

NOT DESIGNATED FOR PUBLICATION

No. 97,529

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

NORMA JEAN WILHITE,
Appellee,

v.

WILLIAM ALAN GODFRED WILHITE, SR.,
Appellant.

MEMORANDUM OPINION

Appeal from Norton District Court; WILLIAM B. ELLIOTT, judge. Opinion filed August 24, 2007. Affirmed.

William Alan Godfred Wilhite, Sr., appellant pro se.

Daniel C. Walter, of Ryan, Walter & McClymont, Chtd., of Norton, for appellee.

Before HILL, P.J., GREEN and GREENE, JJ.

Per Curiam: William Alan Godfred Wilhite, Sr., appeals from a judgment of the trial court in this divorce action. On appeal, William argues that the trial court abused its discretion in dividing the property and obligations of the parties. Finding no abuse of discretion by the trial court, we affirm.

William and Norma Jean Wilhite were married on July 3, 1986. Norma filed a petition for divorce on April 7, 2006. When the petition was filed, the parties had one minor child who was residing with Norma. While the divorce was pending, that child attained the age of majority.

On August 14, 2006, the matter was tried before the trial court. Notice of the hearing was given to William, but he did not appear because he was in the custody of federal authorities on child pornography charges. When he was arrested, William was employed by Rural Telephone Service Company and was earning approximately \$26,000 per year. His total benefit package was in excess of \$40,000. Norma was employed at a manufacturing company.

Norma was the only witness to testify at trial. She identified the assets and liabilities of the parties, stated the values and amounts thereof, and proposed a division that she believed was fair, just, and equitable to both parties. Norma testified that during

their marriage, the parties purchased a house which was originally acquired with proceeds from the settlement for the wrongful death of William's sister. Nevertheless, the house was later mortgaged by the parties and, at the time of trial, the residence carried a mortgage debt of approximately \$19,000.

The parties also owned two cars: a 1998 Suzuki valued at \$3,000 and a 2001 Ford Focus valued at \$5,000. At one time, the parties owed approximately \$6,900 on the Ford Focus, which their son paid off with his trust funds. The Ford Focus was in the possession of the parties' son, and he used the car to drive to college classes.

During his employment with Rural Telephone Service Company, William had accumulated retirement benefits in the amount of \$1,800 and a 401K valued at \$2,500. William also owned a New England Life Insurance policy, which he valued at \$30,000. Nevertheless, Norma testified that there was no cash value in that policy. Norma had a New England Life Insurance policy with a face value of \$50,000 and a cash value of \$1,500. Norma had a second life insurance policy that was purchased by her parents when she was a child. That policy had a death benefit of approximately \$12,000 and a cash value of \$2,600. The parties also had savings bonds gifted to them by William's grandmother totaling \$500. The only items of personal property specifically addressed in Norma's trial testimony was a collection of Budweiser steins.

During their marriage, the parties incurred certain debts in addition to the mortgage. The parties had a \$10,000 liability to the Internal Revenue Service (IRS) for tax year 2002. Norma testified at trial that the parties' 2002 tax return was prepared by William and that he had manipulated and fabricated entries which went into the return resulting in a fraudulent \$10,000 refund. The parties also owed \$700 to the IRS for tax year 2005.

The parties also had a Wells Fargo credit card debt with a balance of approximately \$6,000 and a Citibank credit card with a balance of approximately \$2,500. The credit card debts were jointly incurred by the parties to pay for items for the family.

Both parties had student loans, which they consolidated. Norma's student loan was approximately \$20,000 and William's student loan was approximately \$70,000. The parties believed that it would be more economical to make one student loan payment instead of two. As a result, they combined their student loans so that they jointly owed approximately \$90,000.

After considering the evidence, the trial court awarded the following property to Norma: the marital residence, the 1998 Suzuki, the 2001 Ford Focus, William's Rural

Telephone retirement, William's 401K accounts, her New England life insurance policy, the life insurance policy purchased by her parents, her personal bank accounts, and her personal effects. Norma was also awarded the household goods in her possession, with the exception that the parties' Budweiser stein collection was to be divided by date of acquisition. William was awarded his New England life insurance policy, the savings bonds, the household goods in his possession, and his personal effects.

Regarding division of the debts, the trial court ordered Norma to pay the mortgage debt on the house, the indebtedness on the 2001 Ford Focus, and 2/9 of the student loan debt. William was ordered to pay the 2002 IRS debt, the Wells Fargo credit card, the Citibank credit card, 7/9 of the student loan debt, and the 2005 IRS debt. The trial court also ordered William to pay Norma \$212.40 per month for 96 months, but only if he was released from incarceration within 18 months of August 14, 2006. If he were not released by that time, he would not be required to pay any spousal maintenance.

On appeal, William argues that the trial court abused its discretion in dividing the property and obligations of the parties. The trial court has broad discretion in adjusting the property rights of the 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). Discretion is abused

only when no reasonable person would take the view adopted by the trial court. *Saucedo v. Winger*, 252 Kan. 718, 730-32, 850 P.2d 908 (1993).

Under K.S.A. 2006 Supp. 23-201(b), all property owned by the parties becomes jointly owned property and thus subject to division in a just and reasonable manner upon the filing of a petition for divorce. Kansas law does not require an equal split of joint property. Instead, the court has discretion to consider all the property and arrive at a just and reasonable division. In dividing property, the court must take into consideration the ages 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 the lack thereof, dissipation of assets, tax consequences, and such other factors as the court considers necessary to make a just and reasonable division. K.S.A. 60-1610(b)(1); *In re Marriage of Sommers*, 246 Kan. 652, 654-55, 792 P.2d 1005 (1990).

On appeal, William makes numerous complaints regarding the trial court's division of property and division of debts. William's arguments on virtually all of these points are based upon facts asserted by him in his brief but which are not contained in the record. "An appellant has the duty to designate a record sufficient to establish the claimed error.

Without an adequate record, the claim of alleged error fails.' [Citations omitted.]" *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Christmas Decorations

In his brief, William maintains that the parties' Christmas angel collection and the North Pole Series ceramic house collection should be evenly divided between the parties, in the same manner as the Budweiser steins were divided. Nevertheless, other than William's assertion in his brief regarding these items, there is no evidence in the record that these Christmas items even exist, let alone the value of these alleged items or the source and manner of acquisition. William could have presented evidence to the trial court regarding these items, but he chose not to do so. Issues not raised before the trial court cannot be raised on appeal. *Board of County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003). As a result, William's argument fails.

Number of Marriages and Children

William additionally complains that the trial court did not fully understand the facts presented in this case. First, William points out that the trial court incorrectly noted that this was a first marriage for the parties, when in fact this was Norma's second marriage and William's first marriage. William, however, does not state how this

misunderstanding by the trial court adversely affected the division of property and the division of debts.

William also notes that the trial court incorrectly stated that the parties had only one child when in fact they had two children. The oldest child was an adult at the time the divorce action was filed and therefore was not relevant to the proceedings. The younger child, who was a minor at the time the divorce petition was filed reached the age of majority by the time the divorce was granted. The decree of divorce correctly states that "[t]here are presently no minor children of this marriage." William fails to identify how this immaterial misunderstanding caused the trial court to adjust property rights in a less than fair and equitable manner.

The Parties' Marital Residence

William further argues that the trial court improperly valued the parties' marital residence. The trial court valued the property at \$11,609, and such valuation was based on the fair market value as determined by the Norton County appraiser. William argues that such valuation by the trial court was improper because the court failed to consider improvements the parties had made to the marital residence. William asserts that the trial court erred in failing to add, dollar for dollar, the amounts spent by the parties on those improvements.

William presented no competent and timely evidence of a conflicting value other than that identified by the Norton County appraiser and, therefore, is not entitled to complain at this late date. Nevertheless, even if this issue was properly before the court, the trial court's valuation of the marital residence was supported by substantial competent evidence given that the value placed on the property by the trial court was the same valuation assigned by the Norton County appraiser.

Savings Bonds

William next maintains that the savings bonds were not a marital asset. It is unclear why William is making this argument as he was awarded the savings bonds by the trial court. Consequently, this claim is moot.

Assumption of William's Guilt

William argues that because he had not been convicted of the child pornography charges when the divorce action was tried, the trial court should have presumed him innocent of those offenses. Nevertheless, William fails to identify how such failure on the part of the trial court adversely impacted the division of property and the division of debts. William confuses the presumption of innocence to which he was entitled in his criminal case with the realities of the financial hardships imposed upon his family by

virtue that he had been charged with these serious offenses. Moreover, William later pled guilty to one count of receipt of child pornography.

Nevertheless, it is apparent that the sole manner in which William's incarceration affected the division of property and the division of debts is in the trial judge's acknowledgment that an equalizing payment should not be made by Norma to William:

"If I awarded an equalizing payment today, of course, it would be in favor of the respondent in this case. I see that would accomplish absolutely nothing because of the fact that, as I have already stated, most of the indebtedness I have ordered the respondent to pay is going to have to be paid by the petitioner, or she's going to have to take some steps to relieve herself of the legal obligation to pay those jointly incurred debts."

Although William has been ordered to pay various debts and obligations of the parties totaling approximately \$100,000, there is a probability that he will not fulfill those obligations. The court may take judicial notice that William is incarcerated by federal authorities, having pled guilty and been sentenced to over 15 years of incarceration. As a result, although William was ordered to pay 7/9 of the student loan debt and both debts to the IRS, those obligations are joint in the eyes of the creditors. If William does not pay those debts, Norma will be required to fulfill those obligations, which are likely nondischargeable in bankruptcy. Accordingly, although the trial court acknowledged the

criminal charges pending against William and his incarceration at the time of trial, we cannot say that such acknowledgment resulted in an unfair or inequitable division of property and division of debts.

Ford Focus

William's argument regarding the Ford Focus is somewhat unclear, but he maintains in his brief that he is being "punished because [Norma] gave bad advice" to their son regarding the son's payment of the parties' debt on that car. When the trial started, the parties owned a 2001 Ford Focus, which had a value of \$5,000, and the indebtedness against the car was approximately \$6,900. Norma was unable to contribute to the car payments due to her limited income, and William was unable to make those payments because of his incarceration. At Norma's request, the trial court awarded the car to Norma and construed the transaction between her and the son as an equitable sale.

The trial court's treatment of the Ford Focus was not an abuse of discretion. The net value of the car was less than zero. Moreover, the car was a wasting asset, and a constructive sale to the son was a net gain to the marital estate. As a result, William's contention regarding the Ford Focus is without merit.

The 2002 IRS Debt

In his brief, William contends that the 2002 IRS debt resulted from an unintentional error he had made in preparing the return. Nevertheless, these unsworn assertions by William do not constitute competent evidence regarding the 2002 IRS debt. Instead, the competent evidence presented to the trial court showed that William fraudulently prepared a tax return claiming a refund of approximately \$10,000. The evidence before the trial court showed that William was entirely at fault for filing such return and that Norma was faultless in the matter. Consequently, we determine that the trial court properly assigned this debt to William.

Student Loan

William argues that the student loan should be considered a marital debt and divided equally between the parties. The evidence before the trial court was that both parties originally had student loans. The parties consolidated Norma's \$20,000 in student loan debt with William's \$70,000 in student loan debt. As a result, they jointly owe \$90,000. It was not an abuse of the trial court's discretion to divide responsibility of the student loan debt in proportion to the original loans. In reality, Norma will be responsible for the entire amount of the consolidated loan as William's incarceration will prevent him from repaying that obligation. The trial court did not abuse its discretion in treating the educational loans as nonmarital debts.

Joint Checking and Savings Accounts

William argues that the parties had joint checking and savings accounts when the divorce action was filed and that those accounts should be split equally between the parties. If such accounts existed, William should have presented evidence of this to the trial court, but he failed to do so. William has failed to satisfy his burden of showing that the trial court abused its discretion in awarding the bank accounts to Norma.

The 2005 IRS Debt

William further argues that the trial court should have evenly divided the 2005 IRS debt between the parties because that debt resulted from an error on the part of the parties' accountant. Given the relatively small amount of the 2005 IRS debt (approximately \$700), it cannot be said that the trial court abused its discretion in assigning that debt to William. As noted previously, in all likelihood, the IRS will require Norma to pay that obligation as it is a nondischargeable joint debt.

Equity of Division

The crux of William's argument is that the trial court did not evenly divide the parties' property and their debts. Nevertheless, the law requires a fair, just, and equitable division, not an equal division. *In re Marriage of Roth*, 28 Kan. App. 2d 45, 48-49, 11 P.3d 514 (2000). For a truly equal division, Norma would be required to pay William

\$3,554.50. Even without the unusual circumstances presented in this case, such a small imbalance would not constitute an abuse of the trial court's discretion. Although William received a relatively small amount of property and a large amount of the debts, the assignment of the debts to William is merely nominal because Norma will, in all likelihood, be required to pay these debts given William's incarceration and the nondischargeable nature of the IRS and student loan debts. As a result, we determine that the trial court's division of the parties' property and their debts was fair, just, and equitable given the circumstances presented in this case.

Affirmed.