

## NOT DESIGNATED FOR PUBLICATION

No. 95,362

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LARRY ALLEN CUSHENBERRY,  
*Appellee,*

and

HEATHER DANYAE CUSHENBERRY,  
*Appellant.*

## MEMORANDUM OPINION

Appeal from Butler District Court; MICHAEL E. WARD, judge. Opinion filed  
November 22, 2006. Affirmed.

*Stacy L. Ortega*, of Law Office of Stacy L. Ortega, P.A., of Wichita, for appellant.

*Jeffrey R. Emerson*, of Conlee Schmidt & Emerson, LLP, of Wichita, for appellee.

Before McANANY, P.J., ELLIOTT and BUSER, JJ.

*Per Curiam*: Heather Danyae Cushenberry, now known as Heather Schlesinger,  
appeals the rulings of the trial court regarding her divorce from Larry Allen Cushenberry.

We affirm.

Heather first argues the trial court erred in calculating Larry's monthly income for purposes of child support and maintenance by failing to include the J-Hawk Plumbing, Inc. (J-Hawk), business depreciation expenses. She also takes issue with the court's use of Larry's 2004 and 2005 income to determine monthly income.

Our review is as stated in *In re Marriage of Paul*, 32 Kan. App. 2d 1023, 1024, 93 P.3d 734 (2004), *aff'd* 278 Kan. 808, 103 P.3d 976 (2005).

Heather failed to argue to the trial court that J-Hawk's depreciation should be added to Larry's income for purposes of calculating child support and maintenance. Her depreciation argument was limited to her claim that accumulated depreciation should be added to J-Hawk's value with respect to property division. Issues not raised before the trial court cannot be raised on appeal. *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003). We need not address this issue.

In determining Larry's income for child support purposes, the trial judge stated:

"It is difficult to put my finger on just what Mr. Cushenberry's income is at the present time. I don't mean to suggest that he's hiding anything; it's just that his income has been somewhat variable and, at the present time, is

down considerably. Although it has been suggested by Mr. Cushenberry that the Court look only at the first six months of '05, I believe that consistent with the child support guidelines, the Court should and is going to logically use a one-year historical average for child support calculation in this case. The Court does not believe that the first half of the '05 earnings are an accurate reflection of what Mr. Cushenberry has earned or will likely earn in the future."

Accordingly, the trial court added one-half of Larry's 2004 taxable income (almost \$33,000) with his taxable income for the first 6 months of 2005 (some \$13,000). The trial court has discretion to determine a person's self-employment gross income, and that discretion must include consideration of historical data, when income varies from year to year. *State ex rel. Secretary of SRS v. Huffman*, 22 Kan. App. 2d 577, 584, 920 P.2d 965 (1996).

By averaging half of Larry's 2004 taxable income with half of his 2005 taxable income, the trial court properly considered the variable nature of Larry's income stream.

We also note child support can be modified at any time circumstances render a change proper. *In re Marriage of Schoby*, 269 Kan. 114, 121, 4 P.3d 604 (2000). The trial court retains jurisdiction should either party wish to challenge the amount of support. Based on the evidence presented, the trial court did not abuse its discretion in determining Larry's monthly income.

Heather next claims the trial court erred in finding Larry's businesses, J-Hawk and 2 Brothers Investment, L.L.C. (2 Brothers), had no positive value and were, therefore, not subject to division. She also claims she is entitled to future earnings of the companies.

The trial court is vested with broad discretion in adjusting property rights, and on appeal, we will not disturb the division of property absent a clear showing of abuse of discretion. *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992).

Heather did not argue to the trial court she was entitled to share in future profits of the businesses. We need not address this argument. See *Nielander*, 275 Kan. at 268. We will, therefore, focus only on the trial judge's determination that J-Hawk and 2 Brothers had no positive value and were not subject to division.

"Ultimately, my bottom line is that although I believe that this business has considerable earning potential, it is simply too difficult to say whether this company--or these companies have a current positive value that the Court could reasonably define, and therefore, accurately divide as a marital asset."

#### *Value of J-Hawk*

Larry, his brother, and his father, each own equal shares of J-Hawk. Prior to the

divorce case, Larry and his brother agreed to buy father's share for \$89,000 over a 54-month period by paying father \$1,700 per month.

Heather claims J-Hawk has significant value. But J-Hawk's 2004 liabilities totaled approximately \$276,000 and its assets totaled only \$156,000. Heather did not call any business valuation expert, accountant, or any other witness to support her claim that J-Hawk had a current positive value. Heather's valuation is purely speculative.

The trial court did not abuse its discretion in finding J-Hawk had a negative value at the end of 2004 and, therefore, not subject to division.

#### *Value of 2 Brothers*

Heather also claims the trial court should have considered Larry's share in 2 Brothers when dividing the marital property and debts. 2 Brothers is a corporation formed by Larry and his brother to purchase real estate containing 3 buildings. That real property is leased to J-Hawk which pays \$2,500 per month in rent.

2 Brothers purchased the property for \$350,000; a year later, the property was appraised at \$296,000. At the time of the divorce hearing, 2 Brothers owed some \$312,000 on the mortgage. As a result, the trial court found 2 Brothers was upside down

on the property.

Heather stipulated to the admissibility of Larry's offered appraisal and did not offer any appraisal of her own or call any witnesses to testify as to the value of 2 Brothers.

The trial court did not abuse its discretion in finding 2 Brothers did not have a positive value and was, therefore, not subject to division.

Finally, Heather alleges the trial court erred in dividing the remaining proceeds from the sale of the marital residence. Division of property and debt in a divorce must be just and reasonable. K.S.A. 60-1610(b)(1). But the trial court is not required to divide the property on an equal basis. *Sadecki*, 250 Kan. at 8. Heather's argument fails. The trial court properly determined the remaining proceeds from the sale of the marital residence were reasonably divided for the purposes of property division.

Heather has failed to establish the trial court's division of property was not just or reasonable.

**Affirmed.**