert witness at the end of April 2003, and his deposition taken by the defendants on March 30, 2005. Pretrial questionnaires were exchanged between May 20, 2005, and June 2, 2005. However, the pretrial conference had not yet taken place.

Corl's motion to dismiss provides that he wishes to dismiss because of "discovery questions and discovery remaining to be taken in the above-entitled case and the contemplated delay in scheduling this matter for jury trial, and plaintiff's departure from the State of Kansas...." The discovery questions and possible delay in scheduling the trial appear to concern Dr. Duncan's qualifications and the defense efforts to subpoena evidence from Dr. Duncan's employer to determine if he was qualified to testify under Kansas law. The district court had granted the defense a continuance from the July 24, 2005, trial date to allow for discovery into Dr. Duncan's qualifications. Corl's reference to his departure from the state of Kansas appears to relate to his desire to file the case in federal court based on diversity.

In response to Corl's motion to dismiss, the Hospital and Dr. Youngman argued, in part, that Corl had not been diligent in pursuing his case as no depositions had been taken. Furthermore, Corl had failed to conduct any written discovery. Defendants argued, however, that if the district court granted Corl's motion to dismiss without prejudice certain conditions should be implemented by the court to limit prejudice to the defendants.

The conditions suggested to the district court by the defendants included disallowing additional expert witnesses and locking in the opinions of all parties' designated experts. After Dr. Duncan officially withdrew as Corl's expert witness, Corl needed a new expert witness for causation and the standard of care. Corl argued that Wohlgelernter had reviewed the case and was willing to serve as an expert witness for the standard of care. Corl's efforts to have Dr. Wohlgelernter added as an expert witness, however, proved unsuccessful. Thus, Corl could not agree to the conditions requested by the defendants concerning expert witnesses because to do so would mean that his case would fail as a matter of law.

Failing to place any limits on the addition of expert witnesses, however, would require defendants to conduct new depositions and develop new strategies over 4 years after the case was originally filed. Corl originally designated Dr. Duncan as an expert witness in April 2003. Between the time of designation and the filing of the motion to dismiss, Corl repeatedly contacted Dr. Duncan to determine if he was qualified to serve as an expert witness under Kansas law. However, it appears that Corl did not undertake any independent investigation of Dr. Duncan's qualifications or seek proof other than his assurances.

***6** Corl further argues that the district court erred in denying his motion to dismiss because of a perceived inability to enforce imposed conditions if his case were refiled in federal district court. To support his assertion that the district court could have enforced any imposed conditions, Corl cites to *Brown v. Zackert,* 10 Kan.App.2d 466, 468, 701 P.2d 711 (1985). However, an analysis of *Brown* and *McLaughlin v. Cheshire,* 676 F.2d 855, 857 (D.C.Cir.1982), which cited in *Brown,* does not support Corl's assertion. *Brown* involved the assessment of costs as a condition of voluntary dismissal and whether those costs involved expenses that would be useful to defendant if plaintiff refiled the case. Although the possibility of refiling in another state's court was discussed in *Brown,* the applicability of the conditions of dismissal to any subsequent action in another state was not part of the case. See 10 Kan.App.2d at 467-68. Thus, Corl's reliance

on *Brown's* interpretation of *McLaughlin* appears to be misplaced.

Corl further relies on *Brown* for the assertion that the district court abused its discretion by "not recognizing that K.S.A. 60-241(a)(2) permits the imposition of conditions upon a plaintiff before his motion to dismiss will be granted." However, the district court discussed the option of imposing conditions but expressed concern that the imposition of those conditions may not be upheld in an alternate forum. Furthermore, the imposition of attorney fees was not deemed sufficient to prevent legal prejudice to the defendants. Contrary to Corl's assertions, the district court weighed the imposition of conditions but ultimately determined them to be insufficient. Thus, failure to impose conditions was not an abuse of discretion.

Similarly, Corl asserts that the district court would have been able to ensure compliance with any imposed conditions if the district court had conditioned its dismissal on the ability to convert the dismissal to one with prejudice if the conditions were not met. Corl cites *Brown v. Baeke,* 413 F.3d 1121, 1124 (10th Cir.2005), in which the court granted the plaintiff's voluntary motion to dismiss, but imposed restrictions to avoid redundancy if the case were later refiled and required plaintiff's payment of defendant's duplicative expenses. The court also conditioned the dismissal without prejudice on plaintiff's refiling within 30 days. Otherwise, the dismissal would be converted to a dismissal with prejudice. Although Corl cites *Baeke* as illustrative of action the district court could have taken in granting his motion to dismiss, *Baeke* does not support Corl's argument that such conditions would have alleviated the district court's concerns about the applicability of any conditions if the case were refiled. Furthermore, as asserted by the Hospital, the decision in *Baeke* affirming the imposed conditions only serves to show "the broad discretion of the district court."

***7** In addition, Corl's reliance on *Pope v. Ransdell,* 251 Kan. 112, 833 P.2d 965 (1992), provides no material basis on which to allow this court to rule on appeal that the district court abused its discretion. In *Pope,* a medical malpractice case, the plaintiff's expert witness was not allowed to testify at trial because he failed to provide copies of requested income tax returns. The district court granted a motion to dismiss without prejudice but reserved the right to impose conditions on the dismissal, which were later determined by the court to include costs incurred by the defendant in preparing for the testimony of the original expert witness.

After the case was refiled, the district court granted the plaintiff 60 days to retain another expert witness. Later attempts by the plaintiff to add additional expert witnesses were denied. Despite some similarities to the present case, *Pope* only serves to further illustrate the discretion of the district court in ruling on motions to dismiss without prejudice. Although the district court in the present case could have imposed conditions similar to those imposed by the court in *Pope,* it was not an abuse of discretion for the district court to instead deny the motion after weighing the equities.

Under the totality of circumstances, it cannot be concluded that no reasonable person would have denied Corl's motion to dismiss without prejudice.

We also note the issue of whether the district court erred in denying Corl's motion to endorse an addition expert witness.

If an appellant raises an issue on appeal but does not brief the issue, then it is deemed to have been waived or abandoned. *McGinley v. Bank of America, N.A.,* 279 Kan. 426, 444, 109 P.3d 1146 (2005). Although Corl raises the district court's denial of his motion to endorse an additional expert witness, he fails to substantively brief his arguments showing that the district court erred in its denial. Furthermore, Corl cites no authority to support his proposition that the district court erred. The arguments presented concerning the denial of the motion to endorse an additional expert witness are coupled with Corl's motion to dismiss and cite only to broad notions of his right to have the merits of his case heard by an impartial jury and that the denial of his motions has led to an unfair administration of justice. Thus, the issue of whether the district court erred in denying his motion to endorse an additional expert witness is deemed waived or abandoned. See *McGinley,* 279 Kan. at 444.

Finally, we need to address if the district court erred in striking Corl's expert witness and granting summary judgement for the defendants.

Raising an issue for appeal, but failing to brief the issue, results in its abandonment or waiver. 279 Kan. at 444.

Although Corl asserts the district court erred in striking his expert witness and granting summary judgment for the defendants, he fails to provide any substantive discussion as to the court's alleged errors or provide any authority to support his assertions. Therefore, these issues are deemed abandoned by Corl and are not subject to further review on appeal. See 279 Kan. at 444.

***8** We do not believe we need to address any other issues raised by the parties due to the effect of our above decisions.

Affirmed.

BUSER, J.: dissenting.

BUSER, Judge.

I dissent from the majority's holding that the district court did not abuse its discretion in denying Corl's initial motion to dismiss without prejudice.

It is a "traditional principle" that a plaintiff's voluntary dismissal without prejudice

> "will be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. It is no bar to dismissal that the plaintiff may obtain some tactical advantage by such dismissal, or that the defendant may lose the defense of a period of limitation." *Gideon v. Bo-Mar Homes, Inc.*, 205 Kan. 321, Syl. ¶ 3, 469 P.2d 272 (1970).

Ironically, this well-settled doctrine was fully appreciated by both defense counsel who argued against Corl's motion. Counsel for Kansas Heart Hospital candidly conceded "we also understand that there is a general premise in Kansas law, and it's been my history with this Court and other courts in Kansas, that dismissals are generally granted." Counsel for Dr. Youngman concurred: "Certainly it's my experience, also, that in this jurisdiction, as well as others in the State of Kansas, these types of motions are usually granted."

Having made these concessions, both defense and plaintiff's counsel and the district court focused almost the entirety of the June 10, 2005, hearing discussing proposed conditions to govern any refiling of plaintiff's lawsuit. As counsel for Dr. Youngman explained, "[a]nd the real issue for debate at a hearing such as this is the terms and conditions that are to be applied upon any refiling." During the hearing defense counsel submitted seven conditions they asked the district court to impose upon the plaintiff's refiling of the lawsuit. Plaintiff's counsel did not object to many of defense counsel's conditions except their proposal "locking in" experts and the amount of attorney fees.

In response to the district court's questions regarding the enforceability of any conditions on refiling the plaintiff's lawsuit in federal court, defense counsel for the hospital suggested to the court

> "first, you can retain jurisdiction to make sure the terms and conditions are satisfied. Secondly, certainly this Court's order, while not controlling on a federal court judge, the relationship between the bench in state court and federal court in this location is-locale is good enough that terms and conditions placed upon this dismissal by this Court I think would be honored by our federal court judiciary."

Counsel for Dr. Youngman disagreed, noting "some uncertainty" about the enforceability of any conditions in the federal court while suggesting ways the district court could address that uncertainty.

In denying the plaintiff's motion to dismiss his lawsuit without prejudice, however, the district judge stated:

> ***9** "I come down to the fact that I don't have control of this case if I dismiss it or allow you to dismiss it in a manner that allows me to suggest that we can freeze discovery and give the plaintiffs-or the defendants the relief that they're entitled to if I dismiss without prejudice.
>
> ....
>
> "If I allow you to dismiss the case without having some hammer which would say-especially understanding that you may take it to federal court, because now your client's out of state, and say that I can suggest to the federal court that they have to follow my rulings, I can hope that they do, but I know I don't have any authority to require them to do that."

In exercising discretion in this matter the district court made two errors. First, the district court unduly focused on its perceived powerlessness to enforce appropriate terms and conditions on Corl's refiling the lawsuit in federal court. There is precedent, however, which suggests ways for a district court to enforce its conditions once a plaintiff refiles a lawsuit-including retaining jurisdiction over the matter to entertain a motion by the defendants to dismiss the matter with prejudice. *McCoy v. Whirlpool Corp.,* 204 F.R.D. 471, 475 (D.Kan.2001). Moreover, assuming arguendo the district court was powerless to enforce conditions on a refiled lawsuit in federal court, it is unreasonable to presume that a federal court (upon being informed of the litigation's history and refiling conditions that a state district court judge determined were appropriate) would be incapable or unwilling to provide the defendants with a proper measure of relief with regard to discovery limitations and deadlines, expert witness designations, trial setting, and an award of attorney fees and costs.

The second error made by the district court was more fundamental. A review of the June 10, 2005, hearing transcript reveals no consideration by the court of the potentially prejudicial effect the denial of the plaintiff's motion could have on the plaintiff's case. As shown by subsequent events, however, the district court's decision essentially resulted in the plaintiff being deprived of his right to have the merits of his lawsuit adjudicated by an impartial jury.

When considering a plaintiff's motion for voluntary dismissal filed after the defendant's answer, the important factors in determining legal prejudice are those involving the *parties.* (Emphasis added.) 204 F.R.D. at 473. Reasonable jurists may have weighed the equities of the respective parties differently in this case. That is the essence of judicial discretion to which appellate courts typically afford deference. But, that did not happen here. By failing to even consider, let alone weigh, the potentially grave consequences to Corl of denying the motion to dismiss without prejudice, the district court's decision was an "arbitrary action"-that is, a "failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances." 205 Kan. 321, Syl. ¶ 5.

***10** I would reverse and remand with directions to dismiss Corl's lawsuit without prejudice "upon such terms and conditions as the judge deems proper." K.S.A. 60-241(a)(2).

All Citations

165 P.3d 320 (Table), 2007 WL 2410113

196 P.3d 958 (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.

GREAT PLAINS TRUST COMPANY, Administrator of the Estate of Timothy Wallin, Deceased, Appellee,
v.
Joyce WALLIN, Appellant.

No. 99,483.
|
Dec. 5, 2008.
|
Review Denied Sept. 2, 2009.

West KeySummary

1 **Executors and Administrators**
Personal or Representative Capacity

The administrator of the estate had standing to sue where the estate suffered injury by the illegal transfer of funds. The deceased transferred a large amount of money to his mother shortly before his death. This transfer violated a temporary restraining order in divorce proceedings between the deceased and his wife. The deceased died before the divorce was completed, and the administrator of his estate sued the mother for return of the money after his death. The mother asserted that the administrator did not have legal standing to sue her because the administrator did not suffer an injury. The court found that because the funds would have been in the estate had he not transferred them, the transfer harmed the estate.

Cases that cite this headnote

Appeal from Johnson District Court; Kevin P. Moriarty, Judge.

Attorneys and Law Firms

James C. Wirken and Christopher B. Wirken, of The Wirken Law Group, of Kansas City, Missouri, for appellant.

David G. Watkins and Robert A. Stopperan, of Slagle, Bernard & Gorman, P.C., of Kansas City, Missouri, for appellee.

Before McANANY, P.J., BUSER and LEBEN, JJ.

MEMORANDUM OPINION

LEBEN, J.:

***1** Shortly before his death, Tim Wallin transferred more than $100,000 to his mother, Joyce Wallin. The transfer violated a temporary restraining order in divorce proceedings between Tim and his wife, Grace Wallin. Tim died before the divorce was completed, and the administrator of Tim Wallin's estate sued Tim's mother for return of the money after his death. The district court granted summary judgment to Great Plains as the administrator, but Joyce claims on appeal that Great Plains did not have the legal standing to sue her. The party that suffered injury is the party with standing. Because the funds would have been in Tim's estate had he not transferred them, the transfer harmed the estate. We find that Great Plains, the estate administrator, had standing to sue, and we therefore affirm the judgment of the district court.

I. *We Review the Single Issue of Standing on Appeal from Summary Judgment.*

The sole issue Joyce raises on appeal is the standing of the estate administrator, Great Plains Trust Company, to bring suit. She claims that only Grace, Tim's widow, would have standing to sue.

The district court decided this case on competing motions for summary judgment. We review the question of standing on appeal differently depending on the stage of the proceedings below. If a district court grants a motion to dismiss for lack of standing, we must accept the facts alleged in the petition as true on appeal. *Board of Sumner*

County County Comm'rs v. Bremby, 286 Kan. 745, 751, 189 P.3d 494, 500 (2008). But in the case before us, the standing issue was considered on competing summary-judgment motions, and the district court found that Great Plains could bring suit as the estate administrator. Thus, we must view the facts in the light most favorable to Joyce. While we must accept as true the uncontroverted facts that are unfavorable to Joyce, we otherwise make reasonable inferences from the evidence in her favor. See *Robbins v. City of Wichita,* 285 Kan. 455, 460, 172 P.3d 1187 (2007). Joyce does not challenge the district court's factual findings.

II. *Great Plains Meets the Legal Test for Standing.*

Our analysis must center on the legal test for standing, which is a party's ability to file suit. In order to meet the traditional standing test, "a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Bremby,* 286 Kan. at 761. In other words, a person must suffer an injury for which the law offers some legal remedy, which is referred to as either a cognizable injury or redressability. See *Lance v. Coffman,* 549 U.S. 437, ——, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (listing standing requirements as injury in fact, causation, and redressability). Thus, a party has standing when an injury has been sustained, that injury was caused by the challenged conduct, and the claim is legally recognized. Great Plains, as administrator, has met all of those elements here.

***2** Without question, Great Plains has met the first two elements for legal standing. First, the estate suffered injury because it is missing over $100,000 that it would have held absent these transfers. Second, this loss was directly attributable to the challenged conduct; Tim's transfer of money to his mother in violation of the court's restraining order. Without these transfers, the funds would have been in Tim's estate after his death.

So we are left only with the question of whether there is a legally cognizable claim for redress of these wrongful transfers. Great Plains sought to impose a constructive trust on the funds Tim had given his mother.

A constructive trust may be imposed where it would be inequitable for the person who holds the legal title to retain the property based upon the manner in which it was acquired. *In re Estate of Lane,* 39 Kan.App.2d 1062, 1065–66, 188 P.3d 23 (2008). The imposition of a constructive trust generally requires a showing of actual or constructive fraud. 39 Kan.App.2d at 1066. But we have upheld the imposition of a constructive trust in another case without determining whether fraud had been shown. See *Hile v. DeVries,* 17 Kan.App.2d 373, 374–75, 836 P.2d 1219 (1992) (declining to determine whether fraud is required to impose a constructive trust on insurance proceeds for a case in which the district court found equities required the imposition of a constructive trust); see also *Clester v. Clester,* 90 Kan. 638, Syl. ¶ 2, 135 P. 996 (1913) (stating that constructive trust arises "whenever the circumstances under which the property was acquired make it inequitable that it should be retained by the person who holds the legal title"). Constructive fraud may be found when a legal or equitable duty is breached that "the law declares fraudulent because of its tendency to deceive others or violate a confidence." *Loucks v. McCormick,* 198 Kan. 351, Syl. ¶ 1, 424 P.2d 555 (1967). In such cases, neither actual dishonesty nor intentional deception is required. 198 Kan. 351, Syl. ¶ 1, 424 P.2d 555.

The district court's findings went unchallenged on appeal, and they certainly make it appear that Tim was trying to hide the money from Grace during the divorce proceedings. The district court found that (1) Grace didn't consent to the transfers; (2) the transfers occurred within a few days of Tim's receipt of the restraining order; (3) the transfers were not the payment of any "normal monthly expense" of Tim's; (4) there was no student-loan agreement between Tim and his mother that Tim was obligated to repay; and (5) the transfer from Tim to his mother violated the restraining order.

The lack of agreement to repay student loans is significant in assessing Tim's potentially fraudulent motives. Tim wrote "student loan repayment" on all but one of the checks to his mother, yet he had no such loan agreement. Other evidence showed that Tim had not listed a loan to his mother on either a premarital agreement or on answers to interrogatories in the divorce case. Nor did Tim list any of the transfers in an interrogatory answer about gratuitous transfers made while the divorce case was pending. Grace said that Tim had never mentioned a student loan—and Tim made no similar payment to his mother before the restraining order was entered. In addition, Tim's mother put the checks from Tim into two separate bank accounts; Tim was the pay-on-death

beneficiary on both of the accounts. No contrary evidence was presented on these points.

***3** As we have already noted, Joyce has only raised the issue of standing. She has not challenged whether the evidence supports the *merits* of Great Plains' claim if Great Plains has proper standing. A party does not have to demonstrate that it will actually win on the merits to have standing. *United States v. Premises Known as 7725 Unity Ave. North,* 294 F.3d 954, 957 (8th Cir.2002); *United States v. Rodriguez–Aguirre,* 264 F.3d 1195, 1204 (10th Cir.2001); *United States v. $515,060.42 in U.S. Currency,* 152 F.3d 491, 497–98 (6th Cir.1998). Given the uncontroverted facts found by the district court, Great Plains had a cognizable claim to impose a constructive trust on the funds in Joyce's hands.

III. *Joyce's Arguments that Great Plains Lacks Standing Rest on Faulty Premises and Discuss Caselaw Not on Point.*

In the face of this uncontroverted evidence, Joyce makes two specific arguments about standing. First, she argues that the proper party to bring this claim is Grace, not Great Plains, because Great Plains doesn't have standing while Grace does. Second, she argues that Great Plains must stand in Tim's shoes (and thus have the same rights as Tim would) when it brings a claim to recover funds he freely gave away. Joyce then assumes that Tim would be unable to sue his mother for the return of the funds he had given her. Upon that premise, she argues that the estate may not either because Great Plains must stand in Tim's shoes. We do not find her arguments persuasive.

First, as we have already noted and the district court found as a matter of uncontroverted fact, the funds transferred by Tim to his mother would have been in his estate at his death had he not given them to his mother. Tim died without a will, which left his property to pass to his heirs under intestate-succession laws. See K.S.A. 59–501 *et seq.* No final orders or judgments had been entered in the divorce case at Tim's death, and a divorce case ends on the death of either spouse. *Wear v. Mizell,* 263 Kan. 175, 180, 946 P.2d 1363 (1997); *In re Marriage of Wilson,* 245 Kan. 178, 180, 777 P.2d 773 (1989). Thus, absent some estate-planning devices that Tim didn't use, whatever property interests he had went into his estate on his death. Moreover, Tim and Grace had a premarital agreement, which may affect her rights to receive an inheritance.

But even if Grace were fully entitled to take a spouse's share from the estate, creditors and other potential heirs may have an interest too. The estate administrator—not Tim's widow—has the task of bringing together all of a decedent's assets for administration in the estate. See K.S.A. 59–1401; *Murdoch v. First National Bank,* 220 Kan. 459, Syl. ¶ 3, 553 P.2d 876 (1976). Once property is in the estate, it is subject to the claims of creditors before distributions are made to heirs. See K.S.A. 59–1301 and 59–1503; *In re Estate of Brasfield,* 168 Kan. 376, 383, 214 P.2d 305 (1950) (noting that estate administration "is for the benefit of creditors as well as heirs"). Thus, the proper party to bring a claim for return of these funds to the estate is the estate administrator, which is Great Plains in this case. See *Ponnambalam v. Ponnambalam,* 35 A.D.3d 571, 573–74, 829 N.Y.S.2d 540 (2006) (administrator or executor, not potential beneficiary, has right to sue to recover assets that should have been in the estate); *Scavello v. Scott,* 194 Colo. 64, 68, 570 P.2d 1 (1977) (administrator, not widow, has right to sue to recover funds that should have been in the estate but which husband had transferred to daughter solely to keep funds away from wife during divorce proceeding pending at time of death); *Presbury v. Pickett,* 1 Kan.App. 631, 42 P. 405, Syl. B P. 405 (1895) (personal representative, not heir, is proper party to recover debt owed to decedent); 31 Am.Jur.2d, Executors & Administrators § 1139 (actions are properly brought by estate administrator to recover property that should have been in estate but for wrongful act of decedent or undue influence on decedent); Tomlinson, Administration of Decedents' Estates § 6.18 (1972) ("Under his duty to collect all property receivable by the decedent from others, it is the duty of the executor to ascertain whether any purported or alleged transfer by the decedent during his lifetime was in fact made and was valid and effective.").

***4** Second, Joyce's argument that the estate must stand in Tim's shoes has several faulty premises:

- Joyce assumes that Tim could not sue her to obtain return of the funds he had given her. That's not necessarily so. In *Krogen v. Collins,* 21 Kan.App.2d 723, 907 P.2d 909 (1995), our court upheld a contempt order against a man who had violated a divorce restraining order by giving his money away to other family members. Our court held that the evidence could support the conclusion that the "alleged gifts of money.., were a ruse" to keep the assets from his spouse;

our court also concluded "that he has the means to purge himself of contempt" and obtain his release from jail on the contempt finding. 21 Kan.App.2d at 728, 907 P.2d 909. Thus, in a similar case, we upheld a contempt finding on the basis that a spouse could lawfully get money back that he had given away to family members contrary to a restraining order.

• Tim and his estate are not identical parties. Thus, one might expect that the estate would not step into Tim's shoes for all purposes. Great Plains represents the interests of the estate, from which payments are required to creditors before distributions are made to heirs or beneficiaries.

• Kansas law has long held that fraud "vitiates everything it touches." *E.g., Griesa v. Thomas,* 99 Kan. 335, 342, 161 P. 670 (1916). If Tim's transfers to his mother constituted either actual or constructive fraud, his estate should not be precluded from recovering the money based upon Tim's fraudulent intent. The estate should not be expected to remain in Tim's shoes in that circumstance because the estate would be required to accept—rather than rectify—fraudulent conduct.

• As we noted previously, Great Plains does not have to show that it will ultimately win a fraud claim simply to have standing to sue. Great Plains has shown a claim sufficient to grant standing to sue.

In support of her position, Joyce cites *In re Kastner Estate,* 113 Kan. 106, 212 P. 687 (1923), and *Nelson v. Nelson,* 38 Kan.App.2d 64, 162 P.3d 43 (2007). But neither case decided the issue here: whether a party has standing to bring a lawsuit.

The *Nelson* case is not yet fully resolved in the courts; the Kansas Supreme Court has granted review. But our court's decision in *Nelson* is not closely on point here, anyway. The decedent in *Nelson* had agreed in a divorce settlement to maintain some property for the benefit of his children. After his death, those children sued his estate because he had not complied with the divorce agreement. Our court held that claims against an estate for breach of contract were barred under the Kansas nonclaim statute, K.S.A. 59–2239, which requires that contract-based claims (among others) be brought within specified time limits. Our court also found that no exception applied to that rule, and it specifically rejected theories of fraud or unconscionable conduct as well as a request to impose a constructive trust. Our court noted that the pleadings in the case contained no allegation of fraud and that none had been proven by evidence, either. *Nelson* does not purport to decide anything about standing to sue. Our court reviewed the pleadings and evidence on the merits of the case, not on a standing issue.

***5** In *Kastner,* the decedent granted a mortgage during his life; his estate was bound by the terms of the mortgage. But as Great Plains properly notes in response, a mortgage given as security for a valid debt "is not the equivalent of a gratuitous transfer made in violation of a court order." The bank in *Kastner* had failed to record the mortgage in the proper county, but the estate was still held bound by the unrecorded mortgage (just as Kastner would have been had he still been alive). The mortgage was given lien priority over claims of other creditors in paying claims against the estate. And fraud as to other creditors would not eliminate a decedent's duties under a mortgage: "An executor or administrator stands in the shoes of the decedent in respect to mortgages given by the decedent, whether in fraud of creditors or otherwise." 113 Kan. at 107, 212 P. 687. While *Kastner* involved a standard mortgage to a bank, there is no mortgage or other written debt instrument to support a claim that Tim owed a debt to his mother. Here too, *Kastner* does not purport to decide any issue of standing to sue, and the case holding has no applicability to our facts.

We also note that one of the cases cited and relied upon in *Kastner* was later rejected on the holding now relevant to us. That case was *Crawford's Administrator v. L.B. Lehr,* 20 Kan. 509 (1878). In *Crawford's Administrator,* the court sided with courts elsewhere that had held that an estate administrator could not sue to recover property previously sold by the decedent even if the sale was intended to defraud creditors. 20 Kan. at 512–13. More than 30 years later, the Kansas Supreme Court rejected the view it had embraced in *Crawford's Administrator* and relied upon in *Kastner.* In *McGuire v. Davis,* 95 Kan. 486, 489, 148 P. 755 (1915), the court noted that after the previous Kansas decision there had been many contrary decisions and that they were "supported by cogent reasoning." The court noted that the holding in *Crawford's Administrator* had also been based in part on limitations in the language of the Kansas statute then in effect. Ultimately, the court concluded that "the right of an administrator seems clear to maintain an action to set aside, for the benefit of creditors, lands fraudulently

conveyed by the decedent." 95 Kan. at 489–90, 148 P. 755. Great Plains seeks no greater right.

Conclusion

Joyce's sole issue on appeal is that the estate administrator lacked standing—that Great Plains "does not have standing to attack the decedent's transfers ...; the only party with standing to challenge [them] ... is Grace Wallin...." But Great Plains' claim met all of the requirements for standing to sue under Kansas law.

The judgment of the district court is affirmed.

BUSER, J., dissenting:

***5** The majority acknowledges the uncontroverted fact that the money in question would have been in Tim's probate estate but for the intervivos transfer to his mother, Joyce. The correlate is that the money was not in Tim's probate estate due to that transfer. Because Great Plains lacks standing to sue for property not in Tim's probate estate, I dissent.

***6** Probate estates are limited to the decedent's property at death. See Rheinstein and Glendon, The Law of Decedents' Estates 523 (1971); 33 C.J.S., Executors and Administrators § 145; 31 Am.Jur.2d, Executors and Administrators §§ 460, 462. Consistent with this rule of law, K.S.A. 59–1401(b) refers to an administrator's duty to "marshal all ... property owned by a resident decedent." The majority cites this statute, upon which Great Plains relies for standing, and concludes: "The estate administrator—not Tim's widow—has the task of bringing together all of a decedent's assets for administration in the estate." Slip op. at 8. But the property at issue here was owned by Tim's mother when he died, and Great Plains has no duty to marshal it. Quite simply, the money at issue was not among Tim's assets at the time of his death.

Certainly an administrator or executor has standing to sue over injuries done to the decedent's property before his death. Causes of action "for an injury ... to real or personal estate ... may be brought notwithstanding the death of the person entitled ... to the same." K.S.A. 60–1801. Such a cause of action, formerly belonging to the decedent personally, survives his or her death and may be pursued by the administrator or executor. See *Fogarty v. Campbell 66 Exp., Inc.,* 640 F.Supp. 953, 964 (D.Kan.1986); *Howe v. Mohl,* 168 Kan. 445, 449–50, 214 P.2d 298 (1950).

An administrator or executor may also seek recovery of a decedent's intervivos transfer made while mentally incompetent. See *Wollard v. Home State Bank,* 121 Kan. 474, 475–76, 247 P. 868, *cert. denied* 273 U.S. 674, 47 S.Ct. 572, 71 L.Ed. 834 (1926). The rationale for this rule of law is that "the delivery was not a binding delivery, and it was the administrator's duty to restore the [asset] to a place among [the decedent's] effects." 121 Kan. at 475–76, 247 P. 868. In such a case the cause of action for return of the intervivos transfer would exist before the decedent's death, and the administrator would simply be pursuing an already-existing right. See *Heck v. Archer,* 23 Kan.App.2d 57, Syl. ¶ 3, 927 P.2d 495 (1996).

The majority, however, never directly decides whether Tim had a cause of action against his mother for his own voluntary transfers made during his lifetime. Although the majority discusses "Tim's potentially fraudulent motives," the district court did not hold that Tim (or Joyce) committed either actual or constructive fraud. I would not make such findings for the first time on appeal. See *Gragg v. Rhoney,* 20 Kan.App.2d 123, Syl. ¶ 1, 884 P.2d 443 (1994), *rev. denied* 256 Kan. 994 (1995) ("The existence of fraud is normally a question of fact and, thus, not appropriate for summary judgment.").

The district court's decision was based solely on Tim's violation of the temporary restraining order (TRO). The question, then, is whether Tim could have maintained an action against Joyce for his own violation of a TRO in a separate civil case involving his wife, Grace. To establish standing a plaintiff generally must show that "he or she personally has suffered some actual or threatened injury as a result of putatively illegal conduct of the defendant. [Citation omitted.]" *Lower v. Board of Dir. of Haskell County Cemetery Dist.,* 274 Kan. 735, 747, 56 P.3d 235 (2002). Nothing in the uncontroverted facts suggests that Tim suffered an actual or threatened injury by knowingly and voluntarily transferring the money in question to his mother, the TRO notwithstanding. Moreover, "[t]he general rule is that a party who consents to an ... illegal act cannot recover from other participants thereto for the consequences of the act." *Joy v. Brown,* 173 Kan. 833, Syl. ¶ 1, 252 P.2d 889 (1953).

***7** My colleagues, nevertheless, contend that Tim's violation of the TRO gave him standing to sue his mother. In support, they cite to *Krogen v. Collins,* 21 Kan.App.2d 723, 907 P.2d 909 (1995). According to the majority, in *Krogen* our court upheld "a contempt finding on the basis that a spouse could lawfully get money back that he had given away to family members contrary to a restraining order." Slip op. at 9. I read *Krogen* differently.

The husband in *Krogen,* John Krogen, was the recipient of a settlement in a civil case, and when the district court in a divorce action entered a restraining order prohibiting disposition of the settlement, it warned that "any violation of the order could subject him to a contempt action." 21 Kan.App.2d at 724, 907 P.2d 909. John nevertheless "claimed he had disposed of all the settlement before the restraining order was entered" by giving it to his father and children and spending the rest. 21 Kan.App.2d at 724, 907 P.2d 909. The district court disbelieved John and held him in contempt. 21 Kan. App, 2d at 725–26.

John filed an original habeas action in our court, arguing in part "that he cannot possibly comply with the civil contempt order, so the order is invalid." 21 Kan.App.2d at 727, 907 P.2d 909. Our court agreed as a matter of law that the "impossibility of compliance invalidates a civil contempt order," but it noted that John "misconstrues the standard of appellate review." 21 Kan.App.2d at 727, 907 P.2d 909. Instead of a de novo review, which John requested, we concluded that review "boils down to an issue of credibility." 21 Kan.App.2d at 727–28, 907 P.2d 909.

The district court had concluded that "John's alleged gifts of money to his father and children out of the settlement, and his claim he had spent the unaccounted-for balance, were a ruse designed to prevent [his wife] from receiving her court-ordered share of the settlement. [Citation omitted.]" 21 Kan.App.2d at 728, 907 P.2d 909. In other words, the district court found that John had *not* given the settlement away to family members, and our court found substantial competent evidence to support that finding. 21 Kan.App.2d at 728, 907 P.2d 909. In short, *Krogen* does not establish that Tim's violation of the TRO gave him standing to sue his mother as the majority suggests.

Cases from foreign jurisdictions which my colleagues cite, *Ponnambalam v. Ponnambalam,* 35 A.D.3d 571, 829 N.Y.S.2d 540 (2006), and *Scavello v. Scott,* 194 Colo. 64, 68, 570 P.2d 1 (1977), are not supportive of their position. In *Ponnambalam* parties brought an action alleging that they were devisees of land which was wrongfully transferred "*after* the decedent passed away." (Emphasis added.) 35 A.D.3d at 573, 829 N.Y.S.2d 540. They sought recovery of "funds in certain bank accounts which allegedly *belonged to* the decedent." (Emphasis added.) 35 A.D.3d at 573, 829 N.Y.S.2d 540. I agree that an administrator or executor has standing in such a case because those assets were in the probate estate before the transfer. That is not the situation here.

***8** *Scavello* held that administrators may pursue recovery of "colorable and illusory" intervivos transfers by decedents, which under Colorado law are "a mere pretense and ... void." 194 Colo. at 68. Given the transfer in *Scavello* was colorable and illusory, "full ownership remained in [the decedent.]" 194 Colo. at 68. That is not the situation here, where the district court found as an uncontroverted fact: "The assets transferred by Tim Wallin to Joyce Wallin *would have been* in Tim Wallin's estate upon his death, but for his transfer of those assets to Joyce Wallin ." (Emphasis added.) Under the uncontroverted facts of the present case, full ownership of the money in question did not remain with Tim because it had been given to his mother prior to his death.

My colleagues similarly cite 31 Am.Jur.2d, Executors & Administrators § 1139 and state: "actions are properly brought by estate administrator to recover property that should have been in estate but for wrongful act of decedent." Slip op. at 8. The cited authority actually states (citing *Scavello* in turn):

> "In general, where a spouse makes a transfer which is colorable only—that is, is for the purpose of defeating his spouse's right as his heir while maintaining the full benefit of the property—such a conveyance may be challenged in an action brought by the administrator of the transferor's estate." 31 Am.Jur.2d, Executors & Administrators § 1139, p. 729.

Once again, that is not the situation here, where there was an actual transfer of money to Joyce and as a result, the transfer was not "colorable only."

If Tim could not have maintained an action against his mother for his own violation of the TRO, Great Plains is claiming superior rights to the decedent. I believe this

is the upshot of the majority's fraud/constructive trust discussion. The majority asserts fraud and then uses constructive trust law to judicially grant Great Plains standing to sue for assets which were not in Tim's probate estate.

I would look instead to the violated order. The TRO restrained Tim and Grace "from disposing of any property of the parties or of each of them not necessary for the normal monthly expenses of the parties without the consent of both parties." In other words, the TRO forbade unilateral disposition of the marital property, also known as the marital estate. See K.S.A. 23–201; *Nicholas v. Nicholas,* 277 Kan. 171, 184, 83 P.3d 214 (2004); *In re Marriage of Crane,* 36 Kan.App.2d 677, Syl. ¶ 2, 143 P.3d 87 (2006).

Grace, the petitioner in the divorce, sought the TRO because she had a personal stake in the marital estate. Based upon *Nicholas,* where our Supreme Court considered a wife's claim that her husband had violated a similar restraining order, even though the husband had died before the divorce trial (as Tim did here), Grace would retain standing to enforce the TRO after Tim's death. See 277 Kan. at 171–74, 182–84, 83 P.3d 214. The effect of the majority's holding, however, would be to impermissibly shift the money in question from the marital estate, where Grace Wallin would have standing, to the probate estate, where Great Plains has standing.

***9** I would reverse the district court's granting of summary judgment to Great Plains.

All Citations

196 P.3d 958 (Table), 2008 WL 5135043

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94 P.3d 737 (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 re Matter of the MARRIAGE OF
Adrian Wayne GILCHRIST, II, Appellant,
and
Kathleen Cecilia Francis GILCHRIST, Now the Estate of Kathleen Cecilia Earnst, Appellee.

No. 91,029.
|
July 30, 2004.

Appeal from Sedgwick District Court; James G. Beasley and Mark A. Vining, judges. Opinion filed July 30, 2004. Reversed and remanded with directions.

Attorneys and Law Firms

Jeff Dewey, of Dewey and Lund, LLP, of Wichita, for appellant.

Jeffrey R. Emerson, of Foulston Conlee Schmidt & Emerson, LLP, of Wichita, for appellee.

Before RULON, C.J., ELLIOTT and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** The estate of Kathleen Cecilia Earnst appeals the trial court's order setting aside the journal entry of divorce under K.S.A. 60-260(b).

We reverse and remand with directions.

Kathleen and her former husband, Adrian Wayne Gilchrist, II, had three children. Kathleen and Adrian divorced in 1998; the parties were granted joint custody of the children, with Kathleen designated as the primary residential custodian.

With respect to child support, the journal entry provided: "7. The child support due from [Adrian] to [Kathleen] has been taken into consideration and offset by [Adrian] making [Kathleen's] van payments until approximately November 2001; and giving his share of the home equity to [Kathleen] and by agreeing to support the children in their post-high school educational endeavors.

"8. The parties shall pay for the post-high school education of the children of the parties, including tuition, books, room, and board, as they are financially able to at the time that each child enters into such educational endeavor. Post-high school education may include any vocational, technical, or college education up to the child's age of 23 years.

....

"14. The real estate owned by the parties ... shall be set aside to [Kathleen]. [Adrian] shall execute a quit claim deed of his interest in and to said real estate to [Kathleen] upon the filing of [the] journal entry...."

Kathleen married Robert Earnst in February 1999 and in March 1999, she gave birth to Robert's child and died 2 days later. Adrian's children returned to live with him. Adrian filed a motion to set aside the journal entry of divorce pursuant to K.S.A. 60-260(b)(5) and (6).

Adrian claimed his agreement to relinquish his share of the equity in the marital home and to pay for Kathleen's van in lieu of child support violated public policy. He also argued it would be inequitable if he now had to rear the three children without being reimbursed for his equity in the residence which was to pay for the future support of the children.

Robert was administrator of Kathleen's estate and surrendered the van to Adrian since he was obligated to pay for it. The estate, apparently voluntarily, responded to Adrian's motion, claiming Adrian's child support obligation had not been terminated by the parties or the trial court. The estate concluded the journal entry did not violate public policy and there was no other basis on which the decree could be set aside.

Additionally, the estate claimed paragraph 14 of the decree was separate and distinct from paragraph 7. The

estate argued paragraph 14 awarded the entirety of the residence to Kathleen and therefore, the trial court no longer had jurisdiction to modify the division of property.

The trial court ordered the provision in the decree offsetting Adrian's equity in the residence in lieu of child support to be set aside pursuant to 60-260(b)(5) and (6).

Subsequently, the trial court ruled the residence should be retained in Kathleen's estate and a transfer of assets should be made to Adrian. The trial court awarded Adrian a judgment against Kathleen's estate of about $51,000.

***2** The central issue on appeal is whether the trial court had subject matter jurisdiction to set aside the journal entry of divorce after Kathleen's death. We answer the question in the negative.

The estate argues the trial court abused its discretion by granting Adrian's motion to set aside the journal entry. Adrian counters that we lack jurisdiction over the issue because the estate did not file a notice of appeal within 30 days after the order setting aside the journal entry. See K.S.A.2003 Supp. 60-2103(a).

This argument fails. The law is well settled that an order vacating a judgment is not a final order from which an appeal may be taken. *Bates & Son Construction Co. v. Berry,* 217 Kan. 322, 323, 537 P.2d 189 (1975).

Nonetheless, the question of the trial court's subject matter jurisdiction to set aside the journal entry remains. See *Sandlin v. Roche Laboratories, Inc.,* 268 Kan. 79, 85, 991 P.2d 883 (1999).

On the merits of this issue, Adrian claims it was proper to set aside the journal entry because the trial court retained continuing jurisdiction under K.S.A.2003 Supp. 60-1610 to modify child support. But Kathleen is dead and Adrian now has custody of his children. Adrian also argues he must now provide for future support of his children without the benefit of the property he transferred to Kathleen for that purpose.

This latter argument would be seductive only if paragraph 7 of the decree created a trust for the minor children. If that were the case, paragraph 14 of the decree would have transferred the equity in the residence in trust. If so, the transfer would have been to Kathleen as trustee of the children's trust, not to her personally.

Essentially, the trial court's decision to set aside the journal entry held that Adrian agreed to transfer his equity in the residence and to make the van payments in lieu of future child support.

A divorce decree carrying out the parties' agreement to create a trust for their minor children is valid. *Feldmann v. Feldmann,* 166 Kan. 699, 707, 204 P.2d 742 (1949).

Assuming a trust in the present case (even though paragraph 7 is silent on the subject), Adrian's right to reclaim property from that assumed trust is limited. The trust would terminate on the majority of the children and title to any remaining trust property would revert to its status prior to the date of the journal entry. See *Allison v. Allison,* 188 Kan. 593, 600, 363 P.2d 795 (1961).

Even if the divorce decree created a trust for the future support of the children, any claim to it belongs to the children while they are minors, and not to Adrian. See *Lawrence v. Boyd,* 207 Kan. 776, 778-79, 486 P.2d 1394 (1971).

The trial court lacked jurisdiction to modify the child support pursuant to K.S.A. 60-1610 after Kathleen's death. See *Wear v. Mizell,* 263 Kan. 175, 180, 946 P.2d 1363 (1997).

Adrian also argues the journal entry is void because it violates public policy. A judgment can be set aside under K.S.A. 60-260(b)(4) if it is void. But Adrian did not argue that provision to the trial court. In any event, the argument fails. A custodial parent has a claim for *past* support. *Stapel v. Stapel,* 4 Kan.App.2d 19, 20-21, 601 P.2d 1176 (1979), *rev. denied* 227 Kan. 927 (1980). Adrian was not due reimbursement for past support. The journal entry could not be set aside as violating public policy for not ordering child support.

***3** In setting aside the journal entry, the trial court relied on K.S .A. 60-260(b)(5) and (6). Those sections provide relief if it is no longer equitable that the judgment have prospective application or for "any other reason" justifying relief from the judgment.

Simply put, 60-260(b) cannot apply to the present case because a divorce action abates on the death of a spouse. A divorce action is purely personal and ends on the death of a spouse. *Wear v. Mizell,* 263 Kan. at 180.

Further, Kathleen's estate was never a party to the divorce action. The fact her estate appeared in the divorce case did not give the trial court subject matter jurisdiction. A party can neither waive nor consent to a court's jurisdiction when the court has lost jurisdiction. *In re Care & Treatment of Searcy,* 274 Kan. 130, 136, 49 P.3d 1 (2002). Here, the divorce court lost jurisdiction when the action abated on the death of Kathleen.

To summarize, Adrian's children may have a claim against Kathleen's estate, depending on whether the divorce decree created a trust for their benefit. But Adrian would have no claim to revert any of the alleged trust until the youngest child reaches majority.

The trial court erred in setting aside the journal entry and erred in awarding Adrian a judgment against Kathleen's estate. The trial court lost subject matter jurisdiction over the divorce case when Kathleen died.

Reversed and remanded with directions to dismiss the case for lack of jurisdiction.

All Citations

94 P.3d 737 (Table), 2004 WL 1716204