

No. 95,503

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CHERYL O. STRECKER,

Appellee,

and

ARTHUR C. SELMAN,

Appellant.

MEMORANDUM OPIMON

Appeal from Morris District Court; LARRY B. BENGTON, judge. Opinion filed October 6, 2006.

Affirmed.

David P. Troop of Weary Davis, L.C., of Junction City, for appellant.

James R. McEntire, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Topeka, for appellee.

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

Per Curiam: Cheryl G. Strecker and Arthur C. Selman were divorced after an 11- year marriage. Arthur appeals the district court's approval of a property settlement agreement (PSA) and its subsequent denial of his motion to set aside the divorce decree which incorporated the agreement. We affirm.

Cheryl and Arthur married in 1994. There were two children: Jeremy, born in 1996 and Leah, born in 1999. During the marriage, Cheryl worked as a staff attorney at Kansas State University and Arthur ran a small home-based computer-consulting business.

In April 2005, Cheryl filed for divorce in Morris County. In order to reach an agreement about the division of their assets and debts, Cheryl and Arthur met at the home of mutual friends, Lyman and Tollot Baker. By the end of the meeting, Cheryl and Arthur had reached a tentative agreement. Cheryl drafted the PSA and gave a copy to Arthur for his review. Arthur took the PSA by two attorneys. The first attorney would not review the PSA, but the second attorney met with Arthur and advised him about the agreement. After meeting with the attorney, Arthur sent Cheryl a letter in which he proposed various changes to the PSA.

Most of Arthur's proposals were incorporated into the final draft.

On July 6, 2005, Cheryl and Arthur appeared in district court to finalize the divorce. They provided the district court with a letter, signed by both parties, which stated the couple had resolved all issues except for Arthur's parenting time. Along with the letter, Cheryl and Arthur provided the district court with a proposed PSA, a proposed parenting plan, a proposed divorce decree, and Cheryl's domestic relations affidavit (DRA). In the letter, Cheryl and Arthur asked the district court to approve the PSA and to grant the divorce, subject to a further determination by the court of Arthur's parenting time. The district court called the case in open court with both parties appearing pro se. Although no testimony was presented to the district court, the court announced that it had "reviewed the file" and granted the divorce. The divorce decree approved by the parties and signed by the district court indicated the PSA provided "for a valid, just and equitable division of all property of the parties."

Arthur obtained counsel and filed a motion for a new trial or relief from judgment on July 20, 2005. In the motion, Arthur alleged the PSA was inequitable and there was insufficient evidence to support the district court's finding that the PSA was valid, just, and equitable. Arthur's main concerns were that the home had been undervalued and that Cheryl's retirement funds were not equitably divided.

On August 18, 2005, the district court held a hearing on the motion and the unresolved parenting time issues. After hearing the evidence, the district court denied Arthur's motion. The district court indicated it found no evidence of fraud and determined the PSA was not "outrageously one-sided." Arthur appealed.

Arthur's notice of appeal indicated he was appealing the district court's approval of the PSA as well as the parenting plan. However, Arthur's brief raised no issue concerning the parenting plan. An issue not briefed by the appellant is deemed abandoned. *McGinley v. Bank of America, NA.*, 279 Kan. 426, 444, 109 P.3d 1146 (2005).

Arthur raises two related issues on appeal. First, he claims the district court erred in initially approving the PSA because there was insufficient evidence to support the district court's finding that the PSA was valid, just, and equitable. Second, Arthur claims the district court erred in denying his posttrial motion to set aside the divorce decree.

Cheryl's brief argued that this court lacks jurisdiction to review the district court's underlying judgment because Arthur's filing of his post trial motion was insufficient to extend the deadline for an appeal. However, Cheryl's counsel announced in oral argument that Cheryl was abandoning this claim, in any event,

we conclude this court has jurisdiction to consider both of Arthur's claims.

Arthur first claims the district court erred in initially approving the PSA because there was insufficient evidence to support the district court's finding that the PSA was valid, just, and equitable. In divorce cases, the district court is vested with broad discretion to adjust the property rights of the parties. This rule applies to cases in which a settlement agreement is submitted to the district court for approval. *In re Marriage of Kirk*, 24 Kan.App.2d 2431, 35-36, 941 P.2d 385, rev.denied 262 Kan. 961 (1997). The exercise of the district court's discretion will not be disturbed by an appellate court unless there is a clear showing of abuse, *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

Arthur argues this court's decision in *Kirk* "contemplates that there should be an affirmative showing that the district court reviewed both the separation agreement and the domestic relations affidavit." Arthur further argues that because there is no evidence in the record affirmatively showing that the court actually read and scrutinized the PSA or the DRA, *Kirk* requires an appellate court to set aside the divorce decree. According to Arthur, he only received 20% of the marital estate and one maintenance payment of \$500. Arthur argues this lopsided division of property should have raised serious questions about the fairness of the PSA, prompting a more thorough inquiry by the district court.

K.S.A 60-1610(b)(3) provides "the parties. have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree." Courts must carefully scrutinize separation agreements to prevent fraud and oppression. *Kirk*, 24 Kan. App. 2d at 32 (*quoting Spaulding v. Spaulding*, 221 Kan, 574. 577, 561 P.2d 420). Mere agreement by the parties does not vitiate a district court's duty to scrutinize a settlement agreement. 24 Kan. App. 2d at 34.

Arthur's reliance on this Court's decision in *Kirk* is misplaced. In *Kirk*, the district court approved the parties' settlement agreement, which awarded the husband his excavating business and the wife her Mary Kay business, without first reviewing any evidence of the value of either of the businesses. The property settlement agreement was submitted to the district court by an attorney who represented neither party and was approved in the absence of both parties. The district court later denied the wife's motion to set aside the divorce decree, rejecting her argument that there was not enough evidence on the record to support the district court's finding that the separation agreement was valid and just. On appeal, this court reversed, finding the district court had not followed K.S.A. 60-1610(b)(3). This court held that a district court must "review

evidence in the record sufficient to support the finding that the separation agreement is valid, just, and equitable.” 24 Kan. App. 2d at 36.

Contrary to Arthur’s argument, *Kirk* does not require “an affirmative showing that the district court reviewed both the separation agreement and the domestic relations affidavit. *Kirk* merely requires a district court to have sufficient evidence to scrutinize a separation agreement. An appellate court can only reverse the district court’s approval of the PSA if it abused its discretion by doing so. An abuse of discretion exists where the court’s judgment is arbitrary, fanciful, or unreasonable. See *In re Marriage of Wade*, 20 Kan, App. 2d 159, 168, 884 P.2d 736 (1994), rev, denied 256 Kan. 995 (1995).

Unlike the district court in *Kirk*, the district court here had sufficient evidence in the record to support its finding that the PSA was valid, just, and equitable. Although no testimony was presented to the district court on the day it granted the divorce, the district court had other evidence on which to rely. The district court had Cheryl’s divorce petition, Arthur’s answer to the petition, Cheryl’s DRA, the PSA between Cheryl and Arthur. and two joint letters from Cheryl and Arthur. The DRA provided detailed financial information on the marital property, including the value of the couple’s vehicles. Cheryl’s retirement and stock accounts, and the marital residence. The second letter to the district court stated Cheryl and Arthur had resolved all issues regarding their divorce except for Arthur’s parenting time, and the letter requested the district court to approve the PSA and the divorce decree. When the district court granted the divorce, it explicitly stated that it had ‘reviewed the file.’ Finally, it is important to note that unlike the couple in *Kirk*, both Arthur and Cheryl attended the hearing at which the district court approved the divorce decree.

The PSA approved by the court awarded Cheryl the property she acquired before the marriage, which included the following: a retirement account valued at \$7,100. stock valued at \$4,000, and the house valued at \$130,000 and subject to a \$60,000 mortgage. The PSA required Cheryl to transfer \$7,000 from a second retirement account to Arthur’s retirement account, leaving approximately \$155,900 in Cheryl’s account. The PSA awarded each party a vehicle valued at \$5,000, any bank account in their individual names, and their personal effects. The PSA further awarded Arthur a \$35,000 “equalization payment” and \$4,200 in maintenance, most of which was paid before the divorce was granted.

Although Arthur is correct that the division of property favors Cheryl. Kansas does not require marital property to be divided on a 50/50 basis. *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992) The district court had evidence that the parties were only married for approximately 11 years, that the down

payment for the residence had been made by Cheryl prior to the marriage, and that the parties had negotiated the terms of the PSA. In the face of this evidence, the district courts approval of the PSA did not rise to the level of an arbitrary or unreasonable judicial action. As such, we conclude the district court did not abuse its discretion in initially approving the PSA.

Next, Arthur claims the district court erred in denying his motion for a new trial or relief from judgment. Granting a motion for a new trial filed pursuant to K.S.A. 60-259(a) is within the district court's discretion and will not be disturbed on appeal unless there is a showing of abuse of that discretion. *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 485, 15 P.3d 338 (2000). Similarly, a ruling on a motion for relief from judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the district court. *Midland Bank of Overland Park v. Rieke*, 18 Kan.App.2d 830, 835, 861 P.2d 129 (1993). Judicial discretion is only abused when no reasonable person would take the view adopted by the district court. *Varney Business Services, Inc v. Pottroff*, 275 Kan 20, 44, 59 P.3d 1003 (2002).

In denying Arthur's post trial motion, the district Court stated it could not find any fraud. The burden of proving fraud or misrepresentation in obtaining a judgment is on the movant, Fraud is never presumed and must be proven by clear and convincing evidence. *Cool v. Cool*, 203 Kan. 749, 755, 457 P.2d 60 (1969). A finding that a party did not meet its burden of proof is a negative factual finding. Such a finding will not be disturbed by an appellate court absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *General Building Contr., LLC v. Board of Shawnee County Comm'n's*, 275 Kan. 525, 541, 66 P.3d 873 (2003).

Arthur argues he was entitled to relief from the divorce decree on the basis of fraud, misrepresentation, or misconduct by Cheryl. According to Arthur, Cheryl drafted all the documents for the divorce and manipulated him by having more legal knowledge and financial leverage than Arthur. Arthur alleges Cheryl discouraged him from obtaining counsel and misrepresented certain facts to him, such as the value of the residence.

The district court held an evidentiary hearing on Arthur's motion. There was ample evidence to support the district court's finding that the divorce decree should not be set aside based on fraud Cheryl and Arthur had met with the Bakers to negotiate the terms of the PSA. There was also evidence that Arthur was aware that Cheryl was not his attorney and that he was free to consult legal counsel. After receiving a draft of

the PSA, Arthur contacted an attorney and later negotiated modifications to the PSA. Arthur conceded he had reviewed and understood the final version of the PSA before signing it. Regarding the value of the home, even Arthur indicated he was uncertain about its true value. Considering all the evidence, the district court did not abuse its discretion in denying Arthur's motion based on fraud, misrepresentation, or misconduct by Cheryl.

Arthur further argues the district court applied the wrong legal standard in denying his post trial motion. In denying Arthur's motion, the district court relied primarily on the finding that there was no fraud. Arthur's motion, however, was also based on his argument that the district court abused its discretion in initially approving the PSA. The district court failed to make a specific finding on this issue when it denied Arthur's post trial motion. However, Arthur failed to object to the adequacy of the district court's findings. "A litigant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal." *Hill v. Farm Bur. Mut. Ins. Co.*, 263 Kan. 703, 706, 952 P.2d 1286 (1998). Moreover, as we have already determined, the district court did not abuse its discretion in initially approving the PSA. If the district court reaches the right result, its decision will be upheld on appeal. The reason given by the district court for its ruling is immaterial if the result is correct. *Rose v. Via Christi Health System, Inc.*, 279 Kan. 523, 525, 113 P.3d 241 (2005). We conclude the district court did not err in denying Arthur's post trial motion to set aside the divorce decree.

Affirmed.