

NOT DESIGNATED FOR PUBLICATION

No. 95,695

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

GARY D. MULANAX,

Appellant,

V.

LORI MULANAX,

Appellee.

MEMORANDUM OPINION

Appeal from Jackson District Court; GARY L. NAFZIGER, judge. Opinion filed October 6, 2006 Affirmed in part; reversed in part and remanded.

Pantaleon F. Jr., of Topeka, for appellant.

Bruce C. Harrington, of Topeka, for appellee.

Before MALONE, P.J., CAPLINGER, JJ., and LARSON, S.J.

Per Curiam: In this divorce action, Gary Mulanax appeals from the district court's journal entry of judgment on the issues of spousal maintenance, child support, and the division of the parties' real and personal property and debt. We affirm the district court's decision on all issues except the division of real property. On that issue, we reverse and remand to the district court for consideration of the proper division of a 6 parcel of pasture land.

Factual and procedural background

Gary and Lori Mulanax married on July 31, 1993, and had two children: a son, born in 1993, and a daughter, born in 1996. During the marriage, Gary was the "biggest bread winner" while Lori was primarily responsible for matters related to the children.

The parties owned two parcels of real estate, Gary's grandmother gave the parties the 20-acre parcel, on which they constructed a home. The 6 parcel was pasture land which Gary's grandmother deeded to herself and the parties as joint tenants.

On May 16, 2003, Lori and the children left the marital residence after the parties agreed to separate. Three days later, Gary filed a petition for divorce alleging incompatibility.

During the marriage, Gary earned \$38,000 a year while Lori earned approximately \$18,000-20,000 a year. Lori's earning capacity has since remained the same, although she was unemployed during the pendency of the divorce proceeding. Both parties have completed high school, and Lori earned approximately 10 hours of college credit.

Following trial, the district court granted the parties a divorce but reserved judgment on issues related to custody, visitation, maintenance, and the division of property and debts. The court indicated it would issue a memorandum decision after reviewing its notes and the parties' proposals. Approximately 3 months later, however, the district court held a short hearing during which it ordered a transcript, of the trial and requested proposed finding from the parties.

After the parties filed proposed findings, the court issued a memorandum decision stating:

“[T]he findings of fact proposed by Lori are supported by substantial competent evidence and are adopted and control in the matter now before this Court. The Court further finds that the proposed division of assets and obligations by the parties contained therein constitute a fair and equitable division of the property, assets and liabilities of the parties and it is adopted and is ordered by this court.”

Lori's proposed findings were adopted in total by the district court, with the exception of Lori's proposal that Gary pay her attorney fees. Further, the court specifically found it to be in the best interest of the minor children that they be placed in the residential custody of Lori with “guideline visitation” to Gary.

Lori's counsel prepared a journal entry incorporating essentially all of Lori's proposed findings. Lori's counsel also added provisions requiring Gary to pay within 90 days Lori's share of the value of the parties' real estate (\$10,000 as one-half the equity in the marital residence and \$28,500 as one-half the value of the 60-acre parcel). To secure payment of these amounts, counsel also added provisions granting Lori judgment liens on both properties. Further, counsel added a provision indicating Gary was in “arrearage in child support for four (4) months.”

On August 18, 2005, Len's counsel mailed a copy of the journal entry to Gary's counsel. On August 29, 2005, having not received objection from Gary, Lori's counsel sent a letter to the district court requesting the court sign and file the journal entry. The court complied on September 1, 2005. On the same date, Gary's counsel faxed correspondence to the district court indicating that Gary had objected to the inclusion in the journal entry of the child support arrearage.

Two days after Gary filed his notice of appeal in this case, the district court entered a nunc pro tunc

order eliminating the child support arrearage provision in the journal entry. At a subsequent hearing, which was held to determine whether Gary timely filed his docketing statement, Gary objected to the court's adoption of the journal entry without consideration of his objections. Gary's counsel admitted, however, that his only objection to the journal entry had been that it had included the alleged child support arrearage

Gary timely appealed, appealing only "the judgment granted by Journal Entry on the bifurcated issues of maintenance, support, property and debt division."

Jurisdiction

On appeal, Gary initially challenges the district court's decision granting primary residential custody to Lori. Gary argues the court should have awarded shared residential custody. Gary also challenges the district court's finding it lacked jurisdiction to entertain his post-judgment motion to modify his child support and maintenance obligations during the pendency of this appeal.

However, Gary specifically identified in his notice of appeal the rulings from which he appealed, and he failed to identify either child custody or the court's ruling on the post-judgment motion as issues on appeal. Therefore, we are without jurisdiction to address these rulings. *See In re Marriage of Galvin*, 32 Kan App. 2d 410, 41, 83 P.3d 805 (2004) ("It is a fundamental proposition of Kansas appellate procedure that an appellate court only obtains jurisdiction over the rulings identified in the notice of appeal.")

Gary further argues the district court abused its discretion in adopting Lori's proposed findings of fact because they were not supported by substantial competent evidence. Under this broad claim, Gary suggests the district court abused its discretion in apportioning the parties' personal and real property and debts, setting the duration and amount of maintenance, and setting the amount of child support.

Division of personal property, apportionment of debt, and determination of the value of the marital residence

The district court has broad discretion in adjusting the property rights and financial obligations 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); *In re Marriage of Monslow*, 259 Kan. 412, 414, 912 P.2d 735 (1996). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court. [Citation omitted]. *State v. Bey*, 270 Kan. 544, 546, 17 P 322 (2001). "The burden of showing abuse Of discretion lies with the party

alleging abuse.” *In re Marriage of Larson*, 257 Kan.456, 463-64, 894 P.2d 809 (1995).

K.S.A. 60-1610(b) states in part:

“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.”

Moreover, if a trial court has made findings of fact, the first function of the appellate court is to determine whether those findings are supported by substantial competent evidence when viewed in the light most favorable to the successful party. When the trial court’s findings are supported by substantial evidence, it does not matter whether other evidence offered may have supported a different finding. *Clark v. Clark*, 236 Kan. 703, 704, 696 P.2d 1386 (1985). An appellate court may not reweigh the testimony or pass on the credibility of witnesses. *McKissick v. Frye*, 255 Kan. 566, Syl. ¶ 8, 876 P.2d 1371 (1994).

Gary argues the district court abused its discretion by ignoring uncontroverted evidence of alleged agreements between the parties establishing (1) the value of the marital residence; (2) the division of certain items of personal property; and (3) an equal division of marital debts. Without citation to authority, Gary argues that where the parties agree to a division or apportionment of property, the court must accept the agreement absent some rational basis for disregarding the agreement.

To the contrary, K.S.A. 60-1610(b)(1) gives discretion to the district court to make decisions regarding property division. Indeed, “[a] court is not required to give effect to stipulations between counsel or oral admissions of counsel, which are not reduced to writing and signed by the counsel to be charged therewith, or which are not made a part of the record.” Rule 163 (2005 Kan.Ct.R.Annot, 216). Further, a district court is not required to accept a formal separation agreement unless it finds the agreement to be “valid just and equitable.” K.S.A. 60-1610(b)(3); *In re Marriage of Kirk*, 24 Kan.App.2d 31, 35-36, 941 P.2d 385, *rev.denied* 262 Kan. 961 (1997).

Therefore, even if the parties agreed to a specific distribution of property or apportionment of debt, the district court was not bound by that agreement. Gary cites no additional basis in support of his claim that the district court’s division of personal property, apportionment of debt, or valuation of the marital residence was not just and reasonable under K.S.A. 60-1 610(b)(1),

Thus, we conclude the district court did not abuse its discretion in valuing the marital residence or

apportioning the parties' personal property and debt.

Division of Gary's 401K

The district court granted Lori a judgment for one half of the proceeds of Gary's 401K account "from the date of marriage until the filing of this action." The court specifically found that Gary had failed to produce written evidence of the value of his 401K account and ordered him to do so "forthwith" so that the amount of share could be determined.

On appeal, Gary argues the district court abused its discretion in equally dividing the assets that had accumulated in his 401K account since the parties' marriage. He complains that the district court failed to explain "what was ordered," although he cites no authority to support his argument.

Lori points out that despite the court's explicit order, Gary has provided no information as to the value of or accumulation of value in his 401K account. Thus, it is not the fault of the court, or of Lori, that the amount of Lori's interest is as of yet uncertain.

Gary does not suggest that it was unreasonable to equally divide the assets that had accumulated in his 401K account during the marriage. Nor does he suggest the decision was not supported by the evidence. Under these circumstances, we find no support for Gary's argument that the district court abused its discretion in equally dividing the assets that had accumulated in Gary 401K during the parties' marriage.

Division of the 60-acre parcel of real property

Next, Gary claims the district court abused its discretion in awarding one-half the value of the 60-acre parcel of real property to Lori, because the court failed to explain the statutory factors it considered and did not take into account Gary's grandmother's interest in the property.

Gary's argument that the district court should have considered his grandmother's interest in the 60-acre parcel is convincing. In journal entry of judgment, the district court incorrectly stated that "the parties" owned the 60-acre parcel. Further, the district court failed to acknowledge the uncontroverted evidence that Gary's grandmother had deeded the property to herself, Gary, and Lori as joint tenants. Further, Gary points out that the record includes evidence that neither he nor Lori collected any rent or paid arty taxes on the 60-acre parcel, and his grandmother controlled the property.

In light of this uncontroverted evidence, and absent any explanation by the district court of the basis for its division of the value of the real estate, we find it was an abuse of discretion for the district court to

award Lori one-half the value of the 60-acre parcel. Accordingly, we reverse this determination and remand to the district court with instructions to consider Gary's grandmother's interest in dividing the 60 parcel.

Payment within 90 days

Gary also argues the court abused its discretion in ordering him to pay Lori her share of the value of the real estate within 90 days. He suggests the court failed to consider whether he had "the ability or assets from which to make, such a substantial payment within so little time." Again, he fails to cite authority in support of his contention, and Lori does not respond to this argument.

Gary does not suggest he does not have the ability to meet Ms obligation to pay Lori her share of the value of the real estate. Nor does he point to anything in the record which would support such an argument.

We conclude Gary has failed to show that the district court abused its discretion in requiring Gary to pay Lori her share of the value of the real estate within 90 days,.

Amount and duration of maintenance

Next, Gary claims the trial court abused its discretion in determining the amount and duration of maintenance, because it did not consider the amount of temporary maintenance that had been paid or Lori's "earning capacity, education, experience, living arrangement and arguable willful underemployment."

" "The trial court has wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion." [Citation 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).

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 held that there are no fixed flies in

determining the amount of a maintenance award. 219 Kan. at 306.

The journal entry does not identify the specific factors the district court relied upon in ordering the amount and duration of maintenance. However, in discussing the maintenance issue at trial, the district court specifically inquired about the respective levels of education and earning capacities of both the parties. Further, when discussing the maintenance issue at an earlier hearing, the district court inquired as to the length of the parties' marriage. Moreover, in its memorandum decision, the district court stated it had "reviewed the evidence and testimony" in making its decision to adopt Lori's proposed findings.

In addition, while the court did not explicitly consider Lori's "experience, living arrangement and arguable willful underemployment," these are not factors that necessarily weighed in Gary's favor. The evidence indicates Gary was the primary bread winner" while Lori typically maintained the residence and cared for the children, Lori had slightly more education than Gary, but he had a greater earning capacity given his experience. Lori's testimony indicates she had changed jobs several times, and when she had been employed, it was primarily on a part-time basis. At one point during the marriage, Lori was working as a licensed insurance agent, but Gary asked her to quit the job so she could stay home with the children.

Moreover, during the pendency of the proceedings, Lori was unemployed and paying the children's medical bills, albeit with child support received from Gary. Contrary to Gary's implication that Lori has been deliberately unemployed, her legal testimony indicated she attempted to find employment.

We therefore conclude Gary has failed to show that the district court abused its discretion in determining the amount and duration of maintenance.

Child support

Finally, Gary challenges the district court's award of \$800 per month in child support.

The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the child support guidelines is subject to unlimited review. *In re Marriage of Paul*, 32 Kan. App 2d 1023, 1024, 93 P.3d 734 (2004), *aff'd* 278 Kan 805, 103 P.3d 976 (2005). "Use of the guidelines is mandatory and failure to follow the guidelines is reversible error. [Citation omitted.] Any deviation from the amount of child support determined by the use of the guidelines must be justified by written findings in the journal entry. [Citation omitted.]" *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

On appeal, Gary does not claim the district court deviated from the child support guidelines. Instead, he claims the trial court abused its discretion in ordering him to pay \$800 per month in child support, “given the shared residency” agreement. This argument assumes the court abused its discretion in awarding primary residential custody to Lori and consequently abused its discretion in awarding child support based upon the primary residency determination. As discussed earlier, Gary did not appeal the district court’s determination giving primary residential custody to Lori.

Moreover, the record contains no evidence of such an agreement. And, as discussed earlier, even if such an agreement did exist, the district court is not bound by agreements between the parties on issues related to “legal custody, residency, visitation, parenting time, support or education of the minor children.” K.S.A. 60-1610(b)(3). Rather, it is the district court’s duty to “determine custody or residency of a child in accordance with” the child’s best interests. K.S.A. 60-1610(a)(3).

Here, the district court rejected Gary’s suggestion that the parties be awarded shared residential custody, and awarded Lori primary residential custody. Gary does not suggest that the amount of child support was improperly calculated if the determination of primary residential custody was appropriate.

Accordingly, we find no abuse of discretion in the district court’s determination of the amount of child support.

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