

NOT DESIGNATED FOR PUBLICATION

No. 95,603

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

WILLIAM D. DEVINS,
Appellant,

and

JOHNNA J. DEVINS,
Appellee.

MEMORANDUM OPINION

Appeal from Saline District Court; JEROME P. HELLMER, judge. Opinion filed September 29, 2006. Affirmed.

Gary D. Denning, of Denning and Young, LLC, of Salina, for appellant.

Robert S. Jones, of Norton, Wasserman, Jones & Kelly, L.L.C., of Salina, for appellee.

Before RULON, C.J., MALONE and HILL, JJ.

Per Curiam: William D. Devins appeals the district court's award of maintenance to Johnna J. Devins. We affirm.

William and Johnna first married on June 28, 1970. They began divorce proceedings on June 17, 1987, which concluded in a divorce being granted in 1987 or 1988. William paid maintenance and child support to Johnna and she retained sole custody of the children. Approximately 8 months after the divorce was finalized, William and Johnna moved back together. They remarried on April 29, 1990.

On November 17, 2004, William again filed for divorce. The children were grown and not at issue in the second divorce. William and Johnna entered into a property settlement agreement on April 18, 2005, which the district court accepted as fair, just, and equitable. However, the parties were unable to reach an agreement regarding maintenance.

The district court conducted a hearing on May 10, 2005. At that time, William had been working for 12 years at Salina Vortex as a senior sales engineer. In 2004, William earned \$39,149 gross income, taking home approximately \$2,666 per month. He received periodic raises and usually an annual bonus. The district court determined that William's bonus income averaged about \$2,000 per year. He had also saved approximately \$77,000 in his 401(k) retirement plan and owned stocks that paid and automatically reinvested annual dividends. The district court found that between stock income and voluntary

contributions to his 401(k) plan, William generated an additional \$4,200 per year income. In his domestic relations affidavit, William listed his living expenses as approximately \$1,993 per month, including his car payment, which would be paid in 3 years. At trial, William agreed that his total monthly expenses were approximately \$1,700.

At the time of trial, Johnna had been working for Waters, Inc. for approximately 10 years. Her gross income in 2004 was \$20,250 with a net of \$1,155 per month. She did not receive a regular salary increase or a consistent annual bonus. The district court found that Johnna would no longer be able to contribute to her 401(k) retirement plan, and she did not have any additional income. In her domestic relations affidavit, Johnna listed her living expenses as about \$2,149 per month. At trial, she estimated her monthly expenses to be \$2,410. Johnna's monthly expenses were considerably higher than William's because she had an assortment of health-related costs.

Johnna has had a long history of health problems. She fought breast cancer in 1993 and again in 1997, resulting in a double mastectomy. She has since developed high blood pressure, elevated liver enzymes, and an arterial blockage. Johnna took an extensive list of medications. Prior to their divorce, Johnna was covered by William's health insurance; he paid about \$292.65 per month for coverage for both of them. Her out-of-pocket medical expenses were about \$400 per month with the insurance. After the divorce, Johnna estimated that she would have to pay \$60-\$65 per month for health insurance. Under her new policy, she would pay \$650 in out-of-pocket expenses.

At trial, William's counsel asked Johnna why she did not seek new employment with better pay and benefits. Johnna testified that she remained at Waters, Inc. because of her health problems and limited work experience. Waters, Inc. was very flexible when she had to undergo frequent x-rays, blood work, and other health-related doctors visits. Johnna believed that for a woman of her age, experience, and health, she would have difficulty finding a job in Salina for more money.

After hearing the evidence, the district court ordered William to pay Johnna maintenance in the amount of \$700 per month for a period of 120 months. William timely appealed.

William contends the district court erred in determining the amount and duration of Johnna's maintenance. Specifically, William argues the district court based its decision on the erroneous finding that William and Johnna were married continuously for 34 years. Alternatively, William argues the district court erred in adding the length of the two marriages together to determine maintenance.

"The 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). Discretion is abused if no reasonable person would take the view adopted by the district court. See *Reich v. Reich*, 235 Kan. 339, 343, 680 P.2d 545 (1984). "But the

district court must 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).

K.S.A. 60-1610(b)(2) 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. . . . In any event, the court may not award maintenance for a period of time in excess of 121 months."

The court will consider a variety of factors in determining the appropriate amount and duration of maintenance. These factors include "age of the parties, present and prospective 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. [Citation omitted.]" *Day*, 31 Kan. App. 2d at 758.

On appeal, William first contends the district court abused its discretion in awarding Johnna long-term maintenance based on a factual finding not supported by substantial evidence. William refers to the fact that in the Journal Entry and Decree of Divorce, the district court indicated that the first divorce was *dismissed* by the parties on

September 21, 1987. Where sufficiency of the evidence is challenged, the function of the appellate court is to determine whether the district court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the district court's conclusions of law. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003).

William is correct in noting that the divorce decree erroneously stated that the first divorce was dismissed by the parties on September 21, 1987. In fact, William and Johnna were divorced in 1987 or 1988 and remarried on April 29, 1990. However, the record reflects that the district court was clearly aware of the two separate marriages. In another portion of the divorce decree, the district court stated: "The court finds that the parties have been married for a total of 34 years. The current marriage comprising approximately 15 years of said marriage relationship."

Next, William argues that even if the district court recognized the existence of two marriages, the district court abused its discretion in adding the marriages together to determine the award of maintenance. However, William presents no relevant case law to support his argument. In contrast, Johnna argues that whether the length of the marriage was 15 years or 34 years played a minor role in the district court's determination of maintenance. This assertion is supported by the district court's statement in the divorce decree that "even disregarding the first marriage the current marriage of the parties by

definition is long-term." Johnna alleges the district court properly considered all the relevant factors in determining the amount and duration of maintenance.

A review of the record indicates that Johnna's assertions are correct. The district court based its maintenance award largely on findings regarding the imbalance in earning power, health-care expenses, and overall financial situation of the parties. Including salary, stock income, bonuses, and voluntary 401(k) contributions, William's income was at least twice as much as Johnna's. Furthermore, William's earning capacity had the potential to increase over time while Johnna's earning capacity would not increase. Johnna had a long list of health problems and medications. Conversely, William was healthy, able-bodied with no limitations on his physical activity or employment. Also, the district court noted that William would have disposable income after payment of his living expenses and Johnna would have a deficit. Finally, the district court also acknowledged the respective ages of Johnna and William and that they had agreed to a fair, just, and equitable division of the marital assets and debts.

The district court explained why it found maintenance was necessary, and there was substantial competent evidence in the record to support the district court's conclusion. Furthermore, the district court clearly considered the relevant factors in determining the amount and duration of maintenance. A reasonable person could have taken the view adopted by the district court. Accordingly, we conclude the district court did not abuse its

discretion in ordering William to pay Johnna maintenance of \$700 per month for 120 months.

Affirmed.