

No. 91,701

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

Kara Ellen LAY,

Appellee,

v.

Richard D. STERNADORI,

Appellant.

Review Denied May 3, 2005.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; R. Wayne Lampson, judge. Opinion filed October 22, 2004. Affirmed in part, reversed in part, and remanded with directions.

Richard D. Sternadori, appellant pro se.

Kara Ellen Lay, appellee pro se.

Before HILL, P.J., GREEN and MALONE, JJ.

PER CURIAM.

Richard D. Sternadori appeals from the trial court's judgment involving a property settlement agreement between Richard and Kara E. Lay. This appeal consists of five issues: (1) whether the trial court had jurisdiction to modify its June 2003 default judgment; (2) whether the trial court erred when it considered only the provisions in the

property settlement agreement for the distribution of the real estate proceeds; (3) whether the trial court determined that the property settlement agreement was valid, just, and fair before it incorporated it into the divorce decree; (4) whether the district court properly denied attorney fees to Richard; and (5) whether the district court properly interpreted the property settlement agreement. We affirm in part, reverse in part, and remand with directions.

Kara and Richard were divorced on January 21, 2000. The district court adopted and incorporated into its divorce decree a property settlement agreement (PSA) that the parties had made in 1999 during a prior divorce action that had been dismissed. Kara and Richard agreed that their marital property included three real estate properties.

Tract I referred to the parties' residence in Kansas City, Kansas. Tract II referred to a vacant lot adjoining the residential property. Tract III referred to a vacant lot in Columbia, Missouri. Under the PSA, the proceeds for the sale of these properties were to be distributed as follows:

"[Kara] will on consummation of sale of Tract I and II, and payment of [Kara's] share give a OCD to [Richard] of Tract III. Should [Richard] agree to sell Tract III back to [Kara], [Kara] agrees to buy Tract III for a minimum cost equal to, but not less than the amount agreed upon in this separation agreement. Value of the actual sale cost to [Kara] may also be based upon fair market value at the time of the sale, and may be higher than the dollar amount in this agreement.

"All three tracts are subject to a note and mortgage for approximately Twelve Thousand Five Hundred Dollars (\$12,500.00) which [Richard] will pay taxes, insurance, utilities and loan installments pending sale of Tracts I and II and continue to occupy the premises.

"Upon sale of Tracts I and II the net proceeds shall be distributed first to the payment of the note and mortgage and then divided as follows:

"The total net sale proceeds shall have the amount of Seventeen Thousand Dollars (\$17,100) [sic ] added to the proceeds, as the value of Tract III from which the debt of approximately Twelve Thousand Five Hundred Dollars (\$12,500.00) shall be deducted together with and the debt of Five Thousand Dollars (5,000.00) to Howard D. Lay, and the remaining balance shall be divided so that [Kara] gets a cash share, without participation in the mortgage debt, to compensate for [Richard] getting the Tract III land free and clear or further adjusted in the event [Kara] takes the Tract III land. If property is not sold [Kara and Richard] will remain joint tenants subject to this agreement."

The property settlement agreement also provided that if a breach in the agreement occurred, the party who breached the agreement must be given a written notice of the alleged breach and 30 days to correct the breach. Additionally, if the breach was not corrected within 30 days, the aggrieved party could recover attorney fees if he or she suffered any damages as a result of the breach.

On June 5, 2003, Kara moved to enforce the terms of the PSA. She asserted that Richard had sold Tract III, the Missouri property, for \$22,795 and had not distributed those sale proceeds. She requested that the district court grant her judgment against Richard for his breach of the PSA. Richard did not appear at the hearing. On June 27, 2003, the district court found Richard had breached the terms of the PSA and granted Kara a default judgment against Richard in the amount of \$15,000.

On July 2, 2003, Richard moved to set aside the default judgment. Although Richard's motion did not allege any reason authorized under K.S.A. 60-260(b) to set aside the default judgment, he requested that a hearing be scheduled beyond 10 days so that the parties could "resolve this issue in a private manner." Richard later hired counsel who opposed Kara's motion to enforce the separation agreement even though no order had been issued setting aside the default judgment. Richard maintained that Kara had incorrectly interpreted the PSA. Under Richard's interpretation and calculations, Kara

owed him \$3,067. He also requested attorney fees.

Tract I, the Kansas residence, sold for \$48,500, and Tract II, the adjacent lot, sold for \$1,800. The real estate fees were \$4,196, and taxes were \$365 and \$302. A debt to Howard Lay was \$5,000. Kara explained Tracts I and II, the Kansas properties, were mortgaged for \$12,500 so that Richard could purchase Tract III, the Missouri property. Richard, however, drew against the equity in the properties after the divorce. This increased the mortgage to \$15,400. Tract III, the Missouri property, was sold for \$24,250. The real estate fees were \$1,883.

Kara first added the value of the three properties at the time of their sale, which totaled \$74,500. She then added the real estate fees for the three properties, the taxes on the Kansas properties, the debt to Howard Lay, and the increased mortgage debt, which totaled \$27,148. These expenses were deducted from the value of the three properties, resulting in a balance of \$47,401. This balance was divided by two, making Kara's and Richard's share \$23,700 each.

Kara added the taxes and total mortgage for Tracts I and II, the Kansas properties, to her share and subtracted those amounts from Richard's share because the agreement stated Richard was responsible for the taxes and Kara was not responsible for payment of the mortgage. This made Kara's share \$39,769 and Richard's share \$7,632. Kara had received \$23,235 of the proceeds from the sale of Tracts I and II, the Kansas properties. When that amount was subtracted from her share, Richard owed Kara \$16,533.

Richard asserted that his computations followed the language in the PSA. To

arrive at the "net proceeds" for the sale of Tract I, the residence, he subtracted the real estate fees of \$4,196, taxes of \$365 and \$302, and mortgage of \$15,400 from the \$48,500 sales price. The difference was \$28,237. Richard then added \$17,100, which represented the value stated in the PSA for Tract III, the Missouri property. That sum was \$45,337. He again deducted \$15,400 for the mortgage and \$5,000 for the debt to Howard Lay because the PSA stated the mortgage was to be "deducted together with" the debt to Howard Lay. This resulted in a balance of \$24,937. Richard deducted for the third time the \$15,400 mortgage because the PSA stated "without participation in the mortgage debt." The balance was \$9,537, which was divided in half, making Kara's and Richard's share each \$4,768.

Richard then added into Kara's share \$15,400 for the mortgage on the properties because she was not to participate in the mortgage debt under the agreement. Kara's share then became \$20,168. According to Richard, Kara received \$23,235 from the sale of Tract I, the Kansas residence, and half, or \$900, from the sale of Tract II, the adjacent lot. When those amounts were subtracted from Kara's share, Richard maintained that she owed him \$3,067.

In response, Kara disputed using the PSA value for Tract III, the Missouri property, and deducting the mortgage more than once. She also denied receiving \$900 from the sales proceed for Tract II, the Kansas lot.

The trial court determined that the parties had agreed there was only one mortgage on all three properties in the amount of \$15,400. Thus, this was the amount to be used and it was illogical to deduct the mortgage more than once. It also found that the

sale prices of Tracts I and II, the Kansas properties, and the agreement value of Tract III, the Missouri property, should be used in the calculations. It denied attorney fees to both parties. The trial court's computations were as follows:

Kansas Residence (Tract I) \$48,500

Less Settlement costs \$ 4,196

Taxes \$ 365

Taxes \$ 302

Mortgage \$15,400 20,263

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Net Value \$28,237

Missouri Lot (Tract III) k17,100

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Kansas Residence & Missouri Lot \$45,237[sic ]

Less Howard Lay Debt 5,000

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Net Value \$40,237

Divide between Kara and Richard / 2

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Kara's share \$20,118

Add Mortgage k15,400

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Kara's share of Kansas Residence &

Missouri Lot (Tracts I & III) \$35,518

Kansas Lot (Tract II) \$ 1,800

Divide between

Kara and Richard % 5 / 2

Kara's share Kansas Lot (Tract II) k 900

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Kara's Share of Kansas & Missouri Properties \$36,418

Less: Sales proceeds received by Kara "23,235

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Amount Richard owes Kara \$13,183

The district court granted Kara judgment against Richard in the amount of \$13,183. Nevertheless, the mathematical error noted above resulted in a \$50 error; the

judgment should have been \$13,233.

One week later, Richard moved to amend the journal entry. He argued that the district court's interpretation of the PSA was erroneous because it did not follow the method outlined in the PSA for distributing the proceeds from the real estate. Moreover, he requested that the district court appoint a mediator to determine whether the marital assets were divided equally under the district court's interpretation of the PSA.

Richard also filed two other motions. One requested the district court to set aside the PSA, and the other requested redistribution of the funds from his Prairie Village Supplementary Pension Fund that had been awarded to Kara under the PSA.

At the hearing, Richard stated that half of his Prairie Village Supplementary Pension Fund (about \$1,900) had been distributed to Kara. He stated the parties had agreed to divide the assets in half but maintained that the actual division was not half because Kara retained all of a \$12,000 inheritance that she had received about 1 to 2 years before the divorce. Even though Richard acknowledged he had received all of the \$6,000 in the New Jersey Carpenter's Union Annuities, he argued this still left a discrepancy between his union fund and Kara's inheritance.

On the other hand, Kara asserted that the parties had always kept her inheritance separate from the marital assets and the inheritance was listed in the PSA as her separate property. Further, the PSA stated the amount in Richard's New Jersey Carpenter's Union Annuities was \$11,818 as of 1998. Kara agreed not to claim any interest in those annuities, and in exchange she kept all of her inheritance. Based upon that understanding, Kara said they then divided the other assets so that each received half

of all the assets. She denied any fraud occurred in making the PSA.

On January 2, 2004, the district court denied Richard's interpretation of the PSA regarding the deduction of the mortgage and granted his motion regarding the monies he paid to Kara by crediting \$2,000 against Kara's judgment. Although not stated, it is assumed the credit amount was to offset the distribution from Richard's pension fund.

The district court also denied Richard's request for any further amendments. It also noted a mathematical error had been made in its prior calculations; thus, Kara was owed "\$12,333." The district court then modified Kara's previous judgment against Richard to \$10,333.

On January 16, 2004, Richard filed his notice of appeal. On March 11, 2004, the district court entered another journal entry. It concurred with a letter from Kara that its calculations had mathematical errors and modified its judgment against Richard to \$11,330.

As a preliminary matter, Kara argues that the district court did not have jurisdiction to modify its June 2003 default judgment against Richard. She points out Richard did not move to alter or to amend that judgment within 10 days of its entry; thus, the time to appeal the June 2003 judgment was not tolled and it is the final judgment.

Whether a court has subject matter jurisdiction is a question of law over which an appellate court's scope of review is unlimited. " 'Subject matter jurisdiction is the power of the court to hear and decide a particular type of action.' [Citations omitted.]" *Wichita Eagle & Beacon Publishing Co. v. Simmons*, 274 Kan. 194, 205, 50 P.3d 66

(2002). An issue on subject matter jurisdiction may be raised at any time, even for the first time on appeal or by the appellate court on its own motion. 274 Kan. at 207. If the district court lacked jurisdiction, the appellate court does not acquire jurisdiction over the subject matter on appeal. *Funk Mfg. Co. v. Franklin*, 261 Kan. 91, 95, 927 P.2d 944 (1996).

Under K.S.A.2003 Supp. 60-2103(a), the motions that must be filed within 10 days of a judgment in order to toll the time to appeal are: a motion under K.S.A.2003 Supp. 60-250(b) (a motion for judgment as a matter of law), K.S.A.2003 Supp. 60-252(b) (a motion to amend or make additional findings of fact), or K.S.A. 60-259 (a motion for a new trial or a motion to alter or amend a judgment). *Giles v. Russell*, 222 Kan. 629, 631, 567 P.2d 845 (1977).

Kara is correct that a motion to set aside a judgment does not affect the finality of a judgment or suspend its operation, see K.S.A. 60-260(b), nor does it toll the running of the time under K.S .A.2003 Supp. 60-2103(a) to file an appeal of the final judgment. *Giles* 222 Kan. at 632-33. Thus, we do not have jurisdiction over the June 2003 default judgment.

Richard responds that he filed a timely motion to set aside the June 2003 default judgment and the district court heard that motion and essentially set aside the \$15,000 judgment. He maintains that this court has jurisdiction to consider the district court's rulings that stem from his motion to set aside the June 2003 judgment.

Richard is correct that an appeal from an order determining a motion under K.S.A. 60-260(b) allows for review of that order. See *Giles*, 222 Kan. at 632-33 ("Appeal

from an order denying a motion under K.S.A. 60-260[b] brings up for review only the order of denial itself and not the underlying judgment. [Citations omitted.]").

Nevertheless Richard's notice of appeal creates a different jurisdiction problem. The notice of appeal must identify the parties taking the appeal, designate the judgment or part thereof being appealed, and name the appellate court to which the appeal is taken. K.S.A.2003 Supp. 60-2103(b).

In *Key v. Hein, Ebert & Weir, Chtd.*, 265 Kan. 124, 960 P.2d 746 (1998), a pro se plaintiff filed a notice stating he appealed from the order issued in December 1996. It continued: "'Wherein the court did grant the defendant Memorandum [*sic*] Decision order. And from each and every order entered contrary to plaintiff.'" ' 265 Kan. at 128. The order granting defendant's motion for summary judgment was issued in December 1995, and the order denying plaintiff's motion to amend that decision was issued in December 1996. The defendant contended plaintiff's notice of appeal was not sufficient to address issues on the 1995 order granting summary judgment.

The court in *Key* noted it had previously "rejected entreaties to make the requirements of the notice of appeal technical or burdensome." 265 Kan. at 129. Rather, it used "a broad or 'liberal construction to secure the just, speedy, and inexpensive determination of every action proceeding' required by the code of civil procedure. [Citation omitted.]" 265 Kan. at 129. The court stated a liberal construction of the notice was appropriate in that counsel did not draft the notice. 265 Kan. at 129.

In applying the liberal construction approach to the notice, the court stated the language "'grant the defendant Memorandum Decision order'" ' could be construed as a

reference to the 1995 summary judgment order. 265 Kan. at 129-30. The notice also included the "catch-all" phrase, " 'And from each and every order entered [contrary] to plaintiff.' " That language also embraced the 1995 summary judgment order. 265 Kan. at 130. The court held the notice of appeal was sufficient to include the issues briefed regarding the 1995 summary judgment order. 265 Kan. at 130.

Here, the facts are distinguishable even though Richard filed his notice of appeal pro se. Richard's notice stated: "Notice is hereby given that Appellant Rich Sternadori appeals the Division 8 Court's January 2, 2004[,] decision in the above case." His notice did not make any reference to the September 2003 decision or used any "catch all" language. As such, the liberal construction approach does not apply. Under *Key*, Richard appealed from only the January 2004 decision. As a result, jurisdiction exists on only the issues in the January 2004 decision.

Richard first argues that the district court erred by considering only the provisions in the PSA for distributing the real estate proceeds because (1) there was no meeting of the minds when he and Kara signed the PSA and (2) an inequitable distribution of the entire marital assets results unless the distribution of all the assets is considered.

The district court denied this motion in its January 2004 decision. The record does not contain Richard's motion that requested the PSA be set aside.

"Proceedings to modify a divorce decree based on matters occurring after the decree are to be brought under K.S.A. 60-1610 and are subject to its limitations. However, where relief is sought because of facts existing at the time of the decree which, if known to the court, would have brought about a different result, relief is available under K.S.A. 60-260(b)." In re Marriage of Hunt, 10 Kan.App.2d 254, 259, 697 P.2d 80 (1985).

K.S.A.2003 Supp. 60-1610(b)(3) provides that matters settled by a PSA and incorporated into a divorce decree shall not be subject to later modification by the court except as prescribed by the PSA or consented to by the parties. In this case, the PSA between the parties did not prescribe a method by which the PSA could be modified, nor have both parties consented to setting aside the entire PSA. As such, K.S.A.2003 Supp. 60-1610(b)(3) does not apply to setting aside the PSA.

From statements made at the hearing, Richard asserted that he relied upon fraudulent statements by Kara and her father when he entered into the PSA. Based upon those statements, we assume that his motion to set aside the PSA was filed under K.S.A. 60-260(b)(3).

Under K.S.A. 60-260(b), a motion to set aside a judgment that is based upon fraud under subsection (3) shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." Although we cannot determine the exact date Richard filed his motion, it was filed after the district court's decision of September 29, 2003, or more than 1 year after the district court's divorce decree of January 21, 2000. Thus, his motion under K.S.A. 60-260(b) would have been untimely. Where a motion to set aside a judgment under K.S.A. 60-260(b) is untimely filed, the district court lacks jurisdiction to reopen the divorce decree and to modify it. *In re Marriage of Boldridge*, 29 Kan.App.2d 581, 583-84, 29 P.3d 454, rev. denied 272 Kan. 1418 (2001).

Furthermore, the PSA specifically stated that each party "individually covenant and agree that this Contract is not entered into by way of collusion, fraud or duress, but is the sole agreement between the Parties." Even if Richard relied upon statements by Kara

and her father, who is a Missouri attorney, he also relied upon the independent legal advice of his own Kansas attorney. As such, it is difficult to ascertain how Kara and her father fraudulently induced him into signing the PSA.

In conclusion, we determine that the district court did not have jurisdiction to decide Richard's motion to set aside the PSA. Thus, the district court did not err by denying his motion.

Next, Richard maintains that the district court erred in not setting aside the PSA because it did not determine whether the PSA was valid, just, and equitable under K.S.A.2003 Supp. 60-1610(b)(3) when it approved the PSA as a part of the divorce decree. Richard asserts that the lack of scrutiny by the district court at the time of the divorce proceedings entitles him to relief from that judgment.

In essence, Richard is again arguing the PSA in the divorce decree should be set aside. The record does not contain a motion filed under K.S.A. 60-260(b) or K.S.A.2003 Supp. 60-1610(b) that is based upon this argument. Nor did he make this argument after the district court made its statements at the hearings. In fact, in response to the district court's statements at the first hearing, Richard's attorney replied, "This agreement was approved as fair and equitable back when you did it. There's no motion to set that aside."

Issues not raised to the district court cannot be raised on appeal. *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003).

Richard next maintains that the district court erred by denying his request for

attorney fees. He asserts that he did not have to provide notice to Kara of her breach because she did not provide notice to him of his breach.

The issue of attorney fees was ruled upon in the September 2003 decision. As discussed above, Richard's notice of appeal did not identify in any manner that he was appealing that decision; thus, we do not have jurisdiction over the September 2003 decision. As such, we cannot determine whether the district court erred by denying Richard's request for attorney fees.

In any event "[t]he assessment of costs and attorney fees lies within the sound discretion of the trial court, and its determination will not be reversed on appeal absent a showing of an abuse of discretion." [Citations omitted.]" *Fletcher v. Anderson*, 29 Kan.App.2d 784, 786, 31 P.3d 313 (2001).

At the first hearing, the district court stated neither party was being awarded attorney fees. It explained, "[I]n divorce cases when we come back, particularly on something as detailed as this, that you both are going to suffer for the fact that you didn't do a good job of the contract at the beginning." Richard asserts that this finding ignores the fact that he had legal counsel who reviewed and approved the PSA before it was signed.

Richard misconstrues the remarks of the district court. The district court, in essence, found neither party had willfully breached the PSA. Rather, they had disagreed on the interpretation of the PSA. Moreover, Richard does not dispute that a breach must occur as a condition for an award of attorney fees. Without a finding that a party had breached the PSA, neither party was entitled to attorney fees. As such, the district court

did not abuse its discretion by denying Richard's request for attorney fees.

Lastly, Richard asserts that the PSA states the computation begins with the net amount from the proceeds of the real estate sales, but Kara's computation begins with the gross amount from the proceeds of the real estate sales and thus deducts the mortgage only once from those proceeds. As such, Richard argues that the district court's adoption of Kara's interpretation of the PSA was error because it modifies the provisions in the PSA, which is not authorized by K.S.A.2003 Supp. 60-1610(b)(3) or K.S.A. 60-260(b).

One problem with Richard's argument is that Kara did not request the district court to modify the PSA under K.S.A.2003 Supp. 60-1610(b)(3) or to set it aside under K.S.A. 60-260(b). Kara's motion asked the district court to enforce the provision in the PSA regarding the proceeds from the real estate sales. At the hearing, it was clear the parties disputed how that provision should be interpreted. Thus, both parties were requesting the district court to interpret the real estate provision in the PSA.

When interpreting a property settlement agreement, the primary rule of construction is that the court must, if possible, determine and give effect to the parties' mutual intention at the time the contract was made. *Washburn v. Washburn*, 204 Kan. 160, 161, 460 P.2d 503 (1969). It has also been said:

" 'In construing or interpreting contracts and ascertaining the intention of the parties thereto, the contracts are to be considered in the frame of reference of their subject matter, their nature, and their object or purpose. The spirit and purpose of a contract, as well as its letter, must be regarded in the construction and effectuation thereof, and there can be no doubt that the court may look beyond the form into which the parties have cast their agreement ... The subject matter and the purpose of the contract are material to the ascertainment of the intention of the parties and the meaning of the terms they used, and when these are ascertained, they must prevail over the dry words of the agreement. If the general purpose of a

contract is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. It is always of much importance in the construction of a contract upon which doubt arises to ascertain what was the attitude of the parties to the subject and to find out what was their main purpose and object in making it. If this can be done, the terms of the contract will be so construed as to promote the main purpose, if the language employed will fairly permit such construction ...' [Citation omitted.]" *Koepp v. Pribyl, Executor*, 207 Kan. 478, 481-82, 485 P.2d 1388 (1971).

Richard did not dispute the following facts below or on appeal: there was only one mortgage totaling \$15,400 on all three properties; the initial \$12,500 of this mortgage was used to purchase Tract III, the Missouri property; the additional \$2,900 was incurred by Richard after the divorce; Kara was not to participate in the payment of that mortgage; Richard received Tract III, the Missouri property; and the value of Tract III, the Missouri property, was to be included in the distribution of the proceeds. Further, the PSA is clear that Richard was responsible for paying the taxes on Tracts I and II, the Kansas properties, in exchange for his residing at the Kansas residence after the divorce. Richard has also not disputed, and Kara has not cross-appealed, the district court's values for all three tracts of property, the amounts for the real estate fees and taxes, and the implicit finding in its calculations that the parties equally shared the payment of the real estate fees and the debt to Howard Lay.

Our standard of review for construing a written contract on uncontested facts is *de novo*. *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 920, 46 P.3d 1120 (2002).

The problem with the district court's calculations is that it determined a net value for Tract I that deducted the shared expenses (the real estate fees and the debt to Howard Lay) *and* the expenses that were not shared (the taxes and mortgage). After

arriving at a net value of the proceeds, it then divided that amount by half to determine each party's share. This resulted in Kara paying one-half of the expenses that were the responsibility of Richard, that is, the taxes and mortgage. To compound this problem, the district court then added the full amount of the mortgage and nothing for the taxes in determining Kara's share of the proceeds. This resulted in Kara being reimbursed for an excess amount of \$7,700 on the mortgage and a shortage of \$333.50 on the taxes.

Based upon the above undisputed facts, the better calculation is as follows:

Tract I (Kansas Residence) \$48,500

Tract II (Kansas Lot) k 1,800

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Total Proceeds: Tracts I & II \$50,300

Shared Expenses:

Real Estate Fees \$4,196

Howard Lay Debt k5,000

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Less Total Shared Expenses 9,196

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Net Value: Tracts I & II \$41,104

Tract III (Missouri Property) k17,100

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Total Net Proceeds Tracts I, II, & III \$58,204

Divide between Kara and Richard / 2

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Kara's and Richard's Share \$29,102

Richard's Share \$29,102

Agreement expenses:

Taxes \$ 365

Taxes 302

Mortgage \$15,400

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Less total agreement expenses 16,067

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Richard's Share \$13,035

Kara's Share \$29,102

Less proceeds received 23,235

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Kara's Unpaid Share \$ 5,867

Because Richard did not distribute the sale proceeds for Tract III to Kara, he has breached the terms of the PSA and received an amount greater than authorized under the PSA. Based upon the above interpretation and calculations, Richard owes Kara \$5,867 from the proceeds of the real estate sales. As a result, we reverse and remand with directions that the trial court recalculate the amount that is owed under the PSA.

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