NOT DESIGNATED FOR PUBLICATION

No. 90,225

In the Matter of the MARRIAGE OF

Van De Arlyn HARE,

Appellant,

and

Geneva L. HARE,

Appellee.

Court of Appeals of Kansas

November 24, 2004

Appeal from Montgomery District Court: Jack L. Lively, judge. Opinion filed November 24, 2004. Affirmed.

Glenn E. Casebeer II, of Coffeyville, for the appellant.

Harry M. Bass, of Independence, for the appellee.

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

MEMORANDUM OPINION

PER CURIAM.

Van De Arlyn Hare appeals the trial court's division of property in the divorce with his wife Geneva Hare. Arlyn raises issues concerning whether the division of

property and debts was fair and equitable and whether the trial court erred in finding he was intentionally underemployed and in awarding Geneva attorney fees and costs.

Arlyn argues the trial court did not conduct a fair and equitable division of the parties' property and debt as required by K.S.A.2003 Supp. 60-1610(b)(1). When dividing property and debt in a divorce proceeding, the trial court does not have 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). In addition, K.S.A.2003 Supp. 60-1610(b)(1) provides:

> "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."

The rule in Kansas is that in divorce cases the trial court is vested with broad discretion in adjusting property rights. See *In re Marriage of Schwien,* 17 Kan.App.2d 498, 505, 36 P.2d 541 (1992). 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, 969 P.2d 880 (1998).

Arlyn and Geneva were married in 1983. At the time Geneva filed her petition for divorce in 2001, there were four minor children living in the home. The trial court granted the divorce on the grounds of incompatibility. Geneva was granted sole custody of two children and joint custody was awarded concerning the other two. Geneva had residential custody of all the children. The court granted each party all of their own

premarital property and marital property currently in their possession. Each party received the automobiles in their possession. The court divided the couple's 120 acres of real estate and gave each one 60 acres.

The trial court awarded Geneva her retirement accounts with a value of $67,932 and recognized she was responsible for $18,000 in credit card debt that she would assume and hold Arlyn harmless. The court determined Geneva received $49,932 in marital property. The court determined that Arlyn received property valued at $70,075 and ordered him responsible for several medical debts totaling $2,458, giving Arlyn marital property valued at $67,617.

There was evidence presented of debts by both Arlyn and Geneva to the Internal Revenue Service (IRS). The trial court concluded: "[B]oth parties are indebted to the IRS and those debts will be settled directly with said agency and this Court makes no order concerning payment of delinquent taxes." Arlyn complains the trial court did not take into consideration the potential tax liability he computed at $156,696. Geneva points out the obvious flaw in Arlyn's tax liability computation because the tax liability he is claiming for himself includes $61,299 in tax liability that is the joint responsibility of both parties as it is attached to the 120 acres of land divided by the court. Arlyn only provided documentation for 2 of the 4 tax years by providing a copy of IRS letters of inquiry. The court did not include the IRS debt because it was contingent and Arlyn confirmed it was being contested and appealed. Arlyn also testified that he had a "way out for everybody" concerning the IRS debt.

Arlyn also complains that he was not allowed to testify as to the assets and

debts of the parties, tax liabilities, and his employment history, especially with the disparity of division of assets and debts between the parties greatly favoring Geneva. There is no evidence in the record that Arlyn was prohibited from presenting the evidence complained of on appeal. While the trial court considered all the evidence presented by the parties, the fact that it found some of the debts or liabilities to be unreliable or without computation does not equate to prohibiting the presentation of evidence.

We have examined the record and find the trial court's division of property and debts to fall within the definition of a fair and equitable division. The court conducted a 2-day trial on the property valuation and division, examined all the documentation presented, and judged the credibility of the witnesses. Both parties complained at trial of hidden property, failure to list property for appraisal, and generally disagreed with the valuations opined by each other. We do not find a clear abuse of discretion in the trial court's final decision.

Arlyn also appeals the trial court's decision that he was underemployed. The court found that Arlyn was underemployed and capable of earning at least $3,000 per month as a contract engineer in the aerospace industry. Consequently, the court based its child support determination on $3,000 per month income. The court ordered Arlyn to pay Geneva the sum of $956 per month for child support of the four minor children. The court stated in its order: "[B]ased upon the education, experience and training of the respondent, it is clear that he is currently underemployed and capable of earnings of at least $3,000 per month, and the respondent has not made a good faith effort to become employed to his capacity."

The standard of review of a district court's determination of child support is abuse of discretion. *In re Marriage of Case,* 19 Kan.App.2d 883, 889, 879 P.2d 632, *rev. denied* 255 Kan. 1002 (1994). If reasonable persons could disagree with the propriety of the action taken by the district court, it did not abuse its discretion. *In re Marriage of Cray,* 254 Kan. 376, 387, 867 P.2d 291 (1994).

Under the Kansas Child Support Guidelines (KCSG), Supreme Court Administrative Order No. 128 (2003 Kan. Ct. R. Annot. 99), income may be imputed to the noncustodial parent if that parent is deliberately unemployed or underemployed. *In re Marriage of Scott,* 263 Kan. 638, 645, 952 P.2d 1318 (1998). Specifically, Section II E.1.d. of the KCSG provides: "When there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the Court may evaluate the circumstances to determine whether actual or potential earnings should be used." (2003 Kan. Ct. R. Annot. 102.) See *In re Marriage of Johnson,* 24 Kan.App.2d 631, 634, 950 P.2d 267 (1997), *rev. denied,* 264 Kan. 821 (1998) (citing 1 Elrod, Kansas Family Law Handbook § 14.024D, p. 14-13 [rev.1990]).

Arlyn argues that he last applied for employment with the airline industry in Seattle within a week of the trial. He argues he had his resume at all the airline manufacturers, and two agencies in Wichita were attempting to find him a job. At trial, Arlyn was questioned about his search for work as an engineer and he responded he had not looked in the Wichita paper or contacted job services. Arlyn also stated he had not contacted Boeing Aircraft, Cessna, Lear Jet, nor Beachcraft because he would not work for them.

We find there is substantial competent evidence to support the trial court's decision that Arlyn was intentionally underemployed. The evidence presented at trial indicated that positions were available for persons of Arlyn's caliber and he had not made a good faith effort to secure any of those positions. The court did not abuse its discretion by imputing Arlyn's historical wages pursuant to Section II.E.1.d. of the KCSG in determining the amount of child support.

The trial court also held that Geneva was entitled to recover her reasonable attorney fees in the amount of $8,990 and $101 in costs. The extent of Arlyn's argument on the attorney fees issue is that "the Petitioner received assets including automobiles and retirement accounts, protectable in bankruptcy. The Respondent received assets insufficient to cover his liabilities. The Court erred by assessing additional liabilities for attorney fees and costs to Respondent."

Attorney fees may be chargeable as costs where specific statutory provisions allow for recovery. See *Allison v. Board of Johnson County Comm'rs,* 241 Kan. 266, 269, 737 P.2d 6 (1987). K.S.A.2003 Supp. 60-1610(b)(4) provides: "Costs and attorney fees may be awarded to either party as justice and equity require." The district court is vested with wide discretion to determine both the amount and the recipient of an allowance of attorney fees. See *Baker v. Baker,* 217 Kan. 319, 321, 537 P.2d 171 (1975). Upon review of an award of attorney fees, the appellate court does not reweigh the testimony or evidence presented nor reassess the credibility of witnesses. See *Wiles v. Wiles,* 200 Kan. 574, 576, 438 P.2d 81 (1968). "Where the exercise of discretion is arbitrary and not judicial, and the judgment is inequitable, it will be set aside." *St. Clair v. St. Clair,* 211 Kan. 468, 499, 507 P.2d 206 (1973).

Arlyn has at best incidentally raised this issue. A point incidentally raised but not argued is deemed abandoned. See *Varney Business Services, Inc., v. Pottroff,* 275 Kan. 20, 40, 59 P.3d 1003 (2002). Arlyn does not challenge the amount of Geneva's fees and costs, just the trial court's order that he pay them. Based on the evidence presented to the trial court and the court's distribution of property, we cannot find it was an abuse of discretion for the trial court to order Arlyn to pay Geneva's fees and costs.

Affirmed.