NOT DESIGNATED FOR PUBLICATION

No. 95,799

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

CHRISTINE M. POTERBIN,
Appellee,

and

JOHN F. POTERBIN,
Appellant.

Appeal from Leavenworth District Court; GUNNAR A. SUNDBY, judge.

Opinion filed January 12, 2007. Affirmed.

Robert Hadley Hall, of Leavenworth, for appellant.

Philip R. Glasser, of Overland Park, for appellee.

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

Per Curiam: John F. Poterbin appeals the district court's denial of his K.S.A. 60-260(b) motion for relief from a default divorce decree.

On May 15, 1997, Poterbin's wife filed a petition for divorce. Poterbin was personally served with process but failed to file a responsive pleading or appear for the final hearing. On July 17, 1997, the 60-day waiting period having expired and Poterbin now being in default, the court entered a decree of divorce, placed the two minor children with his wife, ordered Poterbin to pay child support, and divided the marital estate. The court set over to the wife as her separate property the marital home and accompanying 7.36 acres, the $40,318 debt on the home, the family automobile, the personal property in wife's possession, two life insurance policies, and the proceeds from the sale of real estate in Wyandotte County. She was assigned credit card debts of approximately $6,000. Poterbin received the personal property in his possession and his pickup truck. He was assigned his debt of approximately $1,600 to Osawatomie State Hospital. No appeal was taken from this judgment.

On April 29, 2005, almost 8 years after the divorce, Poterbin moved to set aside the 1997 default divorce decree pursuant to K.S.A. 60-260(b). He claimed he lacked capacity when the divorce petition was filed and the district court should have appointed a

guardian ad litem for him pursuant to K.S.A. 60-217. His motion was heard on August 11, 2005.

The testimony at the hearing consisted of a retrospective analysis of Poterbin's competency through the testimony of Dr. Gerald Vandenberg, who examined certain medical records relating to Poterbin and opined that Poterbin suffered from a serious mental illness and lacked the mental capacity to manage his affairs at the time of the divorce. Lay testimony regarding Poterbin's mental state before the divorce was also provided from Poterbin's father and sister. There was no evidence presented that Poterbin had been declared to be legally incapacitated at any time before or during the divorce proceedings.

The district court concluded that the issue of Poterbin's competency made the divorce decree voidable, rather than void as required for relief under K.S.A. 60-260(b)(4), and the facts did not warrant granting Poterbin relief from the operation of the decree under K.S.A. 60-260(b)(6). Poterbin appeals. He claims that the trial court's findings were inadequate and that the decision not to set aside the divorce decree was contrary to the evidence and an abuse of discretion.

Poterbin first claims the district court's findings following the hearing were inadequate since there was no finding as to whether Poterbin was or was not incapacitated when he was served with process in the divorce action. At the conclusion of the hearing and the court's ruling, counsel for Poterbin inquired:

> "[COUNSEL]: Is the Court making the finding that he did have capacity at the time he was served--is that what the Court's finding?
>
> "THE COURT: I didn't --
>
> "[COUNSEL]: Didn't make any finding on that.
>
> "THE COURT: I didn't make any."

When a party fails to object to the lack of a finding, the issue ordinarily will not be considered on appeal because the district court has not had an opportunity to make any necessary additional findings. *Gilkey v. State*, 31 Kan. App. 2d 77, 77-78, 60 P.3d 351, *rev. denied* 275 Kan. 963 (2003). Although there was no formal objection to the court's lack of a finding on the issue of capacity, counsel immediately brought the matter to the court's attention, so under the circumstances we will review the issue.

There is a presumption that the district court found all facts necessary to support its judgment. *Gilkey*, 31 Kan. App. 2d at 77-78. However, this rule applies in instances when the record is silent on a particular issue and the lack of findings does not preclude meaningful appellate review. See *State v. Moncla*, 269 Kan. 61, 65, 4 P.3d 618 (2000).

The record is not silent here. We are not confronted with a conclusion that must be predicated on a particular finding which we presume the court made in spite of there being no reference to it in the court's ruling. The court affirmatively stated that it was making no finding regarding Poterbin's capacity. Thus, under these circumstances the presumption does not apply.

This requires us to ask whether it makes any difference whether Poterbin was incapacitated during the pendency of the divorce action. The district court held, in essence, that it does not matter since Poterbin had never been adjudicated to be incompetent and, thus, the judgment was merely voidable and not void. If this is true, then the lack of a specific finding of incapacity is immaterial. Whether the district court was correct in this conclusion is a matter of law over which our review is unlimited. *Fidelity Bank v. King*, 281 Kan. 1278, 1281, 136 P.3d 465 (2006).

K.S.A. 60-260(b) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (4) the judgment is void . . . or (6) any other reason justifying relief from the operation of the judgment." A ruling on a 60-260(b) motion rests within the district court's discretion and will not be reversed unless an abuse of that discretion is shown. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997). However, the district court has no discretion when a judgment is attacked as being void under K.S.A. 60-260(b)(4). The judgment is either valid or not and, once resolved, the district court must act accordingly. 261 Kan. at 862.

Poterbin's argument challenges the district court's personal jurisdiction to issue the divorce decree. Personal jurisdiction over the defendant is acquired by issuance and service of process in the method prescribed by statute or defendant's voluntary appearance. *Carrington v. Unseld*, 22 Kan. App. 2d 815, 818-19, 923 P.2d 1052 (1996). The question of jurisdiction is one of law over which an appellate court has unlimited review. 22 Kan. App. 2d at 817.

The testimony at the hearing on Poterbin's motion established that he suffered from a mental disorder, but there was never a final court adjudication that he was a mentally ill person or a disabled person at the time of the divorce proceedings. As we learn from *Hodges v. Phoenix Mutual Life Ins. Co.*, 171 Kan. 364, 233 P.2d 501 (1951), the fact that

Poterbin was later declared a disabled person for whom a guardian was appointed is of no consequence.

In *Hodges*, a default judgment was granted against Jackson Hurd who was later adjudicated an incompetent and guardians were appointed for him. G.S. 1949, 60-408 provided that service may be made upon an incompetent person by a summons personally served or publication notice, and if a guardian had been appointed, the guardian was to be served in the same manner. (Our current statute, K.S.A. 60-304[c], differs only in the addition in the current statute of the alternative of service on "a competent adult member of such person's family with whom the person resides."). Hurd's guardians argued the judgment should be set aside because Hurd was incompetent before the suit was filed; thus, the judgment was void because no guardian was appointed or served. This is essentially the same argument advanced by Poterbin.

The *Hodges* court found that "'[a] judgment against a person who is later adjudged to be incompetent does not on that account become void, dormant or invalid, notwithstanding the finding of incompetency is that it had existed since a time prior to the rendition of the judgment.' [Citation omitted.]" 171 Kan. at 369. "'A judgment rendered against a person afterwards adjudged to be insane is not void unless there should be a statute so providing.'" 171 Kan. at 369. Because Hurd was personally served when he

had no guardian, the court held there was personal jurisdiction to enter the default judgment. See 171 Kan. at 370.

Hodges has not been overruled. Poterbin points out, and our research discloses, no expression from our Supreme Court indicating that *Hodges* is no longer good law. We are duty bound to follow Supreme Court precedent, absent an indication the court is departing from its previous position. *State v. Beck*, 32 Kan. App. 2d 784, 788, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004).

Since the judgment was voidable, rather than void, it was the duty of the district court to exercise proper discretion in determining whether the voidable judgment should be set aside. The district court reviewed the disposition of property in the divorce decree, the obligations that befell Poterbin's wife in maintaining the family during Poterbin's illness and since then, and the lack of an order for maintenance in the decree. Our examination of the record discloses no abuse of the court's discretion in deciding not to set aside the decree.

Finally, Poterbin claims that he was deprived of due process of law. This claim was not raised before the district court. Constitutional challenges are not properly before us for review if asserted for the first time on appeal. *U.S.D. No. 233 v. Kansas Ass'n of*

American Educators, 275 Kan. 313, 325, 64 P.3d 372 (2003). Poterbin argues no exception to this rule. Further, Poterbin's brief does not provide any argument, case law, or legal analysis to support a due process claim. Although he cites *Brice-Nash v. Brice-Nash*, 5 Kan. App. 2d 332, 615 P.2d 836, *rev. denied* 228 Kan. 806 (1980), *cert. denied* 452 U.S. 939 (1981), there was no due process issue raised in that case. Thus, the issue has been abandoned. See *In re Marriage of Cohee*, 26 Kan. App. 2d 756, 759, 994 P.2d 663 (1999).

Affirmed.