

NOT DESIGNATED FOR PUBLICATION

No. 94,209

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

REBECCA L. TORLINE,
n/k/a REBECCA L. BARNHARDT,
Appellee,

and

KELLY J. TORLINE,
Appellant.

MEMORANDUM OPINION

Appeal from Ford District Court; VAN Z. HAMPTON, judge. Opinion filed July
14, 2006. Affirmed.

Autumn L. Fox, of The Law Office of Autumn L. Fox, P.A., of Abilene, for the
appellant.

Terry J. Malone, of Williams, Strobel, Malone & Ralph, P.A., Dodge City, for the
appellee.

Before HILL, P.J., JOHNSON, J., and BUKATY, S.J.

Per Curiam: Rebecca L. Torline n/k/a Rebecca L. Barnhardt and Kelly J. Torline were married in 1987. They had three minor children. Rebecca filed for divorce, and the district court entered a decree on June 14, 2002. The issues regarding the division of property remained open at that time. After disputes over appraisers, their appraisals, and other matters, the court heard evidence on the issues and subsequently entered its ruling. Kelly appeals from that ruling arguing that the court did not adequately consider the factors listed in K.S.A. 60-1610 and that its division of property and debt was disproportionate. Concluding that the district court did not abuse its discretion in dividing the items, we affirm.

Before proceeding to the merits of the appeal, we note Rebecca argues this court lacks jurisdiction because Kelly acquiesced in the judgment. She urges that after the district court's ruling, Kelly mortgaged certain real property set over to him and then used the mortgage proceeds to pay some debts. She argues this is particularly egregious since the ruling required him to refinance within 90 days other debts assigned to him which were secured with inherited stock set over to her and that he used none of the mortgage proceeds to refinance any of those debts. She claims prejudice since she then was forced to pay some of the debts assigned to Kelly in order to save her stock.

Kelly apparently admitted during post-trial proceedings in the district court that he did in fact mortgage the real estate in question. At the same time, he justified it with the fact that he had to pay certain farm debts some of which were in Rebecca's name as well. The court made no findings or conclusions in this regard. It deferred the matter to the appellate court where the parties have extensively briefed the issue in both of their appeal briefs and in their respective briefs relating to Rebecca's motion to dismiss the appeal.

In *Gordon v. Gordon*, 218 Kan. 686, 690-93, 545 P.2d 328 (1976), the court discussed the acquiescence of judgments in general and the exceptions found in divorce cases. It stated the general rule as

"anything that savors of acquiescence in a judgment by a party to the lawsuit cuts off the right to appellate review. [Citation omitted.] The general rule that a party who voluntarily accepts a benefit under a judgment or decree thereby waives his right to have it reviewed has been applied in divorce cases under certain circumstances." 218 Kan. at 690.

The *Gordon* court, however, recognized that divorce cases in particular have peculiar problems which may call for "the severability of the provision of the judgment under which the benefits have been accepted or the consistency with which the beneficiary may attack the judgment on appeal." 218 Kan. at 690-91. Such is the case here.

Also we note: "When a judgment is rendered against a party and the judgment consists of separate and distinct parts, the acquiescence in and [one action] by a party will not ordinarily cause a loss of the right to appeal the remaining separate parts of the judgment." *Huet-Vaughn v. Board of Healing Arts*, 267 Kan. 144, Syl. ¶ 1, 978 P.2d 896 (1999).

Because this is a divorce case, and the judgment here consists of several separate and distinct parts, Kelly's actions in mortgaging some of the parcels at most preclude him from appealing the orders pertaining to those parcels which, of course, were awarded to him. However, the issue becomes moot in light of our conclusion that the appeal fails on its merits.

We also observe that any claim by Rebecca that Kelly violated the orders of the district court by failing to refinance certain debts within 90 days in order to release her stock given as collateral must be addressed in further post-trial proceedings before the district court.

We proceed to the merits of the appeal.

Trial to the district court on the property issues lasted 2 days. Over that time, in addition to Rebecca's and Kelly's testimony, the court heard from appraisers, farm operation consultants, a crop consultant, a crop insurance agent, neighboring farmers, a bank president, and a co-op manager. Highly summarized, the record contains the following evidence.

When the parties married, Kelly worked at Farmland Industries at an annual salary of approximately \$40,000. He also farmed part-time. Rebecca worked part-time as a teacher. She apparently brought a parcel of farmland into the marriage worth \$360,000, and it produced rental income in the amount of \$441,000 between 1987 and 2001. After the birth of their first child in 1988, Rebecca stayed home to be a full-time mother.

In 1991, Rebecca inherited stock from her grandmother with a value of approximately \$321,000. The parties then decided Kelly would quit his job and farm full-time. They bought some farmland and used the stock as collateral.

The district court heard evidence that in addition to the property they brought into the marriage individually and then purchased after the marriage, Rebecca received \$1,511,345 in gifts and inheritance from her family between 1990 and 2001. Kelly received over \$100,000 in gifts from Rebecca's family during this time. Rebecca

presented an expert who testified the Torline farming operation was a financial liability to the family and that it required financial support from Rebecca to maintain farming assets. Specifically, the expert opined that for the years 1996 through 2001, the farming operation incurred a net loss of \$492,738. The court also received evidence that from 1990 through 2001, Rebecca cashed in over \$700,000 in stocks to support the farming operation and pay family expenses.

Kelly testified the couple decided he could farm full-time "using stock to buy some land and to grow the farm with[.]" He stated his dreams about the farming operation, expanding into cattle, and the purchase of additional land for the farm. The additional land included parcels which his daughters purchased with trust fund money from their maternal grandfather. He acknowledged Rebecca had sold stock to help with the farming operation. He voiced his strong desire to continue farming.

Following the trial, the district court issued a lengthy and detailed journal entry which included the following paragraphs:

"23. The provisions of K.S.A. 60-1610(b)(1) include instructions regarding the division of property and those are set out as follows:

"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. . . ."

- "24. In consideration of the above factors, the Court finds the following:
- a. Petitioner and Respondent are both 43 years of age and the parties were married for 14 years prior to their separation and the filing of this divorce matter;
 - b. At the time of marriage, the parties had similar earning capacities even though Respondent was the primary wage earner while employed by Farmland Industries, and it was Respondent's desire that Petitioner remain in the home as a 'housewife' and mother to the parties' children;
 - c. After Petitioner received a first distribution of her inheritance, the Respondent decided to pursue his dream of being a full-time farmer and rancher, and therefore, the Petitioner's inheritance was devoted primarily to development of a farm and ranch, and the parties relied upon Petitioner's inheritance to provide security for the extensive loans that were taken to purchase land and equipment and for operating expenses;
 - d. Subsequent to the Respondent's change of occupation from an employee of Farmland Industries to a full-time farmer, the parties received distributions from Petitioner's parents as gifts, and those gifts were applied to indebtedness incurred for the operation of the farm;
 - e. Petitioner's parents still reside near her and there are continuing family ties with her immediate family, which enhance her apparent natural

tendency and preference for preservation and wise use of the property which Petitioner received by gifts and inheritance;

- f. During the marriage and subsequent to Petitioner's receipt of distributions of inheritance and gifts from her parents, the stock that was gifted to her was split and increased in value substantially through no efforts of the parties, while at the same time there were losses incurred from the operation of the farm and there was a dissipation of assets resulting from those continual losses which were represented by tax returns showing the operations of the farm resulting in net operating losses during every year of the parties' marriage;
- g. The history of the parties' income and circumstances, together with the future earning capacity of the Petitioner and the Respondent respectively, show there is no need for an order awarding spousal maintenance to either party."

After setting out the statute and the foregoing findings made in consideration of them, the district court proceeded to accommodate Kelly's desires to continue farming and awarded him the agricultural real property and the farm equipment plus all the debt associated with those items. The court awarded Rebecca essentially all the property remaining from her inheritance and gifts she had received from her family. A summary of the property and debt apportionment in the journal entry appears as follows:

Personal Property Division

| <u>Rebecca</u> | | <u>Kelly</u> | |
|-----------------------|-----------------|-------------------|-------------|
| ADM stock (inherited) | \$1,204,277.20 | Farm equipment | \$377,300. |
| Harvested crops | \$17,699.27 | Harvest crops | \$7,510. |
| Two vehicles | \$47,500. | One vehicle | \$27,816. |
| Life Ins. cash value | \$18,732. | Ins. policy/stock | \$45,928. |
| IRAs/Bank accts | >\$102,114. | IRA/Bank accts | >\$115,232. |
| Misc. Household items | | | |
| Total amount | >\$1,390,333.10 | | >\$503,199. |

Real Property Division

| <u>Rebecca</u> | | <u>Kelly</u> | |
|----------------|------------|--------------|------------|
| Two parcels | \$741,000. | Four parcels | \$426,729. |

Division of Debts

| <u>Rebecca</u> | | <u>Kelly</u> | |
|--|-----------|--------------|------------|
| Debts (one real property/one vehicle) | \$80,519. | Debts | \$607,504. |

We note at this point, if one subtracts Rebecca's inherited stock value from her total, her award of personal property amounts to \$186,055.90, which is considerably less than what Kelly received in personal property.

While Kelly's appeal brief lists two issues, we view the arguments as raising one issue. Did the district court abuse its discretion in its application of K.S.A. 60-1610(b)(1) to the facts of the case and, thus, apportion the property and debts in a disproportionate manner?

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

Kelly contends that although the trial court cited to the factors set forth in K.S.A. 60-1610(b)(1), it failed to "actually consider them." He concedes it is within the court's discretion to award an unequal distribution of assets, but complains that at age 43, he is left with virtually no money, no unencumbered assets, and has over \$600,000 in debt. We view the arguments not so much that the district court did not consider the factors. Obviously, the court mentioned them in its journal entry and set forth in great detail

several facts it felt were relevant and on which it based its apportionment of property and debt. We view Kelly's argument more along the line that the court did not see the factors as he sees them.

One thread running throughout Kelly's argument is that the farm was a profitable operation and that factor has contributed to the parties' accumulation of assets over the years. As to the profitability of the farm, however, the district court found against Kelly based upon competent evidence including the tax returns of the parties and expert opinions offered by Rebecca. We realize Kelly argued the other way on this issue. We will not reweigh the evidence, however, and there is more than sufficient competent evidence to support the court's finding.

One of Kelly's biggest complaints is the district court focused almost entirely upon where the property came from to the exclusion of other factors in the statute. It appears the court did place great emphasis on the source of the assets the parties had at the time of the divorce. We find no abuse of discretion, however, in light of the facts present here.

Initially, it is not unreasonable to restore to one party the property he or she inherited or received as a gift from others and which the other party had no part in bringing to the family. Nor is it unreasonable under these facts to deny Kelly any share in

the appreciation in value during the marriage of any property Rebecca inherited or received as a family gift. Again, based upon competent evidence, the district court found that the farm operation incurred net operating losses every year of the marriage and the parties spent a substantial amount of Rebecca's gifts and inheritance to meet living expenses and sustain the farm.

Had this been a case where inherited assets and gifts to one party had appreciated in value and not been dissipated in a losing operation, then the other party certainly would have a stronger claim to a portion of any of the appreciation. Those are not the facts here, however.

Kelly's brief cites us to a number of cases setting out decisions which the appellate courts of this state have concluded either did or did not amount to an abuse of discretion in dividing assets and debts in a divorce case. We find them of little aid here. None of the cases have facts that are similar to the ones here. All property and debt apportionments in divorce cases must be judged on their own facts. Rarely, are the facts of one case so close to those of another that one decision can be determinative of what should be done in the other.

The district court here acceded to Kelly's wishes and gave him all the farmland and farm equipment. Obviously, he may continue the farm operation or liquidate the assets and find another occupation. Should he choose other work, he certainly seems very capable in view of his age and prior experience to find such.

The district court restored to Rebecca what remained of the property she inherited and was gifted. The court did not act unreasonably when it declined to award Kelly any of those assets. While the gifts and inheritance did apparently sustain the farm operation during the marriage, we know of no compelling reason they should do so after the divorce. If one removes Rebecca's inheritance and gifts from the equation, then the division of property and debt is not very different.

The district court appropriately applied K.S.A. 60-1610(b)(1) in this case. It looked at what property the couple had owned prior to marriage as well as the property each had acquired after marriage in their own right and through joint efforts. The court did not abuse its discretion in its division of property. See *McCain v. McCain*, 219 Kan. 780, 785-87, 549 P.2d 896 (1976).

Affirmed.

JOHNSON, J., concurring: I write separately to clarify that I would restrict our holding on the acquiescence issue to the unique circumstances of this divorce case.

Citing to *Gordon v. Gordon*, 218 Kan. 686, 545 P.2d 328 (1976), appellee's brief acknowledges that our Supreme Court has applied acquiescence differently in divorce cases. Apparently, the challenging party must show some harm or prejudice arising from the act of acquiescence.

Rebecca claims she suffered financial prejudice when she had to pay off a bank loan assigned to Kelly. However, that harm flowed directly from Kelly's disobedience of a court order to effect the release of the security interests in Rebecca's ADM stock. As the majority notes, compliance with the court's refinancing order is not on appeal. A dismissal of this appeal would not resolve the harm that Rebecca claims.

Given the size and nature of the marital estate, I would hold that Rebecca has failed to establish sufficient prejudice because of Kelly's mortgaging his assigned real estate to mandate our dismissal of this appeal.