

## NOT DESIGNATED FOR PUBLICATION

No. 95,907

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LILY LEVINS,  
*Appellee,*

and

DAVID LEVINS,  
*Appellant.*

## MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed April 13, 2007. Affirmed.

*David Levins*, appellant pro se.

*Ronald W. Nelson and Joseph W. Booth*, of Nelson & Booth, of Shawnee Mission, for appellee.

Before GREENE, P.J., CAPLINGER, J., and BRAZIL, S.J.

*Per Curiam:* David Levins appeals pro se the district court's order distributing property, establishing child support and health care costs, and granting attorney fees to Lily Levins in her divorce from him. David does not dispute the parenting time arrangements. Because David has not compiled a sufficient record for review and cannot factually or legally show that the district court erred, we affirm.

David and Lily were married on January 7, 1989, in Oceanside, New York. David and Lily have two children, April, born July 28, 1991, and Max, born April 10, 1996. David and Lily lived in Kansas for 5 years before Lily filed for divorce on April 4, 2005, claiming that they were no longer compatible.

They attempted to divide their property, establish custody, and determine child support. However, they were unable to finalize the details of their divorce and took the matter to court.

After a brief trial, the district court granted the divorce. The court approved David and Lily's division of their individual checking accounts and the sale of their marital home, with some adjustments for Lily's investment of premarital monies to purchase the home. Additionally, the court divided their cars and ordered that each would retain their individual retirement accounts except that Lily would transfer approximately \$40,000

held in a T. Rowe Price IRA to David as an equalization. Neither David nor Lily asked for or received spousal support. The court granted both David's and Lily's joint legal custody of the children and designated Lily as the primary residential parent.

The court found that Lily's annual income was \$25,000 and that David's annual income was \$50,000. The court also found that Lily paid \$65 per month for the children's health insurance and incurred a 12-month average of \$125 for summer care for Max. The court applied these facts to the child support guidelines (guidelines) and ordered David to pay \$967 per month in child support payments which represented a 67% proportionate share of the children's total support. The court also ordered David to pay 67% of the children's uninsured health care costs. Finally, the court awarded Lily \$4,000 in attorney fees to help her cover the approximately \$7,000 in fees she incurred prosecuting the divorce. David timely appeals.

Lily timely filed for attorney fees on appeal. David has not filed a response. Additional facts will be added as necessary.

#### *Division of marital property*

David claims that the district court erred by not considering his "proposal that our

joint marital assets be divided 50-50." David argues that a property division of 80-20 proposed by Lily and adopted by the court violated K.S.A. 60-1610(b). David does not cite any case law to support his arguments and does not cite to the record to establish his claim that the court divided the estate 80-20.

The district court has "broad discretion in adjusting the property rights of parties involved in divorce actions and [its] exercise of 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). A district court abuses its discretion when no reasonable person would take the view of the district court. See *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Martis*, 277 Kan. 267, 280, 83 P.3d 1216 (2004).

The district court is required to divide the joint marital property in a just and reasonable manner. K.S.A. 60-1610(b)(1). However, "just and reasonable" does not require an equal split and there is not a presumption in Kansas that joint marital property should be divided equally. See *In re Marriage of Brane*, 21 Kan. App. 2d 778, 783, 908 P.2d 625 (1995). The district court is required to consider several factors when dividing marital property:

"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." K.S.A. 60-1610(b)(1).

Here, it appears that the court considered some of the factors on the record, even though it did not specifically cite each factor in the divorce decree. The court noted that David and Lily had been married for 15 years, that Lily brought assets into the marriage, and that Lily and David generally allowed Lily's premarital assets to appreciate. It appears that the court considered the tax consequences of distributing the retirement accounts to avoid either party paying an early penalty. However, the court did not cite David's and Lily's future earning capacities as a factor.

David claims that the court divided the total marital estate 80-20. David cites to petitioner's Exhibit 1 for support of this claim, but the exhibit has not been included in the record on appeal. Moreover, David has not provided any record cites to establish the total amount of the estate, particularly the checking accounts and retirement account balances and the value of their cars. This problem is further complicated by the fact that David and

Lily partially divided their estate during the divorce which the district court implicitly approved in its order.

Additionally, David attempts to show bias by claiming that Lily provided inaccurate earnings information to the court. However, this court does not reweigh evidence or make credibility determinations. *In re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005). Because David has not provided a sufficient record for review nor has he provided record citations to support his claim, he cannot show that the court abused its discretion. Therefore, his claim fails.

#### *Child support*

David argues that the district court erred by using his current salary on the date of trial rather than his 2005 actual earnings to determine the appropriate monthly child support payments and his proportionate share of the children's health care costs. David requests the court order David and Lily to pay the children's health care costs equally.

The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the guidelines is subject to unlimited review. *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).

"Use of the guidelines is mandatory and failure to follow the guidelines is reversible error. [Citations omitted.]" *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998). A child support obligation calculated based on the guidelines is presumed to be reasonable; the party alleging that the support amount is unjust or inappropriate bears the burden of establishing that an adjustment should apply. Kansas Child Support Guidelines, section I (2006 Kan. Ct. R. Annot. 105).

Here, David is challenging the facts underlying the calculation, not the actual calculation itself. David believes it was inappropriate for the court to use the parties' income on the date of trial rather than their previous year's income for calculating the award. Where a party challenges the underlying facts of a district court's decision, the question on appeal is whether there is substantial competent evidence to support the district court's factual finding. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. See *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003).

Here, the district court found that Lily makes \$25,000 annually and that David's annual base salary is \$50,000 based on Lily's and David's testimony. Thus, there is substantial competent evidence to support the district court's factual findings.

The guidelines do not mandate what evidence or what time period the court should use to determine the parties' income. However, the guidelines require the court to include "income from all sources, including that which is regularly or periodically received, excluding public assistance and child support received." Kansas Child Support Guidelines, Section II, D (2006 Kan. Ct. R. Annot. 106). Because the guidelines do not provide a specific date on which income should be calculated for purposes of child support, it is not unreasonable for a court to calculate future payments based on current income. Moreover, the guidelines provide a presumptively reasonable child support amount. David has not cited any case law or statutes to support his argument that the district court abused its discretion in determining their respective income, nor has he presented any evidence or arguments that an adjustment should apply. Furthermore, the court used his base salary and did not consider the possibility of additional bonuses in determining David's salary. Therefore, David has not overcome his burden and the district court did not abuse its discretion.

*Attorney fees*

David complains that the district court erred by ordering him "to pay the man my x-wife [*sic*] employed to take away my children. This man did not re-present [*sic*] my views. In fact, he did everything in his power to get a very unfair and inequitable



settlement." David does not challenge the reasonableness of the fees.

When reviewing whether a district court erred in awarding attorney fees, the appellate court must conduct a two-step analysis. First, attorney fees must be granted under statutory authority or by the parties' agreement. The district court does not have the power to grant attorney fees based on equity alone. The issue of whether the district court had authority to impose fees under a particular statute is a question of law that appellate courts review *de novo*. See *Rensenhouse v. Bauer*, 33 Kan. App. 2d 148, 150, 98 P.3d 668 (2004).

K.S.A. 60-1610(b)(4) authorizes the district court to award fees in divorce cases "to either party as justice and equity require." Therefore, the district court had the statutory authority to award fees.

After determining the court has authority to impose fees, the next question is whether the court abused its discretion in imposing fees.

"The district court is vested with wide discretion to determine the amount and the recipient of an allowance of attorney fees. When reviewing an award of attorney fees, the appellate court does not reweigh the testimony or evidence presented or reassess the credibility of witnesses. [Citation

omitted.] An attorney fee award will not be set aside on appeal when supported by substantial competent evidence. [Citation omitted.]" *In re Marriage of Burton*, 29 Kan. App. 2d 449, 454, 28 P.3d 427, *rev. denied* 272 Kan. 1418 (2001).

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).

Lily testified that she incurred approximately \$7,000 in attorney fees due to David's failure to resolve the divorce through "We the People" and by dragging out the process after she hired an attorney. Lily's opinion was that the divorce probably would have been finalized earlier if David had hired an attorney. The court awarded her \$4,000 without specifying why it was awarding fees. However, the record shows that there was a significant disparity between their respective incomes. Although David claims that the award was arbitrary because Lily was awarded 80% of their marital estate and, therefore, had sufficient financial resources to pay her legal fees, there is no evidence in the record to support this calculation.

The record on appeal frustrates appellate review. It is not clear how the court

calculated the fee award and there is evidence in the record that David prolonged litigation, which caused Lily to incur approximately \$7,000 in fees. Because David has not cited facts in the record to support his claim, he cannot meet his burden establishing that the court's award was such that no reasonable person would take the view of the district court. Therefore, the district court did not abuse its discretion.

*Appellate attorney fees*

Lily filed a motion with this court seeking attorney fees based on David's failure to raise any valid legal argument on appeal, properly cite the record for the basis of his appeal, or cite relevant legal authority for his arguments.

"Rule 7.07(c) provides that an appellate court may award fees against the appellant, the appellant's counsel, or both if it 'finds that an appeal has been taken frivolously, or only for purposes of harassment or delay . . . .' (2006 Kan. Ct. R. Annot. 57). A frivolous appeal is an appeal that presents no justiciable question, is readily recognized as devoid of merit, or presents little prospect of success. *Peoples Nat'l Bank of Liberal v. Molz*, 239 Kan. 255, 257, 718 P.2d 306 (1986)."

While David, filing this appeal pro se, has not provided a sufficient record for review and, thus, failed to show how the court erred, allegations of abuse of discretion are

generally reviewable and not frivolous.

We deny the motion for attorney fees on appeal. Affirmed in part; appellate attorney fees are denied.