

NOT DESIGNATED FOR PUBLICATION

No. 95,772

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CHERYL L. ZIMMERMAN,
Appellee,

and

BOBBY D. ZIMMERMAN,
Appellant.

MEMORANDUM OPINION

Appeal from Seward District Court; TOM R. SMITH, judge. Opinion filed
March 2, 2007. Affirmed.

J. Gregory Swanson, of Swanson Law Office, of Liberal, for appellant.

Wayne R. Tate, of Tate & Johnson, L.L.C., of Hugoton, for appellee.

Before GREEN, P.J., ELLIOTT and MALONE, JJ.

Per Curiam: Bobby D. Zimmerman appeals the district court's decision concerning property division, spousal maintenance, and attorney fees. Finding no abuse of discretion, we affirm.

On February 16, 2005, Cheryl L. Zimmerman filed for divorce from her husband, Bobby, after 27 years of marriage. After an evidentiary hearing, the district court filed a journal entry on October 27, 2005, in which it granted the divorce, divided the marital property, and ordered Bobby to pay spousal maintenance to Cheryl and attorney fees.

The district court divided the marital property by awarding Bobby the income-producing rental property he had inherited valued at \$21,650; personal property worth \$66,000; and \$18,500 as half of the cash on hand, for a total of \$106,150. The district court awarded Cheryl the marital home valued at \$50,000; personal property worth \$52,000; \$14,000 to equalize the personal property division; and half of the cash on hand in the amount of \$18,500, for a total of \$134,500. The district court split the Zimmermans' debt of \$8,249 to Southwest Medical Center between the parties. After considering Cheryl's needs and Bobby's ability to pay, the district court ordered Bobby to pay spousal maintenance in the amount of \$500 per month for 60 months. The district court also ordered Bobby to pay Cheryl's attorney fees in the amount of \$2,500.

Bobby timely appeals. Additional facts will be provided.

Property division

Bobby first claims the district court abused its discretion in dividing the property. Bobby contends the district court made a number of findings concerning the division of property which were not supported by the evidence. Bobby also argues the district court abused its discretion by dividing the marital property so that Cheryl received a disproportionate amount of the property Bobby had inherited during the marriage.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. [Citation omitted.]" *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998). It is not the function of the appellate court to reweigh the evidence and the credibility of witnesses. *In re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005).

K.S.A. 60-1610(b)(1) governs property division in a divorce action and requires the district court to consider several relevant factors in dividing the marital property:

"In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties;

their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property."

In a divorce proceeding, the district court is required to divide property equitably, but not equally.

"Kansas, as an equitable division state rather than a community property state, does not require an equal split of all property acquired during the marriage. Rather, Kansas law 'gives the court discretion to consider all of the property, regardless of when acquired, to arrive at a just and reasonable division.' [Citation omitted.]" *Rodriguez*, 266 Kan. at 352-53.

Furthermore, a district court is not obligated to award to each party all property owned by such party prior to the marriage, or property inherited or received by gift during the marriage. *McCain v. McCain*, 219 Kan. 780, Syl. ¶ 3, 549 P.2d 896 (1976).

Bobby contends the district court erred by considering a protection from abuse order as a factor in dividing the marital property. He argues the district court's reference to the protection from abuse proceeding demonstrated the district court's prejudiced attitude against him.

The contested passage from the journal entry is as follows:

"The parties separated on February 2nd of 2005 after [Bobby] had filed a protection from abuse proceeding in Seward County Case No. 05-DM-26, claiming that [Cheryl] had assaulted him approximately two (2) weeks before he filed the protection from abuse action. At the time of filing of the action, [Bobby] obtained an order removing [Cheryl] from the home forcing her to live with her parents.

"This matter was filed on February 16, 2005. On the 1st day of March, 2005, at a hearing before this Court [Cheryl's] Motion for Interlocutory Orders, the Court returned the Petitioner to the marital residence and ordered the Respondent to pay \$1,100.00 per month as temporary spousal maintenance during the pendency of this action."

Contrary to Bobby's assertion, the district court did not mention the protection from abuse proceeding in a manner that placed Bobby in a negative light. Rather, the district court mentioned the proceeding to explain who had possession of the marital residence and to provide relevant procedural and preliminary factual information. There is no evidence that the district court considered the protection from abuse proceeding as a factor in dividing the marital property.

Bobby also objects to the district court's finding that Cheryl "has never been steadily employed during the marriage and appears unemployable to this Court." The district court further stated that Cheryl "is easily confused and is found by this Court to be

both mentally and physically challenged." Bobby claims these findings were not supported by the evidence.

However, Bobby's contention ignores the relevant evidence produced at trial. Cheryl testified that she was 51 years old and had a high school education. During the 27-year marriage, she had worked outside the home for a total of 4 years, 2 years in an ice cream shop and 2 years doing housekeeping work. Cheryl earned minimum wage at both jobs, and she had not worked outside the home since 1997.

Cheryl also testified that she had terminated her last job due to back pain, which supported the district court's finding that Cheryl had physical challenges that limited her ability to work. In addition, Cheryl testified that she relied heavily on her mother "to help [her] with things" she cannot figure out, including preparation of a list of all of her property. These facts, in conjunction with the district court's observations of Cheryl's level of comprehension at trial, supported the district court's factual findings.

Bobby's biggest complaint concerns how the district court divided property inherited by Bobby during the marriage. Property inherited by one spouse during the marriage becomes divisible marital property at the commencement of a divorce action. K.S.A. 2006 Supp. 23-201(b). Therefore, the district court was obligated to consider Bobby's inherited property in determining an equitable division of the assets.

Bobby argues the district court's finding that "there is no evidence that there was ever any agreement to keep his [inherited] money as separate property" was erroneous. However, neither party produced any evidence at trial of either a written or oral agreement that Bobby was to keep his inheritance separate from the money used for the family. In fact, the opposite seems to be the case. Bobby testified that "[b]asically everything that we have . . . bought . . . has been bought with my inheritance money." Cheryl similarly testified that the two had lived almost exclusively off the inherited money for the last couple of years. Thus, the evidence presented at trial supported the district court's finding that there was no agreement to keep Bobby's inherited money separate.

Bobby objects to the district court's decision to award him only \$6,275 of the \$51,000 cash on hand. However, Bobby's argument is misleading and ignores the totality of the property division. Of the \$51,000 cash on hand, the district court awarded \$14,000 to Cheryl to equalize the personal property division, leaving a balance of \$37,000. The \$37,000 was then split equally between the parties, with Bobby receiving \$18,500 representing his half. From this amount, however, Bobby was required to pay \$5,600 in past spousal maintenance, \$4,125 for one-half of the medical debt, and \$2,500 for Cheryl's attorney fees, leaving a balance of \$6,275. Thus, although only \$6,275 remained in Bobby's pocket, the district court's division of the cash on hand was far more equitable than Bobby claims.

The district court properly considered the statutory factors in arriving at its property division. It is not the function of the appellate court to reweigh the evidence and credibility of witnesses. *Kuzanek*, 279 Kan. at 160. The property division calculated by the district court is just and equitable. We conclude the district court did not abuse its discretion in the property division order.

Spousal maintenance

Next, Bobby claims the district court erred in ordering spousal maintenance. The district court ordered Bobby to pay maintenance in the amount of \$500 per month for 60 months.

"The trial court has wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion. [Citations omitted.]" *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003). However, the district court is required to comply with the statutes authorizing payment of support and maintenance, and its failure to do so is reversible error. *In re Marriage of Cline*, 17 Kan. App. 2d 230, 234, 840 P.2d 1198 (1992).

K.S.A. 60-1610(b)(2) permits the district court to award spousal maintenance of future support "in an amount the court finds to be fair, just and equitable under all of the circumstances." In determining the amount of maintenance awarded to Cheryl, the

district court stated that it considered "the division of assets made by this Court; the needs of the Petitioner which are extreme, and the ability of the Respondent to pay, which is average and further, this Court has considered the length of this marriage."

As previously stated, Cheryl is 51 years old, has a high school education, has only worked outside the home for 4 years during the 27-year marriage, has not held a steady job in more than 8 years, has never earned more than minimum wage, and does not appear to have any experience handling money. Cheryl presented a reasonable estimate of her living expenses in the amount of \$1,090 per month. Bobby, on the other hand, has vocational training, a long-term history of steady employment, and income-producing inherited property.

Once again, it is not the function of the appellate court to reweigh the evidence and credibility of witnesses. *Kuzanek*, 279 Kan. at 160. The district court's findings concerning maintenance were supported by the evidence, and this court will not second guess the district court's credibility assessments. We conclude the district court did not abuse its discretion in ordering Bobby to pay maintenance in the amount of \$500 per month for 60 months.

Attorney fees

Finally, Bobby argues the district court erred by ordering him to pay \$2,500 to Cheryl for attorney fees. The district court is vested with wide discretion to determine both the amount and the recipient of an allowance of attorney fees. See *Baker v. Baker*, 217 Kan. 319, 321, 537 P.2d 171 (1975). "Where the exercise of discretion is arbitrary and not judicial, and the judgment is inequitable, it will be set aside." *St. Clair v. St. Clair*, 211 Kan. 468, 499, 507 P.2d 206 (1973).

K.S.A. 60-1610(b)(4) provides that "[c]osts and attorney fees may be awarded to either party as justice and equity require." Here, Cheryl requested attorney fees in the amount of \$4,000. The district court considered the financial status of both parties and the fact that Bobby had paid his attorney \$2,500. Because the district court is vested with wide discretion to determine the appropriate amount of attorney fees, and the district court seems to have based the amount granted on comparable legal services provided to Bobby, we conclude the district court did not abuse its discretion in awarding \$2,500 in attorney fees to Cheryl.

Affirmed.