

NOT DESIGNATED FOR PUBLICATION

No. 96,342

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LORETTA CAROL BEAL,
Appellee,

and

STEPHEN A. BEAL,
Appellant.

MEMORANDUM OPINION

Appeal from Harper District Court; LARRY T. SOLOMON, judge. Opinion filed February 23, 2007. Dismissed in part and affirmed in part.

Alan C. Goertng, of Goering and Slinkard, of Medicine Lodge, for appellant.

H. Douglas Pfalzgraf, of Pfalzgraf Law Offices, of Wellington, for appellee.

Before GREEN, P.J., MARQUARDT, J., and BRAZIL, S.J.

Per Curiam: Stephen A. Beal appeals the trial court's modification of his divorce settlement agreement. We affirm in part and dismiss in part.

Loretta Beal and Stephen were married in June 1998. This represented the second time these two married each other. Loretta filed for divorce in October 2003 on the grounds of incompatibility. Stephen refused to sign a property settlement agreement until all references to street addresses were omitted, explaining that many of the properties had inconsistent or incorrect addresses, and the legal descriptions would be "easier to understand."

The settlement agreement was approved by the parties and filed in December 2003, and it indicated Loretta was to receive, "LOT TEN (10), AND THE WEST HALF (W/2) OF LOT ELEVEN (11), IN BLOCK TWO (2) OF MARTINS SECOND ADDITION TO THE CITY OF HARPER, HARPER COUNTY, KANSAS" and "LOT THREE (3), BLOCK THREE (3), OF WOODLAND'S ADDITION TO THE CITY OF HARPER, HARPER COUNTY, KANSAS." Desert Springs, Inc., was a sole proprietorship run by Stephen, in which he received four parcels of real property under the settlement agreement.

Loretta believed that she was receiving the residence located on Van Buren Street valued at \$72,000. Loretta lived in the residence on Van Buren Street before, during, and

after the divorce. After the divorce, Loretta installed a wood stove and remodeled the kitchen, estimating that she spent \$4,500 on improvements.

Attached to the settlement agreement was a "recapitulation" which showed that Loretta was to receive real property valued at \$92,000, while Stephen was to receive all of Desert Springs, Inc.'s holdings, valued at \$215,000. The trial court incorporated the settlement agreement in the divorce decree, which was filed in January 2004.

In August 2005, Loretta filed a motion for an order nunc pro tunc of the divorce decree, claiming that the settlement agreement had an erroneous legal description for the real property that was awarded to her. Loretta claimed that Stephen acknowledged the error but refused to agree to a modification. Loretta asked the trial court to modify the settlement agreement so that it included the correct description of the real property awarded to her.

In December 2005, before the trial court ruled on Loretta's motion, Loretta filed a motion pursuant to K.S.A. 60-260. In the motion, Loretta incorporated the claims from her nunc pro tunc motion and alleged that the mistakes in the legal description were clerical in nature. Loretta again asked the trial court to correct the real property legal descriptions.

At a hearing on the motions, Stephen testified that he purchased the Van Buren Street

property using personal funds and funds from Desert Springs, Inc. Stephen testified that he wanted the house because he paid for it prior to the marriage. It was Stephen's assertion that the legal descriptions in the settlement agreement were correct and that he was supposed to receive the Van Buren Street property. He claimed that there was no mistake in the agreement.

After hearing testimony and arguments from the parties, the trial court ruled in favor of Loretta, noting that without the value of the Van Buren property for Loretta, the property settlement division would have been heavily weighted in favor of Stephen. The trial court also found that Stephen's postdivorce actions in regard to the property were "inconsistent" and made "no sense," and determined that Stephen was not able to provide logical or credible explanations for his actions. The trial court found Loretta's claims to be meritorious and granted relief pursuant to K.S.A. 60-260(b)(6). Stephen timely appeals.

Stephen argues that a nunc pro tunc order is not an appropriate remedy when the trial court is exercising judicial discretion and not merely correcting a clerical error. The trial court agreed with Stephen, explicitly finding in its memorandum order that an order nunc pro tunc was not appropriate, given Loretta's claims regarding the trial court's approval of an erroneous document at the initial property settlement conference. Since the trial court agreed with Stephen, this issue is not appealable and it is dismissed.

Next, Stephen argues that the settlement agreement was not ambiguous at the time it was signed by the parties. Since there was no finding to the contrary by the trial court, this is not an appealable issue, and it is dismissed.

Stephen next contends that any mistake made in the legal descriptions of the properties was unilateral on Loretta's part, and he was awarded exactly what the parties intended. Stephen argues that in the absence of fraud, a unilateral mistake will not "excuse the non-performance of a contract."

Stephen claims that both parties agreed he was to receive the Van Buren Street real property. However, Loretta testified at the hearing that the parties agreed she was to receive that property. The trial court found that Stephen's actions were "inconsistent" with his stated position, his "knowledge, motives, and intentions" were suspect, and his claim was not credible.

This court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003). The trial court's finding that Stephen's claim was not credible means we cannot evaluate this as a unilateral mistake of fact. Instead, we defer to the trial court's findings of fact relating to witness credibility.

Stephen claims the trial court erred by relying on K.S.A. 60-260(a), or K.S.A. 60-260(b)(1)(2) or (3). However, the trial court very clearly relied only on K.S.A. 60-260(b)(6). Therefore, any complaint about reference to another section of the statute is without merit and is dismissed.

Next, Stephen believes that the trial court ignored the fact that he bought and paid for the property, and he claims that Loretta would receive a "windfall" if she is allowed to keep the property. Stephen also contends that the trial court's decision to substitute K.S.A. 60-260(b)(6) for another section of the statute was erroneous.

K.S.A. 60-260 allows the trial court to relieve a party from a final judgment or order for any number of reasons. K.S.A. 60-260(b)(6) allows the remedy for "any other reason justifying relief from the operation of the judgment." Unlike another portion of the statute, relief under K.S.A. 60-260(b)(6) must be requested within a "reasonable time" instead of the strict 1-year time limit.

The granting of relief under K.S.A. 60-260(b) rests within the sound discretion of the trial court, and on appeal this court's scope of review is limited to determining whether the trial court's decision constituted an abuse of discretion. *Ellis v. Whittaker*, 10 Kan. App. 2d 676, 677, 709 P.2d 991 (1985).

The language of K.S.A. 60-260(b)(6) authorizing relief for "any other reason justifying relief from the operation of the judgment," gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice. *In re Marriage of Thomas*, 16 Kan. App. 2d 518, 525, 825 P.2d 1163, *rev. denied* 250 Kan. 805 (1992). K.S.A. 60-260(b)(6) may also be used in situations where K.S.A. 60-260(b)(1) would apply. 16 Kan. App. 2d at 524. However, the general catch-all of K.S.A. 60-260(b)(6) may not be used to escape the time limits for vacating a judgment which are imposed under the first three subsections of K.S.A. 60-260(b). *Wilson v. Wilson*, 16 Kan. App. 2d 651, 656, 827 P.2d 788, *rev. denied* 250 Kan. 808 (1992).

The trial court expressly ruled out fraud on Stephen's part, which would eliminate the application of K.S.A. 60-260(b)(3). However, the trial court believed a number of circumstances justified the application of K.S.A. 60-260(b)(6). The trial court noted that Loretta did not discover the inaccurate property descriptions until 18 months after the divorce decree was filed. The trial court also believed the issues raised by Loretta went beyond mere clerical errors or mistakes, which would bar application of K.S.A. 60-260(b)(1). The trial court noted that it never would have approved the property settlement agreement had the facts been as Stephen alleged. Thus, it believed K.S.A. 60-260(b)(6) was the appropriate vehicle by which to grant relief to Loretta. The trial court did not abuse its discretion by granting Loretta relief under K.S.A. 60-260(b)(6).

Stephen's first, second, and fourth issues on appeal are dismissed; all other issues are affirmed.