

MANDATE

COURT OF APPEALS,

Appellate Court No. 05-94745-A

ss.

STATE OF KANSAS,

District Court No. 03CV8377

The State of Kansas, to the District Court within and for the County of JOHNSON
in the State of Kansas, Greeting:

WHEREAS, In a certain civil action lately pending before you, wherein IN THE
MATTER OF THE MARRIAGE OF PATRICK J. SCHERZER, petitioner, and, GIOVANNA A.
SCHERZER, respondent, a judgment was rendered by you against the said petitioner from which
judgment said petitioner prosecuted an appeal in the Court of Appeals within and for the State of
Kansas;

AND WHEREAS, on February 2, 2007, on consideration of the said
appeal, it was ordered and adjudged by the said Court of Appeals that the judgment of the District
Court be affirmed in part, reversed in part, and remanded. An attested true copy of opinion attached.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to
be had of the said judgment of the Court of Appeals, according to law.

Costs

Fees of Clerk of the Appellate Courts	\$	130.00
Other Costs	\$	
Total	\$	

WITNESS my hand and the seal of said Court of Appeals affixed

hereto, at my office, in the City of Topeka, on MAY - 9 2007

Carol G. Green

CAROL G. GREEN, Clerk of the Appellate Courts

MANDATE RECEIVED BY CLERK

TRIAL JUDGE NOTIFIED

Date: _____

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS.

2007 MAY 14 AM 9:43

05-94745-A-03CV8377

NOT DESIGNATED FOR PUBLICATION

No. 94,745

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

PATRICK J. SCHERZER,
Appellant/Cross-appellee,

and

GIOVANNA A. SCHERZER,
Appellee/Cross-appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS M. SUTHERLAND, judge.

Opinion filed February 2, 2007. Affirmed in part, reversed in part, and remanded.

H. Reed Walker, of Law Offices of H. Reed Walker, P.A., of Mission, for
appellant/cross-appellee.

Allan E. Coon and *Gregory D. Kincaid*, of Norton, Hubbard, Ruzicka & Kreamer
L.C., of Olathe, for appellee/cross-appellant.

Before MARQUARDT, P.J., ELLIOTT, J., and KNUDSON, S.J.

Per Curiam: This is a property division dispute in a divorce action. Patrick Scherzer appeals the trial court's award of maintenance for Giovanna Scherzer and refusal to award certain offsets and credits to Patrick. Giovanna cross-appeals the trial court's award of offsets and credits to Patrick and the denial of her request for attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

Patrick and Giovanna were married on November 20, 2000; each had two children from prior marriages. The parties entered into a prenuptial agreement which Patrick had utilized in at least one of his three previous marriages. Paragraph 2 of the agreement provided that both waived their rights to maintenance except a lump sum payment for Giovanna based on the length of time between the date of marriage and the date when the parties "establish separate residences in connection with divorce, legal separation or other similar proceedings."

On November 14, 2003, Giovanna made a deposit on an apartment and several days later used a credit card to purchase furniture and household items for the apartment. On November 21, 2003, Giovanna moved from the marital residence to the apartment.

Patrick sued for divorce but never served Giovanna. Giovanna sued for divorce in May 2004, and the two cases were consolidated.

Patrick claimed Giovanna established a separate residence on November 14, 2003, and was, therefore, only owed a 2-year lump sum payment of \$40,000 under their agreement.

The trial court found that Giovanna was entitled to a lump sum award of \$60,000 for 3 years of marriage and allowed offsets to Patrick for charges Giovanna made for furniture for her apartment and for moving expenses. With regard to charges Giovanna made after November 21, 2003, the trial court allowed Patrick certain offsets if they were for the sole benefit of Giovanna or her children and allowed a \$10,000 credit for the payment Patrick made as advance division of property. The trial court also ruled that all charges made by Giovanna after the date she filed her divorce petition were her responsibility. The trial court divided furniture and vehicles as jointly titled property and denied Giovanna's request for attorney fees.

Patrick has appealed, and Giovanna has cross-appealed.

The standard of review for interpretation of a prenuptial agreement is as stated in *Ranney v. Ranney*, 219 Kan. 428, Syl. ¶ 1, 548 P.2d 734 (1976):

"[C]ontracts, made either before or after marriage, the purpose of which is

to fix property rights between a husband and wife, are to be liberally interpreted to carry out the intentions of the makers, and to uphold such contracts where they are fairly and understandingly made, are just and equitable in their provisions and are not obtained by fraud or overreaching."

The trial court is vested with broad discretion in adjusting property rights in a divorce, and that discretion will not be disturbed on appeal absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

Patrick first argues Giovanna was entitled to a lump sum payment for only 2 years because she made a deposit for an apartment and purchased some furniture before their third anniversary. But Patrick does not dispute Giovanna physically moved out of the marital residence after their third anniversary.

Paragraph 2 of the prenuptial agreement was unambiguous, and the trial court did not err in holding Giovanna established her new residence after the third anniversary, entitling her to a lump sum payment of \$60,000.

Patrick also claims the trial court abused its discretion in dividing the financial liabilities between Giovanna and him.

This issue deals with ¶ 11 of the agreement which provides:

"Satisfaction of Separate Debts and Liabilities. All debts and liabilities incurred by either of the parties prior to or after the date of the parties' marriage shall be paid by the party who incurred same, and the property of the other party shall not be liable in any respect for the payment of same. Each party shall indemnify and hold the other harmless with respect to the payment and satisfaction of such debts and liabilities."

The trial court found the provision to be ambiguous and, thus, examined the evidence to determine the intent of the parties. Neither party disputes this holding. The trial court stated that if literally interpreted, the provision would make Giovanna responsible for the purchase of clothes for Patrick's children even when Patrick instructed her to use a credit card. The trial court concluded this would be an absurd result.

The trial court ruled the intent of the parties was that any debts incurred by either party consistent with the usual and routine charges during the marriage would not be subject to the contract provision. And even before the separation, if the debts were incurred secretly for the sole benefit of that party and for purposes contrary to maintaining the marital relationship, then they would be the sole responsibility of the party incurring the debt.

After the separation, debts incurred for the sole benefit of the party or that party's children would be the sole responsibility of that party except where the debt was authorized or approved by the other party. The agreement did not make any distinction for expenses incurred before or after the separation. The trial court focused on the purpose of the charges in determining who should be responsible for the debts.

Patrick complains the trial court erred in failing to hold Giovanna solely responsible for some of the credit card charges. The trial court found these charges to be Patrick's liability because they were incurred as usual and routine charges during the marriage or with Patrick's specific or implied authorization or approval.

Given the trial court's determination of the parties' intentions, the court did not abuse its discretion with respect to these credit card debts.

Patrick also requested several debt items be paid by Giovanna in full or half of the balance. One of these items involved car payments on Giovanna's Volkswagen. There was a dispute as to whether the car had been a Christmas gift for Giovanna from Patrick.

The trial court ordered the parties to sell all the vehicles they owned at the highest possible price. After all the cars had been sold and the balance on the Volkswagen had

been paid, the parties would then divide the net proceeds.

Patrick was the sole financial provider in the marriage, and Giovanna was to take care of the family and home. The trial court's ruling that Patrick was responsible for the car payment until the time of the divorce was not an abuse of discretion.

With respect to the other debts involved in this subissue, Patrick argues Giovanna should be jointly and equally liable because they were incurred for the benefit of both parties in order to maintain their lifestyle during the marriage.

Considering the financial imbalance between the parties and the arrangement under which they operated during the marriage, the trial court's decision to make Patrick responsible for these items was not an abuse of discretion.

As part of her cross-appeal, Giovanna claims Patrick should not have been allowed to offset certain expenses against his lump sum obligation. With respect to some of the charges, the trial court ruled that all debts and charges made by Giovanna after she filed for divorce would be her own responsibility. With respect to the balance of the challenged items, the trial court considered disputed testimony of Patrick and Giovanna, circumstances under which charges were made, and the nature of the charges. A different

judge might have reached different results, but there is no showing of an abuse of discretion by the trial judge in this case. See *In re Marriage of Cray*, 254 Kan. 376, 386, 867 P.2d 291 (1994).

Giovanna also claims in her cross-appeal the trial court erred in refusing to award her attorney fees pursuant to the agreement and pursuant to K.S.A. 60-1610. Under the statute, a trial court is vested with discretion to determine the amount and recipient of attorney fees. *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 534-35, 920 P.2d 450 (1996).

Under ¶ 2 of the agreement, the parties expressly waived all claims for attorney fees except as specifically provided later in the paragraph. After explaining the lump sum payment formula, the paragraph stated:

"Nothing in this agreement is intended and therefore shall not be construed as precluding an award of reasonable attorneys' fees, court costs or suit expenses in Giovanna's favor if Patrick should refuse to honor this agreement and should Giovanna then have to resort to legal recourse to compel enforcement of this agreement."

The trial court ruled that under K.S.A. 60-1610(b)(4), it would be justified in

awarding attorney fees to Giovanna due to the extreme disparity in the financial condition of the parties *but for* the prenuptial agreement.

But under the language of the agreement, the trial court found the appropriate inquiry was whether Patrick had asserted good faith defenses to Giovanna's claim under the agreement. The trial court answered its question in the affirmative and ruled Giovanna was not entitled to attorney fees under the agreement.

The plain language of the agreement allowed Giovanna an award of attorney fees, court costs, and suit expenses "if Patrick should refuse to honor this agreement and should Giovanna then have to resort to legal recourse to compel enforcement of this agreement."

Patrick refused to pay a 3-year lump sum amount, and Giovanna had to resort to legal recourse to compel enforcement of the agreement. The agreement says nothing about letting Patrick off the hook if he has some good faith defense to Giovanna's claim.

Further, there was evidence of telephone messages left by Patrick for Giovanna, indicating he intended to make her spend a lot of money for legal fees in order to proceed in court against him. Attorney fees are awarded to a party to enable that person to assert marital rights that might not otherwise be protected, and the courts allow the necessities

of one party to be weighed against the financial ability of the other in awarding attorney fees. See *Dunn v. Dunn*, 3 Kan. App. 2d 347, 350, 595 P.2d 349 (1979).

In the present case, the trial court denied Giovanna's request for fees simply because of what it read into the agreement. This was an abuse of discretion under the peculiar facts and circumstances of this case.

The appeal is affirmed; the cross-appeal is affirmed in part, reversed in part, and remanded for a determination of reasonable attorney fees, court costs, and suit expenses as called for in the prenuptial agreement.

A true copy ATTEST
Carol J. Green

Clerk Supreme Court