

NOT DESIGNATED FOR PUBLICATION

No. 90,784.

In the Matter of the MARRIAGE OF

Diane A. CURRY,

Appellee,

and

Frederick T. CURRY,

Appellant.

Court of Appeals of Kansas

December 10, 2004

Appeal from Leavenworth District Court; Gunnar A. Sundby, judge. Opinion filed December 10, 2004. Affirmed.

Rhonda K. Levinson, of Levinson & Levinson PA, of Basehor, for appellant.

Robert D. Beall, of Robert D. Beall, LLC, of Leavenworth, for appellee.

Before GREEN, P.J., MCANANY, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

Fredrick T. Curry appeals the trial court's division of property, assignment of

debt, terms of spousal maintenance, and calculation of child support in his divorce from Diane A. Curry. We affirm.

Fred and Diane were married over 20 years. They have two children, one of whom, Kyle, is still a minor.

The parties owed considerable amounts on their credit card accounts. Fred opened a post office box and had the monthly credit card statements sent to the post office box. In 1997, Fred used some savings to pay off these credit card balances. Diane claimed the money came from her savings. Fred claimed it was money he put into savings from his paychecks. After the accumulated balances had been paid off, Diane thought any new charges on the accounts were being paid off regularly within a month or two.

In July 2001, Fred and Diane had a confrontation when Fred asked Diane to sign an \$80,000 home equity/debt consolidation loan. He showed her documentation confirming that they were \$80,000 in debt. When Diane asked him to show her the credit card statements so that she could see the cause of this debt, Fred refused. Fred ultimately disclosed that marital funds had been spent on a young woman named Melea Steiner. Fred borrowed \$14,800 to purchase an automobile for Steiner. He helped pay her rent, paid \$5,000 in tuition for her, purchased clothing and a computer for her, sent her flowers and chocolates, and added her as an authorized user on his Visa card. Additionally, Fred bought Steiner's friend Gina a desktop computer and sent her flowers.

Diane filed an action for separate maintenance in November 2001, and obtained an order for temporary placement of Kyle with her and for temporary child

support and spousal maintenance.

In January 2002, Diane submitted discovery requests to Fred concerning the couple's debts and accounts. She sought to obtain information about their credit card accounts, which amounted to over \$92,000 at one point in the marriage. Fred failed to fully respond, so Diane filed a motion to compel.

By June 2002, Fred had reduced the credit card debt to just over \$54,000. The couple sold their marital home and split the proceeds evenly. They each received somewhere between \$25,000 and \$29,000 from the sale. Fred applied his share to the credit card debt. Diane was of the opinion that none of the remaining debt was for family expenses. Fred argued the contrary.

On June 6, 2002, the court held a status conference. The court entered a decree of separate maintenance (which, on Fred's motion, was later converted to a decree of divorce), thereby leaving for trial the disposition of the parties' assets and liabilities, child custody, child support, and maintenance. The court scheduled another status conference for June 13, at which the court ordered Fred to produce a paycheck stub from his current employer, his Army retirement information, and provide Diane with information so she could obtain a credit report on Fred.

During the marriage the parties filed joint tax returns every year. During the pendency of this action, Diane filed a separate income tax return which resulted in a higher overall tax liability for the parties. She claimed she did this to allow their daughter, who was in college, to qualify for more federal financial aid. She did not advise Fred of this strategy until after she filed her return.

The trial, held on August 30, 2002, consisted of testimony from Diane and Fred and their exhibits. Fred and his counsel were late for trial. They arrived during Diane's direct examination. There had been other occasions where proceedings had been delayed or rescheduled due to the tardiness of Fred's counsel.

Diane testified about her KPERS retirement account, two accounts in her name held at First Command, an IRA account, and a mutual fund account. She testified about a checking and money market account held at Armed Forces National Bank. These accounts constituted her share of the proceeds from the sale of the marital home and insurance proceeds from her father's death. She also testified about Fred's retirement accounts and his military retirement benefits. The parties were married for 15 1/2 of the 20 years Fred spent in the military. Diane sought, and Fred did not oppose, a distribution of 38.5% of Fred's military retirement benefits to Diane. Fred did, however, challenge Diane's valuation of his private retirement account which he believed was worth \$3,000 less due to recent market behavior.

The parties were divorced on the grounds of incompatibility. The court awarded maintenance for 92 months, subject to modification pursuant to K.S.A. 60-1610. The court ordered Fred to pay child support and to provide medical insurance for their son. Absent the latter obligation, Fred would have been eligible for free medical care for himself following his retirement from the military.

The court evenly divided the bank accounts between the parties, awarding to each \$42,200. Each was awarded half of Diane's IRA valued as of August 1, 2002. Diane was awarded her mutual fund estimated at \$38,000 together with several other smaller

accounts. Fred was awarded the Northrop account valued at \$42,200. Additionally, the court ordered that any additional accounts disclosed within 30 days were to be divided equally. Accounts that were not disclosed within 30 days would be awarded 25% to the party that should have disclosed the account and 75% to the other party. In order to equalize the property division, the court set aside to Fred \$500 of the tax liability created by Diane's separate tax filing. The court assigned the balance of the credit card debt to Fred since it is "largely debt that [Fred] incurred by helping others that were not family members without the permission or knowledge of [Diane]." To the extent these payments to Steiner and her friend were loans, as Fred claimed, the right to collect on these loans was set over to him.

The court awarded Diane \$1,000 in attorney fees stating there had been a historical difference in incomes and this would provide her access to the court. The court also awarded Diane additional attorney fees of \$875 for the time and effort her attorney spent to obtain information about the credit card debt.

With respect to conditions that would terminate maintenance, the court agreed that there would be conditions on maintenance. The court explained that it did not have to outline those conditions in the decree, because maintenance can be modified or terminated if there is a significant change in circumstances.

Fred moved for a new trial. Following the hearing, the court amended the divorce decree by modifying the maintenance and child support awards. Fred now appeals.

Maintenance

Fred contends that the decree creates a cycle whereby maintenance may not be modified or terminated under any circumstances. Fred argues that the statute states that maintenance may be modified or terminated only under the circumstances set out in the decree. He points specifically to the following language in K.S.A. 60-1610(b)(2): "The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree." Fred argues that since the statute looks to the decree to define the circumstances under which maintenance can be modified or terminated and, in this case, the decree looks to the statute to provide such circumstances, a cycle is created where maintenance cannot be modified or terminated under any circumstances. These concerns are unfounded.

We exercise unlimited review over the interpretation of a statute, which is a question of law. *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004). K.S.A. 2003 Supp. 60-1610(b)(2) provides: "The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree." This tells us that the court may choose to include conditions for modifying maintenance in the decree itself or may choose not to. Choosing not to, however, does not divest the court of jurisdiction to modify maintenance under the appropriate circumstances. Parties to a divorce may move to modify or terminate maintenance awards based on a change in circumstances, regardless of whether the conditions for terminating maintenance are spelled out in the decree. Two years after the current statutory language was engrafted onto our divorce law, the court in *Herzmark v. Herzmark*, 199 Kan. 48, 427 P.2d 465 (1967), recognized the authority of the district court to modify its decree due to changing circumstances,

such as remarriage of the party receiving spousal maintenance. The court said,

"The court which decrees alimony in the first instance should not be powerless to act under its equitable powers in event factors exist which would require special consideration." 199 Kan. at 54.

The issue in *In re Marriage of Cray*, 18 Kan.App.2d 15, 846 P.2d 944 (1993), rev'd in part on other grounds, 254 Kan. 376, 867 P.2d 291 (1994), was whether the trial court erred by omitting provisions in the decree stating that maintenance would terminate on death, remarriage, or cohabitation. This court determined the trial court did not err. Whether or not the remarriage contingency is specified in the decree, upon the remarriage of the receiving former spouse the paying former spouse may move that maintenance be terminated.

The lack of specificity in the district court's decree regarding the conditions for termination or modification of maintenance was not error.

Fault

Fred argues that the trial court improperly considered fault when it assigned the couple's remaining credit card debt to him. We review the district court's division of property to determine if it abused the wide discretion it has in adjusting the financial obligations of the parties in a divorce action. To demonstrate that the district court abused its discretion, Fred must show that the court's action was arbitrary, fanciful, or unreasonable. *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998).

As stated in *In Re Marriage of Sommers*, 246 Kan. 652, 657, 792 P.2d 1005 (1990), "in all but extremely gross and rare situations, financial penalties are not to be

imposed by a trial court on a party on the basis of fault."

Diane did not seek a divorce based upon a claim of fault. The court divorced the parties on the grounds of incompatibility. In setting over the credit card debt to Fred, the court found that this debt was primarily the result of spending for Steiner and others outside the marriage without Diane's knowledge and consent. The court did not set this debt over to Fred based upon a theory of fault, but rather on a theory of dissipation of marital assets, a factor the court should consider under K.S.A.2003 Supp. 60-1610(b)(1) in deciding upon an equitable division of property. The trial court did not abuse its discretion by considering this conduct when making its decision.

The Overall Division of Marital Assets and Debts

The district court has wide discretion when dividing marital property in a divorce action. This division need not be equal in order to be fair. *Rodriguez*, 266 Kan. at 354. K.S.A.2003 Supp. 60-1610(b)(1) lists the responsibilities of the court in making a division. Fred argues that the trial court abused its discretion in dividing the property of the parties by (1) not considering the tax consequences of the division on the parties, and (2) abandoning its role as a neutral factfinder and behaving more sympathetically toward Diane.

1. Tax Treatment

In his brief Fred argues that he received 61% of the taxable assets but only 11% of the nontaxable assets, and that Diane received 39% of the taxable assets and 89% of the nontaxable assets. When questioned in oral argument, Fred's counsel could point to no evidence of this in the property division. While he points to instances where Fred may

choose to sell or convert an asset and realize a taxable gain earlier than would Diane, this does not mean that Diane received a tax-free asset. Fred fails to identify any marital asset which, if adjusted for taxes, would have resulted in a significantly different overall distribution of the marital estate. Some assets, such as Diane's IRA and Fred's 401K were divided evenly between the parties in kind. Thus, both parties would ultimately be exposed to a tax liability. Fred fails to demonstrate that any disparity in the marginal tax rates for him and Diane substantially affects the court's overall division of the marital estate. The district court did not abuse its discretion in its manner of valuing and distributing the marital assets.

2. Neutral Factfinder

In his brief, Fred lists the following instances where he believes the court was not acting in a neutral manner: (a) the court's lowering of the value of Diane's mutual fund; (b) the court's perceived assumption that Fred would not disclose accounts; (c) the court's award to Diane of a higher percentage of Fred's military retirement than she requested; (d) the court's award of attorney fees to Diane; (e) the court's assignment of more debt to Fred than to Diane; (f) the court's increase of Fred's income; and (g) the court's hostility toward Fred's attorney.

a. The Mutual Fund

K.S.A.2003 Supp. 60-1610(b)(1) states: "The trial court may consider evidence regarding changes in value of various assets before and after the valuation date in making the division of property." The district court lowered the value of the mutual fund awarded to Diane. However, the court also lowered the value of Fred's 401K account. The court explained these adjustments were made to accommodate pre-trial

market fluctuations. These adjustments do not evidence an abuse of discretion or an abandonment by the district court of its role as the neutral factfinder.

b. Undisclosed Accounts

Regarding any so-far undisclosed accounts, the court ruled:

"[A]ny accounts that have not been disclosed or disclosed within 30 days, including the AIM account, I'm going to award 75 percent of those accounts to her and 25 percent of value of those accounts to him as of August first, 2002.

....

"... [T]o be on the safe side, the Court's going to say undisclosed assets in the form of bank accounts will be awarded 75 percent to the party who was--25 percent of that account to the party who should have reported it but failed and 75 percent to the other party unless it's disclosed within the next 30 days."

The fact that the court's initial remark suggested that Fred would be the non-discloser merely reflects the fact that the evidence established that before trial Fred had been the one who withheld information on accounts. The court's gender-neutral closing remark on this topic confirms the court's awareness that future non-disclosures could be caused by either party. These remarks do not demonstrate ill will towards Fred or any abandonment by the district court of its role as the neutral factfinder.

c. Military Retirement

During the trial, Diane requested that 38.38% of Fred's retirement benefits be set over to her. Fred did not contest this request. The trial court rounded up this percentage to 38.5%. This rounding up changed the benefit amount by \$3.50 per month.

Married couples seldom treat their economic union as a Fortune 500 SEC-regulated business. We suspect Fred never proposed a financial audit of their fiscal affairs

during the more than 20 years the parties were married. The fact that Fred now demands CPA exactitude in the winding-up of this marital/economic union is disingenuous. Couples do not lead their married lives in that fashion and the law does not impose that level of exactitude at the end of their marriage.

The parties computed that Diane was married to Fred 76.76% of the time he spent in the military. Rounding 76.76% to 77% and dividing by two yields 38.5% for Diane's one-half interest in Fred's military benefits. The court's refusal to extend its calculations to two decimal places does not establish that the district court abandoned its role as the neutral factfinder or abused its discretion.

d. Attorney Fees

The district court awarded attorney fees of \$1,875 to Diane. \$1,000 of this was due to the disparity in income between the parties and was granted to assure the parties' equal access to the courts. The court also awarded Diane \$875 in fees for Fred's non-compliance with pretrial discovery regarding the credit card debt. This was based upon an estimated 7 additional hours spent obtaining this information at a rate of \$125 per hour. Fred focuses upon the exchange at the June 13, 2002, status/discovery conference regarding what information was needed. This does not address, however, the other efforts taken by Diane's counsel to obtain information on the credit card accounts. The awarding of fees does not demonstrate an abandonment by the district court of its role as the neutral factfinder.

e. Debt

Fred argues the court showed its bias against him by making him responsible for a share of the income tax debt that resulted from Diane's separate filing. The court made this allocation of the tax liability in order to more fairly equalize the overall division of the net marital estate consistent with K.S.A.2003 Supp. 60-1610(b)(1). To do so does not evidence an abandonment of the court's neutrality.

f. Fred's Income

At the hearing on Fred's posttrial motion, the court recalculated maintenance and child support because it had improperly included Fred's retirement benefits as part of his income. In doing so, the court used Fred's earnings disclosed on the paycheck stub that was submitted at trial in August to make its income calculations. Based upon a paystub for the period ending August 23, 2002, the court calculated Fred's monthly gross income to be \$5,499, or \$65,988 per year. Fred claimed his annual gross earnings were \$62,850.59. The court's reliance upon evidence properly admitted at trial in order to calculate Fred's income does not demonstrate an abandonment of the court's neutrality.

g. Hostile Behavior

Fred complains that the court began the trial without Fred or his attorney present. Fred's argument can be synthesized to the following proposition: Judges who insist on starting court on time demonstrate ill will towards tardy lawyers and litigants, and their rulings should be set aside. We will not dwell further on this proposition. The court's unwillingness to wait once again for a litigant whose counsel displayed tardiness in the past does not constitute ill will or an abandonment of the court's role as the neutral factfinder. A court does not abuse its discretion in proceeding with trial of a civil matter when one of the parties, properly notified of the trial setting, fails to appear.

Fred next argues that the court berated his lawyer during arguments over Fred's income calculations at the hearing on his posttrial motion. Frustration and exasperation do not necessarily constitute ill will. Fred was allowed to present his current paystubs and testify regarding his income. Fred's complaints in this regard fall short of a showing of ill will or a lack of judicial neutrality that requires us to set aside the court's rulings.

Finally, Fred argues he was prejudiced because his attorney was not allowed to respond to Diane's lawyer's objection to the admission of two exhibits. There was no prejudice because the objection was overruled. Fred's exhibits were received in evidence. There was no need for Fred's lawyer to respond. The court's handling of this evidentiary ruling does not demonstrate ill will towards Fred or an abandonment of the court's neutrality as a factfinder.

The trial court did not abuse its discretion in its division of the marital estate.

Child Support

Fred argues the trial court erred in calculating a \$28 credit for his monthly health and dental insurance expense for his son for the purpose of computing his child support obligation. Fred contends the monthly credit should be \$128.

It is important to note that this issue is raised not in the context of a motion to modify child support, but rather a motion for a new trial pursuant to K.S.A. 60-259. At trial, Fred did not submit a child support worksheet but presented evidence regarding the cost of his medical and dental coverage.

At the hearing on his posttrial motion, he claimed his \$460 annual premium

would be reduced to \$230 if the coverage were only for him. He also asserted that he is currently paying \$41.30 every two weeks for dental coverage primarily for the benefit of his son. He also mentioned a \$19.12 a month fee he pays for his son. Altogether he estimated that he pays \$128 a month for both medical and dental.

At the conclusion of the hearing on Fred's posttrial motion, the trial court rejected Fred's exhibits and testimony regarding insurance, stating:

"To add them now would not change ten percent differential, so the Court won't consider that to reevaluate based upon new information, because I don't think it would generate a ten percent difference in the child support."

It appears that the trial court intertwined the standards for considering a motion for a new trial and a motion to modify child support based upon a change in financial circumstances. A change of financial circumstances generally does not warrant modification of the child support if the change in support is less than 10%. Fred does not claim there has been a change in his financial circumstances. However, based upon the trial court's characterization of Fred's evidence as "new information," and the fact that none of this evidence was unavailable to Fred at the time of trial, we take the trial court's ruling to mean that Fred's evidence did not satisfy K.S.A. 60-259 in that it was not newly discovered evidence which he could not, with reasonable diligence, have discovered and produced at the trial. We review the trial court's determination of child support to determine if it abused its discretion. *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000). Having done so, we find no abuse of discretion. Based upon our understanding of the trial court's ruling on Fred's 60-259 motion, we find no error.

Affirmed.

