

**In the Matter of the MARRIAGE OF Steven R. GLEUE, Appellant,
and
Arlene T. GLEUE, Appellee.
No. 90489.
Court of Appeals of Kansas
August 20, 2004**

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Review Denied Jan. 20, 2005. [*]

Appeal from Republic District Court; J. Stephen Nyswonger, judge. Opinion filed August 20, 2004. Affirmed.

James F. McMahon, of McConnell & McMahon, of Lenexa, and Kevin L. Phillips, of Weltmer Phillips Law Office, of Mankato, for appellant.

Darrell Miller, of Miller and Ludwig, of Mankato, for appellee.

Before JOHNSON, P.J., LARSON, S.J., and GLENN D. SCHIFFNER, District Judge, assigned.

MEMORANDUM OPINION

PER CURIAM.

This is a contentious case where Steven R. Gleue appeals the parenting plan and the division of property ordered by the district court after the dissolution of his marriage to Arlene T. Gleue.

Steven's appellate brief raised nine separate arguments which we have considered but will not address separately as they essentially boil down to dissatisfaction with child custody and parenting plan rulings, the division of property, the timeliness and rulings of posttrial motions, amount of child support entered, and claimed bias and prejudice of the judge.

Arlene's brief sets forth four issues as relating to imputing money to Steven in dividing property and calculating child support; granting of joint custody of the couple's minor child with Arlene as the primary caregiver, the motion for a new trial was not timely filed but if it was, the motion was nevertheless heard on the merits; and the trial court was not biased in its findings of fact and conclusions of law and reached a fair and just result.

We were told at oral argument that with the involvement of the district court trustee a claim has been made for social security benefits for the minor child of the parties, Jama Keoni Gleue, born June 7, 2000, and that all issues relating to child support amounts have been resolved posttrial and do not need to be considered by us on appeal.

We have considered all of the arguments of both parties, and while we may not write or comment on each issue briefed or argued in the order raised, the issues presented to us are the following:

1. Did the district court abuse its discretion in its custody award and establishing the parenting plan?
2. Did the district court abuse its discretion in awarding a property equalization judgment to Arlene?

3. Was the motion for a new trial timely filed and ruled upon?

4. Did the trial court show bias and prejudice sufficient to require a reversal and the ordering of a new trial?

Although the record is extensive, it did not include the income tax returns of Steven which were admitted into evidence and commented on by the court in its decision. We must assume such comments were properly made as "an appellant has the duty to designate a record sufficient to establish the claimed error. Without an adequate record, the claim of alleged error fails." *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 777, 27 P.3d 1 (2001). We are confident the parties are fully aware of the proceedings and testimony at trial, which we will summarize except as necessary to discuss the issues raised.

This was not a typical marriage. Steven and Arlene were married in December 1996. At the time Steven was 46 and Arlene was 22. Arlene is a Philippine National and she came to the United States in December 1996 on a fiancé visa. Steven and Arlene had corresponded by mail and Steven visited Arlene in the Philippines on two occasions. The marriage occurred in a short time because of the restrictions on a fiancé visa.

From the time she arrived in the United States until November 1997, Arlene lived alone in a small garage apartment. Steven did not live in the apartment but instead, lived with his parents. Steven would occasionally visit but Arlene testified that Steven told her that he would not stay because it was too cold. Steven has chronic fatigue syndrome and was last employed in 1982. He is well-educated with an undergraduate degree in health, physical education and recreation, and a doctorate of chiropractic degree. He receives social security disability income of \$597 per month.

Arlene had received 2 years of college training in the Philippines as a secretary although she had worked only briefly at other jobs before coming to the United States in 1996. Arlene's first job was cleaning and washing for a neighbor across the street from her apartment. Arlene has worked as a dietary aide at a nursing home and then a hospital since 1997. She testified she worked erratic hours and was paid \$6.86 per hour. Arlene testified that Steven would provide certain living costs for her and then he would take her entire paycheck, deduct the costs of the expenses, and give her \$25-\$50 per month for her use. In November 1997, Steven bought a house and Arlene lived there alone until the couple's son, Jama, was born on June 7, 2000.

In 1990, Steven began managing his parents' assets. He opened multiple accounts in different names, including his and Arlene's, in order to be able to transfer money from his parents' accounts and to conduct his plan of investing. Steven had the ability to make all the transfers and had complete control of the money because he had power of attorney from both his parents and from Arlene. Steven realized all the income and capital gains on his joint tax returns with Arlene. Arlene testified that Steven told her half of all the profits in the accounts were his. Total income from 1997 to 2000 was \$867,565; federal income tax for these years was \$223,523 and the trial court found Steven had at his disposal and usage over this 4-year period the sum of \$644,042 to do with as he pleased. Substantial losses occurred in 2000 and 2001 and Steven testified that prior to filing for divorce, he transferred all accounts back to his parents' names, neither he nor Arlene had any more accounts, and he transferred less money back to his parents than he transferred out initially.

In May or June 2001, Arlene filed for a protection from abuse order but later withdrew it. Steven moved into the house in June 2001 in an attempt to help their marriage. However, in September 2001, Arlene moved out of the house and the couple separated. Shortly thereafter, Steven filed for divorce in October 2001. Temporary custody of Jama was established with alternating weekends, 2 days 1 week 3 the next week with Steven taking care of Jama while Arlene worked.

The parties were divorced on January 7, 2002, on the grounds of incompatibility. After discovery, the remaining issues were tried on October 5, 2002. The court granted joint custody to both Steven and Arlene

and gave primary residential custody to Arlene. The court ordered alternating weekends and holidays between the parties and allowed Steven to have Jama whenever Arlene was at work.

As to property issues, the court concluded that all the substantial income that Steven earned from his parents' property and paid income tax thereon would be attributed to and considered as marital property. The court awarded Arlene a "property equalization judgment" in the amount of \$150,941.34, which represented the amount of money that had been transferred into accounts bearing only Steven's name and accounts bearing Steven's and Arlene's names.

The court awarded the parties' house to Steven but ordered it be sold within 6 months to satisfy the indebtedness. Arlene was to be held harmless from liability on the house. Steven was ordered to pay all medical bills for Jama's delivery. Both parties were ordered to pay their own attorney fees. Maintenance was not ordered. The journal entry setting forth the court's verbal findings and orders on the day of trial was filed on November 20, 2002.

On December 6, 2002, Steven filed a motion for new trial and/or for amendment of judgment. Arlene moved to strike Steven's motion as being untimely. The court considered both motions at the same hearing, taking the motion to strike under advisement and hearing arguments on Steven's motion for a new trial.

Steven's counsel made basically the same arguments that had been made on Steven's behalf at trial. He argued there was no marital property and he objected to residential custody of Jama being given to Arlene. The court did not change any of its previous rulings and found a constructive trust was not appropriate as Steven's family did not know what he was doing, Steven had control over more than \$600,000 of profits during the marriage and presented no evidence as to what had happened to all the money over which he exercised absolute control during the parties' marriage.

The court found all the holdings on the new trial motion were in the alternative because the new trial motion had been filed by fax and was not filed within the 10-day period irrespective of holidays.

From these proceedings, Steven appeals.

Steven's arguments that the trial court failed to make specific findings in support of its judgment is without merit. The trial court's detailed findings and rulings following completion of the trial are set forth in 15 pages of the transcript. They are detailed and easily allow adequate review on appeal under Supreme Court Rule 165 (2003 Kan. Ct. R. Annot. 202). See *In re Marriage of Bradley*, 258 Kan. 39, 44, 899 P.2d 471 (1995).

We first consider Steven's argument that the district court erred in naming Arlene the primary residential custodian of Jama.

In re Marriage of Whipp, 265 Kan. 500, 506, 962 P.2d 1058 (1998), teaches that the trial court is in the best position to make the inquiry and determination as to custody and in the absence of abuse of discretion its judgment will not be disturbed on appeal. Unless we conclude no reasonable judge would have reached the result reached below, the trial court's determination must be affirmed on appeal. *Bradley*, 258 Kan. at 45. The trial court clearly considered all of the factors which are set forth in K.S.A.2003 Supp. 60-1610(a)(3)(B) and these need not be restated here.

Steven principally contends that the trial court's decision was not in Jama's best interests because (1) he has a loving and caring relationship with Jama; (2) he does not work and is able to devote his full time to caring for Jama; (3) Arlene's work schedule is inconsistent and disruptive to a normal schedule; (4) he provides a better diet for Jama's nutritional health as supported by expert testimony; (5) Arlene's unstable living arrangement with another man who has a criminal record, drinks and smokes, is improper; (6) Arlene discourages Jama from calling Steven "father"; (7) Arlene used offensive and abusive language towards Steven in Jama's presence and Arlene put her fist through Steven's glass door while Steven was holding Jama; (8) Arlene has done everything to undermine the relationship between Steven and Jama and she

does not respect or appreciate the bond Jama has with Steven; and (9) Arlene is planning to take Jama to the Philippines without any provision for return.

The court found and the record reflects that Arlene's evidence in support of the court's ruling was compelling. She clearly showed she was a loving and devoted parent to Jama. She presented evidence from four ladies who attested to her dedication at work and her responsible acts as a mother to Jama. She specifically testified that while she would like to visit her family, she hoped to become a United States citizen and that her son would be raised here.

We hold the court established a fair and equitable parenting plan that was in Jama's best interests. Joint custody was awarded and under K.S.A.2003 Supp. 60-1610(a)(4)(A), the parties have equal rights to make decisions in the best interests of the child under their custody. The court gave residential custody to Arlene but ordered that when she is at work that Jama was to be with Steven and then ordered alternate weekends with each parent. Any inequity in time that Steven would not get in overnight visits during the week is surely made up by requiring that Jama be with Steven when Arlene is at work. The court specifically found there was nothing to indicate that Steven is not a good father and that he could not be a good father in the future.

The evidence was conflicting but substantial competent evidence supports the trial court's decision. The trial court's rulings regarding custody and the parenting plan are not an abuse of discretion.

Steven argues the trial court erred legally and abused its discretion in awarding a property equalization judgment to Arlene of \$150,941.34.

The general rule in dividing property in divorce cases as articulated in *In re Marriage of Cray*, 254 Kan. 376, 386, 867 P.2d 291 (1994), is:

"This court has recognized on numerous occasions the importance in allowing a trial court broad discretion in determining what is just and reasonable in the division of marital property. The breadth of this discretion was recognized in *LaRue v. LaRue*, 216 Kan. 242, 250, 531 P.2d 84 (1975), where the court stated: 'Nowhere in any of our decisions is it suggested that a division of all the property of the parties must be an equal division in order to be just and reasonable.' The legislature has left this discretion to the trial courts, and if there is to be a change in that discretion then it is a matter for the legislature."

The *Cray* court also stated: "In an action for divorce, separate maintenance, or annulment, the trial court has discretion to value the marital assets at the time of separation, at the time the petition is filed, at the time of the divorce hearing, or as the facts and circumstances in the case dictate." 254 Kan. 376, Syl. ¶ 3. The evidence is undisputed that tax returns filed by Steven indicate he had reportable income (dividends and capital gains) in 1997 of \$274,082; in 1998 of \$279,866; in 1999 of \$326,231; and in 2000 of \$13,313. Steven also paid federal income taxes on that income in the amount of \$43,242 in 1997; \$81,826 in 1998; \$98,159 in 1999; and \$396 in 2000. At the time of trial, Steven testified that he had not filed his 2001 return but that he estimated approximately \$300,000 in capital losses and had offsetting capital losses in 2000 of \$100,000.

The evidence was undisputed that Steven allowed a loan application to be submitted under his signature which showed that his net worth was \$883,135.73 as of December 29, 2000. The home which was the subject of the loan application had been purchased in 1997 for just under \$50,000 and by December 2000 had been paid for using money from the mutual funds under Steven's absolute control. Arlene clearly stated several times that Steven had told her that half of all the income he generated using his parents' funds was his property.

Arlene argued and the trial court suspected that Steven transferred all of the money out of the multiple accounts back to his parents prior to and in anticipation of filing for divorce. The trial court reasonably held all of the income was Steven's and was necessarily considered to be marital property notwithstanding the transfer of the assets.

Steven apparently used either his or his parents' money to pay the purchase price of the house and then mortgaged it for what appears from appraisals to be an amount much greater than its actual value. This was undoubtedly approved by the mortgage company based on the \$883,135 net worth Steven represented on December 29, 2000, about 9 months before the parties separated. Requiring Steven to hold Arlene harmless from any liability on this obligation is clearly reasonable and proper.

The district court had a difficult and unusual set of facts to consider. Steven's actions had divested him of control or ownership over assets which had clearly been assets of the marriage. To allow the conveyances and leave Arlene with nothing would have been unjust.

This was not an equal division of property but the value of all of the assets was clearly shown, the amount of income and taxes thereon was in evidence, and all of the information concerning the house was before the court. Steven transferred money from accounts bearing his individual name and accounts bearing Arlene's name. We find no abuse of discretion in the trial court's division of the marital property, including ordering Steven's assumption of all the indebtedness secured by the mortgage on the parties' residence and the equalization award and judgment granted to Arlene.

While the trial court held in the alternative that Steven's posttrial motions for a new trial and/or for amendment of judgment may not have been timely filed, the ruling on Arlene's motion to strike as untimely was withheld until the actual motions were considered and ruled upon.

The time argument is interesting from a legal perspective but not from a practical sense. The Kansas Supreme Court in *City of Lawrence v. McCormick*, 275 Kan. 509, 66 P.3d 854 (2003), ruled that the Friday after Thanksgiving is *not* a "legal holiday" under K.S.A. 35-107 and was thus not excluded in time computation. Thus, the 10-day period here for filing of the posttrial motions was December 5, 2002. The motions were fax-filed December 6, 2002, but a copy was mailed to Arlene's counsel, which would invoke the 3-day mailing rule of K.S.A. 60-206(e) which is discussed in *Hundley v. Pfuetze*, 18 Kan.App.2d 755, Syl. ¶ 6, 858 P.2d 1244, rev. denied 253 Kan. 858 (1993). It therefore appears to us that the motions were timely and properly considered by the court.

Any error in the trial court's rulings as to the timeliness is harmless because the record reflects the motions were argued and ruled upon.

The granting of a new trial is a matter of trial court discretion and will not be disturbed on appeal except upon a showing of abuse of that discretion. *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 485, 15 P.3d 338 (2000). The arguments made, the tax returns presented, and the suggestion of necessity of correcting prior errors had, in fact, been considered by the court at the time of trial and in the court's decision. It was not an abuse of discretion for Steven's new trial and/or amendment of judgment motions to be denied by the trial court.

We find no evidence requiring reversal that the trial court's decisions were the product of bias or prejudice. Code of Judicial Conduct, Canon 3 (2003 Kan. Ct. R. Annot. 520). There were real issues to be considered as to the legal effect of Steven's actions and whether the funds were gifted to him, converted by him, whether he was legally entitled to half of the profits, and whether he had paid income tax on his parents' income improperly on tax returns which involved Arlene. The court's comments on these issues do not constitute bias. "Bias and prejudice exist if a judge 'harbors a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one.'" *State v. Alderson*, 260 Kan. 445, 454, 922 P.2d 435 (1996) (quoting *State v. Foy*, 227 Kan. 405, 411, 607 P.2d 481 [1980]). The party alleging judicial misconduct bears the burden of showing his or her substantial rights were prejudiced. *State v. Gadelkarim*, 256 Kan. 671, 681, 887 P.2d 88 (1994). An adverse ruling to one's position and argument does not establish bias and prejudice. This was a hard case, well tried by both sides, requiring difficult decisions which the trial court made. We do not find bias or prejudice which requires reversal and a new trial.

The trial court entered a monetary judgment which was within reason under the facts presented. We will not now recompute the amount of the judgment or find it was based on accounts which should or

should not have been utilized. The argument that the judgment, although improper, should have been for a lesser sum is rejected.

The trial court is affirmed.

Notes:

[*]Justice Gernon not participating.