

No. 91,443

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the MARRIAGE OF

Patricia A. SHAPLAND,

Appellee,

and

Leland L. SHAPLAND,

Appellant.

MEMORANDUM OPINION

Appeal from Grant District Court; Tom R. Smith, judge. Opinion filed
November 19, 2004. Affirmed.

K. Mike Kimball, of Kimball and Campbell, LLP, of Ulysses, for appellant.

Wayne R. Tate, of Tate & Johnson L.L.C., of Hugoton, for appellee.

Before GREENE, P.J., PIERRON and MALONE, JJ.

PER CURIAM.

Leland L. Shapland appeals the property division and maintenance awarded to Patricia A. Shapland in their divorce. Finding no abuse of discretion, we affirm.

Leland and Patricia were married in 1976 and have two adult children. Leland was farming with his father at the time of the marriage. In the early 1980's, Leland and Patricia began their own farming operation. Patricia filed for divorce on August 7, 2002,

alleging incompatibility. At the time the divorce was filed, the parties owned 160 acres of land and also farmed 2,000 acres of rented property. The parties also operated a custom hay service in which they would swath, stack, haul, and market hay for other farmers. The custom hay farming was the major source of income for the parties.

Patricia actively participated in the family farm operation as an equipment operator and as the primary bookkeeper. She also maintained the family residence and was the primary caregiver for the children while they were living in the household. Patricia contributed financially to the farming operation by using her inheritance to pay various farm debts and expenses. During all but 4 years of the marriage, Patricia also worked full time outside the home.

The farming operation was primarily financed through the Farm Credit of Southwest Kansas PCA (Farm Credit) of Garden City. On March 6, 2002, Leland and Patricia submitted a financial statement to Farm Credit showing their net worth at \$762,459. On March 10, 2003, the parties submitted a financial statement to Farm Credit stating their net worth was \$521,373.

On April 2, 2003, Farm Credit sent Leland and Patricia a letter denying the parties a loan for operating money for the 2003 crop year. Farm Credit denied the loan because of a substantial operating loss the prior year and because of Patricia's refusal to sign new loan documents. After being denied the operating loan, the parties agreed to sell certain farm equipment. The court approved the sale and scheduled an auction for July 22, 2003. The sale proceeds provided enough funds to pay the note to Farm Credit.

At the pretrial conference on March 25, 2003, Patricia was ordered to submit

her joint asset/debt exhibit on or before March 28, 2003. Leland was ordered to submit his joint asset/debt exhibit on or before April 25, 2003. The trial court did not set a valuation date for the property.

On June 26, 2003, the trial court ordered Leland to provide Patricia an itemized accounting of all income and expenses from January 1, 2003, to July 22, 2003, including any accounts receivable. Leland had not produced the itemized accounting by the time of trial on September 9, 2003. A subpoena was issued that ordered Leland to provide all alfalfa contracts, bank statements, deposit slips, and cancelled checks on his farm account. Leland was threatened with contempt proceedings before he finally provided the records.

The divorce decree was granted on September 17, 2003. The court found the value of all property and assets awarded to Leland, less debts he was obligated to pay, was \$550,000. The court found the value of all property and assets awarded to Patricia, less debts she was obligated to pay, was \$98,000. The court granted Patricia a property settlement judgment of \$226,000 to equalize the division of property to be paid in 20 equal installments over 10 years. The court ordered that Leland pay Patricia spousal maintenance in the amount of \$1,200 for 60 months and \$600 for an additional 60 months.

On September 25, 2003, Leland filed a motion for reconsideration and a motion for a new trial. The court denied the motions. Leland appeals.

Property division

Leland claims the property division was inequitable. In Kansas, the trial court is vested with broad discretion in adjusting property rights. *In re Marriage of Kirk*, 24 Kan.App.2d 31, 35-36, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. See *In re Marriage of Rodriguez*, 266 Kan. 347, 352-54, 969 P.2d 880 (1998.)

Initially, Leland argues the trial court erred by failing to establish a property valuation date at the pretrial conference. The pretrial order did not specify a valuation date. At trial, the court set the valuation date as August 1, 2002. The petition for divorce was filed August 7, 2002.

The selection of the appropriate valuation date for the division of marital assets is fact intensive and left to the discretion of the trial court. *In re Marriage of Cray*, 254 Kan. 376, 386-87, 867 P.2d 291 (1994). Citing *In re Marriage of Schwien*, 17 Kan.App.2d 498, Syl. ¶ 3, 839 P.2d 541 (1992), the *Cray* court stated: "*When the time of evaluation becomes an issue* in a contested case, the trial court at the pretrial conference should set the valuation date." (Emphasis added.) 254 Kan. at 387. Leland argues that the holding in *Cray* mandates that the trial court set the property valuation date in any divorce proceeding at the pretrial conference.

Although the pretrial order did not specify a valuation date, there was no violation of the ruling in *Cray*, as Leland asserts, because the valuation date was not at issue at the time of the pretrial conference. Neither party requested the court to set a property valuation date at the pretrial conference. If Leland had contested the issue of the

valuation date prior to trial, the court should have set the valuation date at that time. Since he failed to do so, Leland cannot now complain about this issue.

Leland's primary argument is that an intervening event, *i.e.*, the call by Farm Credit for payment of the farm operating note resulted in a liquidation of assets, the creation of refinanced debt, and tax consequences. He argues that the trial court did not take into account the liquidation of assets and resulting debt when making the property division. Leland states that the liquidation sale "changed everything." He argues that if the trial court had taken into account the remaining assets, the refinanced debt, and the tax consequences of the sale, the judgment in favor of Patricia should have been \$64,000 rather than \$226,000. Leland had advanced these arguments to the district court in his motion for new trial.

K.S.A.2003 Supp. 60-1610(b)(1) provides, in pertinent part:

"In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities, the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property."

When dividing property and debt in a divorce proceeding, the trial court is not required to accomplish an equal division; the distribution must be just and reasonable. *In re Marriage of Roth*, 28 Kan.App.2d 45, 48-49, 11 P.3d 514 (2000).

The trial court valued the parties' assets based primarily upon a joint exhibit offered at trial. Even though the valuation was based upon a joint exhibit, Leland complains the values were "clearly erroneous" due to the intervening liquidation sale.

Leland argues that when it became obvious that the liquidation sale made the valuation date a relevant concern, the trial "should have been halted" for the court to conduct a hearing to determine the proper valuation date.

The record supports Leland's assertion of a downsizing of the farming operation after the parties separated. However, Leland's problem was that he failed to present convincing evidence to the trial court that the liquidation sale changed everything as he now asserts on appeal. The liquidation sale occurred on July 22, 2003. While Leland's brief indicates this was a forced sale, the evidence showed that it was a result of an agreement by the parties. Furthermore, the evidence showed that Leland repurchased a substantial amount of the farming equipment from his own sale.

Leland compounded the problem by failing to supply current financial records of the farming operation as ordered by the court. The trial court specifically found that Leland "has attempted to evade, conceal and hinder information" which affected Leland's credibility before the court. The court found the evidence Leland presented of his deteriorated financial position to be unpersuasive. The trial court divided the parties' assets and debts as they existed at the time the divorce petition was filed, noting: "There was no long term separation by the parties prior to marriage, nor has there been any special reasons for any date of valuation being later than August 1, 2002...." We cannot conclude that the trial court's ruling in this regard constituted an abuse of discretion.

In particular, Leland complains that the trial court failed to consider the tax consequences of the farm equipment sale and the subsequent repurchase of some of the equipment by Leland. Extensive exhibits and testimony were presented at trial on this

issue. The trial court's journal entry opinion included a lengthy analysis of Leland's potential tax liability. The trial court found that Leland failed to meet his burden of proof that the liability should be considered in the property division. The trial court stated: "This court finds there are both too many intangibles and a lack of persuasive evidence in order to find there is any present value as a debit to be granted to the respondent for the claim of a deferred tax liability."

The trial court's finding that Leland failed to prove his tax liabilities constitutes a negative finding of fact. In order for an appellate court to set aside a negative finding of fact, the party challenging that finding must prove arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *Thomason v. Stout*, 267 Kan. 234, 238, 978 P.2d 918 (1999). Leland fails to meet this burden.

Finally, Leland challenges two factual determinations of the trial court. Leland asserts that a \$28,000 down payment on land was a loan from his father. The trial court found no evidence of a loan, so it was not counted as marital debt. Leland also asserts that his signature on a home equity loan was forged. The trial court addressed the issue and found the debt to be valid. We do not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact. *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 12, 61 P.3d 68 (2002). Furthermore, while Leland mentions these issues, they are not fully briefed. A point incidentally raised but not argued is deemed abandoned. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 40, 59 P.3d 1003 (2002).

It is evident from the trial transcript and the trial court's extensive opinion that

the court considered the factors of K.S.A.2003 Supp. 60-1610(b)(1) in making its property division. The trial court's division of assets and debts as of the date the divorce petition was filed was fair, just, and equitable. Leland's evidence of an intervening event and potential tax liabilities was unconvincing. The record supports the trial court's finding that Leland did not cooperate in providing information to the court in a timely manner. A party asserting that the trial court abused its discretion bears the burden of showing such abuse of discretion. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995). Leland has failed to meet the burden of proof required to show there was an inequitable division of property.

Spousal maintenance

Leland argues the trial court erred in ordering the amount of spousal maintenance. The trial court awarded Patricia spousal maintenance in the amount of \$1,200 for 60 months and \$600 for an additional 60 months for a total of \$108,000.

"The trial court has wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed on appeal absent a clear abuse of discretion.' [Citations omitted.]" *In re Marriage of Day*, 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003).

K.S.A.2003 Supp. 60-1610(b)(2) states that the divorce decree "may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances." The factors which may be considered in determining the need and amount of maintenance are age of the parties; present and perspective earning capacities; the length of the marriage; the

property owned by each party; the parties' needs; the time, source, and manner of acquisition of property; family ties and obligations; and the parties' overall financial situation. *In re Marriage of Sedbrook*, 16 Kan App.2d 668, 670-71, 827 P.2d 1222, *rev. denied* 251 Kan. 938 (1992).

Here, the court noted that its maintenance award was based on the large difference in income between the parties and the length of the marriage. The court stated that it took into account the income listed on the 1999, 2000, and 2001 income tax returns. The 2002 income tax return was not finalized at the time of the divorce trial.

Leland argues the trial court did not properly consider the depreciation in farming operations when setting the amount of maintenance. When faced with an issue of depreciation in farming operations when setting child support, this court stated that "the taxable income shown in a tax return is not always a reliable indication of domestic gross income. However, a total disregard of depreciation in farming operations is an abuse of discretion by a court." *In re Marriage of Lewallen*, 21 Kan.App.2d 73, 75, 895 P.2d 1265 (1995).

Here, the trial court did not disregard the depreciation in farming operations when setting spousal maintenance; rather, the journal entry illustrates that the trial court gave depreciation much thought when determining the disparity in income between the parties. Despite Leland's assertions that he no longer has earning capacity from the farm because of the liquidation of assets and reduction of the farming operations, Patricia presented the trial court with evidence supporting substantial income for Leland in 2003. In response, Leland failed to supply evidence of his farming operation for 2003. Leland

also failed to provide the court with a budget demonstrating that he was incapable of paying the spousal maintenance. The trial court noted that Leland had gone to great lengths to conceal his assets and income in contemplation of the pending divorce.

The evidence presented at the hearing reveals that the spousal maintenance award entered by the trial court was fair, just, and equitable, as required by K.S.A.2003 Supp. 60-1610(b)(2). Indeed, Leland's income was sufficient to pay Patricia \$2,000 per month in temporary spousal maintenance during the pendency of the divorce. The trial court did not abuse its discretion with its final award of spousal maintenance.

Affirmed.