

NOT DESIGNATED FOR PUBLICATION

No. 93,655

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

JANEE MARIE PHILLIPS, N/K/A COMLEY,
Appellee/Cross-appellant,

AND

BILLY RAY PHILLIPS,
Appellant/Cross-appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; REBECCA L. PILSHAW, judge. Opinion filed August 4, 2006. Affirmed in part, reversed in part, and remanded with directions.

David J. Morgan, of Wichita, *T. Michael Wilson*, of Stinson, Lasswell & Wilson, L.C., of Wichita, for appellant.

Janee M. Phillips, n/k/a/ *Janee M. Comley*, of Wichita, appellee pro se.

Before HILL, P.J., Greene, J., and BRAZIL, S.J.

Per Curiam: We are asked in this case to review an order amending maintenance and a finding of contempt for failure to pay maintenance. Because the trial court refused to make findings of fact, as required by statute and court rule, we reverse the maintenance order and set aside the contempt conviction. We remand to the district court for further findings of fact and conclusions of law as required by K.S.A. 60-252 and Supreme Court Rule 165 (2005 Kan. Ct. R. Annot. 217).

Facts and Prior Proceedings

In the parties' 1999 divorce, Billy Ray Phillips was ordered to pay \$5,000 maintenance per month to Jancee Marie Comley (formerly Phillips). Phillips' company, Mid-America Auto Auction and/or MAA, L.C. (MAA), that he either owned or worked for, paid this \$5,000 per month, as maintenance, to Comley, as a result of an income withholding order, beginning November 25, 1999, through September 25, 2002. Overall, MAA paid Comley \$175,000. Phillips paid no maintenance on his own. With the passage of time, through several motions, Phillips sought reduction of the maintenance award. On January 14, 2000, Phillips filed several posttrial motions according to K.S.A. 60-252(b), K.S.A. 60-259, and K.S.A. 60-260, requesting the trial court amend its findings of fact, make additional findings, amend the the judgment, and grant him relief from judgment. On January 31, 2000, Phillips filed an amended motion. The amended

motion, among other things, requested that maintenance be reduced to \$2,000 per month, make findings of fact supporting the spousal maintenance award, and lift the income withholding order. Later, on June 19, 2001, Phillips filed a motion to terminate spousal maintenance altogether.

But another lawsuit caused a delay in the resolution of Phillips' motions. A declaratory judgment action was filed requesting interpretation of a severance agreement that reportedly transferred ownership of MAA from Phillips to his sons. Comley intervened in that lawsuit; basically the action involved the interpretation of the agreement between Phillips and his sons, and a request to determine Phillips' interest in the business at the time of his divorce. This matter later reached our court in *Phillips v. Phillips*, No. 88,428, unpublished opinion filed February 28, 2003. The court had found that Phillips transferred his ownership in MAA through an oral contract prior to the divorce. Comley appealed this ruling, and we affirmed. District Judge Rebecca L. Pilshaw, in the divorce case, later adopted the ruling of the declaratory judgment.

With no more maintenance being paid to her, Comley filed a motion and supporting affidavit alleging Phillips and MAA were in indirect contempt for failure to comply with the court's orders. On August 20, 2004, a bench trial was held to address both Phillips' motions to modify maintenance and Comley's contempt motion. As a

result of the trial, on September 24, 2004, Judge Pilshaw decided to reduce maintenance to \$2,500 per month. This adjustment became effective as of September 25, 2002, which was the date of the last payment made to Comley from MAA under the initial income withholding order. Judge Pilshaw also found Phillips was in contempt for failure to pay maintenance.

On appeal, Phillips challenges the trial court's decision regarding maintenance, arguing the court erred when it set the date the modification would become effective as September 25, 2002, instead of November 1, 1999. He also contends the trial court abused its discretion in determining the amount and duration of maintenance.

Scope of Review

Because of the many unknowable fact possibilities facing a trial court, K.S.A. 60-1610 (b)(2) grants trial courts great discretion when awarding maintenance in a divorce decree. The statute provides:

"The 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 decree may make the future payments modifiable or terminable under circumstances

prescribed in the decree. The court may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court. . . . At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree."

On an appellate level, our view is that "[t]he trial court has wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion." [Citations omitted.]" *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003). However, the district court is required to comply with the statutes authorizing payment of support and maintenance, and its failure to do so is reversible error. *In re Marriage of Cline*, 17 Kan. App. 2d 230, 234, 840 P.2d 1198 (1992).

Analysis

Phillips contends that the trial court abused its discretion first in making the effective date of the reduction of maintenance as September 25, 2002, instead of

November 1, 1999, the date of the original decree. He also argues that a \$2,500 per month payment, which is more than half of his monthly income of \$4,000, was an abuse of discretion. We have no problem with the effective date of the modification. But because there are no findings of fact by the trial court, we cannot effectively review whether the amount ordered was an abuse of discretion.

1. Date of reduction.

K.S.A. 60-1610 (b)(2) controls this issue. It gives the trial court the discretion to grant and modify spousal maintenance. K.S.A. 60-1610(b)(2) states that "[t]he court *may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court.*" (Emphasis added.) This language directly contradicts the contention that the effective date of a judgment that modifies spousal maintenance *must* relate back to the date of the motion to modify. This language means that a trial court has the discretion to determine the retroactive effective date of any modification to maintenance to any date so long as it does not exceed the limit of 1 month after the motion is filed.

Phillips arguments to the contrary are unpersuasive. The authority Phillips relies upon is irrelevant and does not control this issue. Phillips cites K.S.A. 60-252(b), K.S.A.

60-259, and *In re Marriage of Riggle*, 30 Kan. App. 2d 967, 972-73, 52 P.3d 360, *rev. denied* 274 Kan. 1112 (2002). These authorities only relate to jurisdictional and preservation issues; they do not relate to the effective date of a judgment modifying maintenance.

K.S.A. 60-252(b) provides that a party may move a court to amend its findings, make additional findings, or amend its judgement. It also grants the court jurisdiction to make the requested amendments so long as the motion was made within 10 days after the entry of the initial judgement. Likewise, K.S.A. 60-259 allows for a party to move for a new trial within 10 days after the entry of judgment. Finally, the issue discussed in *In re Marriage of Riggle* was the impact of a motion to alter or amend judgment had on determining whether a timely notice of appeal had been filed. See 30 Kan. App. 2d 967, Syl. ¶ 8.

Judge Pilshaw here determined the modification would become effective on September 25, 2002. The selection of this date does not appear to be arbitrary or is it an abuse of discretion. This was the date Comley received her last maintenance payment under the income withholding order. Therefore, it appears to be a reasonable date at which to make the modification effective, especially in light of the fact that the sale of the company occurred prior to the divorce. The trial court did not abuse its discretion when it

selected September 25, 2002, as the date the maintenance modification became effective.

We affirm this portion of the court's order.

2. Failure to make findings of fact.

The purpose of spousal support is to provide for the future support of the divorced spouse, and the amount of maintenance is based on the need of one of the parties and the ability of the other party to pay. *Carlton v. Carlton*, 217 Kan. 681, 681, 538 P.2d 727 (1975). A maintenance award must be fair, just, and equitable under all the circumstances. K.S.A. 60-1610(b)(2). In *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976), the Kansas Supreme Court enumerated eight factors that may be considered when awarding maintenance, including: (1) the age of the parties; (2) the parties' present and prospective earning capacities; (3) the length of the marriage; (4) the property owned by the parties; (5) the parties' needs; (6) the time, source, and manner of acquisition of the property; (7) the family ties and obligations; and (8) the parties' overall financial situation. However, the *Williams* court also stated that there were no fixed rules in determining the amount of a maintenance award. 219 Kan. at 306.

For purposes of appellate review, K.S.A. 60-252 and Supreme Court Rule 165 (2005 Kan. Ct. R. Annot. 217) both mandate that a trial court state the controlling facts

and legal principle in all contested matters submitted to a judge without a jury. These requirements are in part for the benefit of the appellate courts in facilitating a review. See *Henrickson v. Drotts*, 219 Kan. 435, 441, 548 P.2d 465 (1976). When the findings and conclusions of the trial court are inadequate to permit a meaningful review, this court may remand the case for new findings and conclusions. See *Mies v. Mies*, 217 Kan. 269, 274-75, 535 P.2d 432 (1975).

In this case, the initial journal entry stated the amount of maintenance, the duration of the award, instructions regarding the payment of the award, and the conditions under which maintenance would be terminated. The journal entry provided for an income withholding order and made it clear that the trial court was retaining jurisdiction to modify the award to prevent manifest injustice. Despite requests to make findings to support the award, Judge Pilshaw refused to make further findings to support the maintenance award responding that she was "not going to justify my rulings on the record. There is ample justification for what I have ruled contained within the record . . ."

We do not seek justification of the rulings; we seek facts and reasons.

K.S.A. 60-252(a) provides that a judge shall state the controlling facts "orally or in writing." It further states that "[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and reasons for the decision appear therein."

When the judge announced her ruling from the bench, she commented that the situation was not a normal one due to the fact that Phillips was in business with his sons and together they had blurred the line making it difficult to determine Phillips' income. The judge commented that even though records indicated that Phillips was receiving a salary from MAA of \$4,000 a month, his lifestyle did not reflect someone who was receiving \$4,000 a month in income. She noted that Phillips was receiving a number of financial benefits as a result of his employment. Eventually, the judge concluded:

"There is such a fine line going on here that it's hard to walk. I've just picked a figure out of the air as to what I am going to assess as Mr. Phillips' income, and I will assess his income at \$4,000 that he receives a month, and then I will say that at a minimum--well, I'm going to say, I'm going to attribute \$1,000 extra in kind financial benefits that are directly related to his employment. I think the cell phone is receipted to his employment. I think a number of things that . . . I believe will count as income. The cell phone being provided to him is a benefit to him personally, et cetera. So, I'm going to say that Mr. Phillips' income is \$5,000 a month. I'm sort of making it up, so if you want to appeal again and spend billions of dollars more and appeal it again, that's fine. I'm

making this up. Everybody else is making stuff up, not lying but making stuff up. Everybody's kind of flying by the seat of their pants in this case, so I am, too. A thousand dollars a month I am adding. So I will base his salary—I will indicate his salary is \$5,000 a month for purposes of spousal maintenance. (Emphasis added.)

"One of the reasons I'm not adding in all this other stuff is, you know, I've been—according to your paperwork, Ms. Comley has not had any income. Somebody is helping her out and giving her money. Do we count that as her income because somebody is helping her pay her bills and things? Sort of what Mr. Phillips' sons are doing for [him] as well. They are keeping their father in the style which he's become accustomed, quite lavish, but if they were just kids giving their dad this kind of money, there wouldn't be a question whether it was income or not. The fact that he works for that business, so it looks like income. It's your guys' fault. I cannot believe in the number of years I've been dealing with this stuff that things aren't better yet over there yet. That's your business, and I'm going to attribute only a thousand, and the rest is gifted to Mr. Phillips.

"I went through all of your figures. You know, we can sit here and go through all this stuff. The bottom line is I think that a reasonable amount of spousal maintenance for Ms. Comely based on the adjusted downward figures, et cetera, would be \$2500 a month spousal maintenance. I'm leaving the six years on."

The function of an appellate court is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003).

We cannot complete that function in this case with the condition of this record. When a trial court states it is "sort of making up facts," we cannot ignore that statement and rely upon an argument that the court meant to say it was "estimating amounts." We must reverse and remand for further findings of fact and conclusions of law concerning the amount of maintenance as well as the duration of the award. What facts did the trial court find to be telling? What amounts are fair, just, and equitable, and why? We reverse and set aside the contempt conviction, noting the district court may renew the conviction depending upon its findings of fact and conclusions of law.

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