NOT DESIGNATED FOR PUBLICATION

No. 96,332

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In re Marriage of:

CHRISTIAN W. KUNZLE,
Appellant/Cross-appellee,

and

JANET L. KUNZLE,
Appellee/Cross-appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL, judge. Opinion filed October 26, 2007. Affirmed in part, reversed in part, and remanded with directions.

Michael E. Whitsitt, of Westwood, for appellant.

Jon A. Blongewicz, of Leawood, for appellee.

Before MARQUARDT, P.J., BUSER, J., and LARSON, S.J.

Per Curiam: Christian W. Kunzle appeals the trial court's decisions concerning his income, child support, maintenance, property division, loan from his family, private school fees, payment for the Toyota RAV4, and failure to designate gifts from his family as his sole property. Janet L. Kunzle cross-appeals the trial court's decision to credit Christian for their minor child's health insurance premiums. We affirm in part, reverse in part, and remand with directions.

Christian skated professionally in Switzerland before he moved to the United States in 1982. Christian and Janet were married on June 1, 1984. They had two children, Michelle born on September 15, 1985, and Natalie born on March 10, 1990. Michelle was emancipated and Natalie was 15 years old at the time of the divorce hearing. After marriage, Christian was employed as a consultant with a Swiss pharmaceutical company.

Janet worked as a skating coach until Natalie was 5 or 6 years old. She has had only part-time jobs in the past couple of years.

Christian filed for divorce. At trial, the trial court heard testimony from Christian and Janet. A decision was entered on September 22, 2005.

Christian filed a motion to settle the journal entry on the issues of interest on loans

from Christian's family and the calculation of child support. The trial court held a hearing on this motion and ordered that interest on the loans from Christian's family would accrue according to their terms until Janet moved out of the house, and Christian was not entitled to credit for Natalie's health insurance premium under the Kansas Child Support Guidelines (Guidelines). In the journal entry and decree of divorce, the trial court determined that Christian's annual salary was $120,000 and ordered him to pay Janet $1,666 per month in maintenance and $1,170 per month in child support to commence on October 1, 2005.

The journal entry also ordered that when the house was sold, the loans due to Christian's parents and sister were to be repaid; however, the interest would only accrue until Janet moved out of the house. The net proceeds from the sale of the house after payment of costs was to be divided equally between Christian and Janet. The Toyota RAV4 vehicle was awarded to Janet. Christian was ordered to make the payments on the RAV4, and Christian was awarded his woodworking tools. The parties were ordered to pay Natalie's tuition at St. Thomas Aquinas "in the same proportions as their incomes bear to the total family income on the currently effective Child Support Worksheet."

Christian filed a motion "for alteration or amended findings and judgment, for a new trial, and for amendment of judgment" claiming that the trial court abused its discretion in the following: (1) finding that his income was $120,000 a year; (2) setting the

commencement date for child support and maintenance payments, and failing to credit him for payments made during the time Janet and Natalie still lived in the house; (3) terminating accrual of interest on loans from Christian's family; (4) ordering Christian to pay a proportionate share of Natalie's private school tuition; (5) dividing the RAV4 vehicle and its debt and the woodworking tools; (6) failing to properly set aside Christian's premarital contributions to the residence to him; (7) failing to address how the potential proceeds from the house litigation were to be divided; and (8) not awarding Christian credit on the child support worksheet for Natalie's health insurance.

The trial court heard arguments on the motion and modified the date the child support and maintenance payments were to begin; ordered that the house litigation proceeds would be split evenly after attorney fees and costs were reimbursed; ordered that the cost of Natalie's health insurance be credited to Christian for child support calculations; and awarded various items of personal property to Christian. The trial court denied the other issues raised in Christian's motion.

An amended journal entry and decree of divorce was filed on February 10, 2006. Christian timely appeals. Janet timely cross-appeals.

Christian's Income

On appeal, Christian argues that the trial court abused its discretion in determining his income.

In its memorandum opinion, the trial court found that Christian's income was $120,000 based on Janet's "estimation of her husband's income" and that it is "inconceivable that even the best money manager could stretch $60,000 to cover that kind of lifestyle." Janet asserts on appeal that Christian is asking this court to reassess the witnesses' credibility and that Christian's income determination was based on substantial competent evidence.

The parties disagree as to the applicable standard of review. Christian contends that a mixed standard is required, encompassing the abuse of discretion and whether the determination is supported by substantial competent evidence. Janet asserts that the only standards of review are substantial competent evidence for findings of fact and the abuse of discretion standard for maintenance, property division, and child support orders.

An appellate court reviews the trial court's findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the trial court's conclusions of law. Substantial evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. An appellate court has unlimited

review of conclusions of law. *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007).

This court does not reweigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *LSF*, 283 Kan. at 19. However, this court reviews the evidence and determines whether there is substantial competent evidence to support the trial court's findings.

Janet testified that "half of it [Christian's salary] or so was left in Switzerland in an account of his dad's or in an account that we had, I don't really honestly know." Later she testified that "Flint or ISC, Switzerland would give--put a certain amount, put $120,000 a year or $10,000 a month in accounts in Switzerland. We would bring over $60,000 through the year, and that would be his salary." She claimed that Christian told her that he earned $120,000 per year since 1994. To support her assertion, she entered into evidence Christian's consulting agreements covering the period from January 1, 1994, to December 31, 1996, and a marketing agreement dated March 22, 1994.

Christian admitted that he had previously gifted money he earned to his father during his professional skating career. Later, his father gifted the money to Christian and Janet. Christian testified that this was done for tax reasons. Christian stated that his only

employment now is with ISC USA, a pharmaceutical company, where he negotiates technology transfers and licensing agreements, and he has had an income for the past 5 or 6 years between $60,000 and $65,000 per year.

Janet handled all of the family's finances. Copies of the parties' federal income tax returns prepared by a professional accounting firm show Christian's gross income in 2003 at $59,658 and his gross income in 2004 at $63,287. Janet signed these returns. Also entered into evidence was a contract between ISC USA and Christian for a term from June 1, 2005, until September 1, 2005, for a salary of $5,000 per month plus expenses.

Christian and Janet bought their house for $1,015,000. Janet's understanding was that the $600,000 down payment for the house came from money they had saved in Switzerland under the gifting arrangement with Christian's parents. At the time of trial, the Kunzles had listed the house for sale at $1,275,000.

The evidence in the record on appeal shows that Janet made $220 in 2003 and $3,373 in 2004. She now has 3 part-time jobs. She testified that she has not looked for an 8-to-5, or 9-to-5 full-time job because "that's not the job for me." She stated: "I don't want to have to say to Natalie, 'I'm sorry, I can't take you to the movies tonight because I gotta go back to work,' or 'I can't be there for you for your school thing because I'm at work.' My kids are

important to me." Janet testified that in 1998 she made $23,000 giving private skating lessons. At the time of trial, she was teaching private skating classes at $20 per hour. The trial court imputed an annual income of $20,000 to Janet.

Janet testified that financial life during the marriage was generally "wonderful." They sent the children to private schools and allowed the girls to participate in volleyball programs. Christian testified that Natalie's volleyball activities cost about $5,000 a year. Janet testified that she requested financial aid from St. Thomas Aquinas for Natalie's tuition, and they paid only $439.44 a month for 10 months.

Either party to a divorce action is competent to testify upon all material matters involved in the controversy. See K.S.A. 60-1609(c). Janet's testimony and Christian's contracts with ISC USA from January 1994 to December 1996 were the only proof that Christian's income was $120,000 per year. Therefore, we find that the trial court's conjecture on their lifestyle, combined with Janet's testimony, is not substantial competent evidence to support the trial court's finding that Christian's income was $120,000 per year. The trial court abused its discretion in making this finding, and we reverse and remand this issue to the trial court.

Child Support

Christian argues that the trial court erred in ordering his child support payments based on an erroneous finding that his annual income was $120,000. Christian also claims that the trial court used the gifts and loans received from his parents to conclude that his income was $120,000.

Even though Christian and Janet disagree on where the $600,000 down payment for the house came from, it cannot now be considered part of Christian's current income for a determination of child support. The trial court abused its discretion in considering the $600,000 when making its finding of Christian's annual income.

Christian cites a Kentucky case in which a father testified that the mother earned substantial nonreported income through gambling. In *Schoenbachler v. Minyard*, 110 S.W. 3d 776, 785 Ky. (2003), the Kentucky Supreme Court held that "[n]either a 'windshield appraisal' that appellee's 'lifestyle and property reflected an income greater than her W-2's and tax returns indicated' nor appellant's bare allegations of additional income are sufficient to support the trial court's finding of additional income."

The Kentucky court applied the Kentucky Child Support Guidelines which contain different provisions than our Kansas Guidelines. See 110 S.W.3d at 781-85. There are also

factual and evidentiary differences between the cases.

Nonetheless, based on the analysis above, we find that the trial court abused its discretion when it calculated Christian's child support payments.

Estoppel as to Income

Christian argues that Janet should be estopped from claiming his income was $120,000 a year, because she assisted in preparation and signed the tax returns that reported his income at approximately $60,000 annually.

Because we are reversing the trial court's finding on Christian's income, we will not address this issue.

Maintenance

Christian claims that the trial court relied solely on the Guidelines in setting maintenance instead of considering the statutory factors. Christian also argues on appeal that the trial court had insufficient evidence to determine maintenance payments to Janet because she did not provide a domestic relations affidavit.

Janet admits that she failed to file a domestic relations affidavit; however, she

contends that her testimony at trial provided substantial and uncontroverted evidence of need for both maintenance and child support. We do not agree. Even though the trial court has wide discretion regarding spousal maintenance, a judgment awarding maintenance will not be disturbed unless there is a clear abuse of discretion. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003). The trial 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).

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. *In re Marriage of Bradley*, 282 Kan. 1, 7, 137 P.3d 1030 (2006). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Bey*, 270 Kan. 544, 546, 17 P.3d 322 (2001).

The purpose of spousal support is to provide for the future support of the divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other party to pay. *Carlton v. Carlton*, 217 Kan. 681, 538 P.2d 727 (1975).

A maintenance award must be fair, just, and equitable under all the circumstances. K.S.A. 2006 Supp. 60-1610(b)(2). The Kansas Supreme Court has set forth eight factors that may be considered when awarding maintenance, including: (1) the age of the parties; (2) the

parties' present and prospective earning capacities; (3) the length of the marriage; (4) the property owned by the parties; (5) the parties' needs; (6) the time, source, and manner of acquisition of property; (7) the family ties and obligations; and (8) the parties' overall financial situation. However, there are no fixed rules in determining the amount of a maintenance award. *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976).

Supreme Court Rule 164 requires that parties to a divorce case furnish the court with a domestic relations affidavit. (2006 Kan. Ct. R. Annot. 215.) However, this rule is not jurisdictional. Compliance with the rule is not mandatory and may be waived by the trial court at its discretion. *Cook v. Cook*, 231 Kan. 391, 395, 646 P.2d 464 (1982). This court has indicated that the importance of Rule 164 lies in ensuring that the trial court is provided with the necessary financial information to make determinations that are fair, just, and equitable. See *In re Marriage of Kirk*, 24 Kan. App. 2d 31, 32-33, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997). Accordingly, the trial court may obtain this information through other means, such as testimony of a party. See 24 Kan. App. 2d at 34.

Janet speculated in her testimony about what an apartment would cost and then testified as to the cost of Natalie's volleyball and school expenses. Janet did not testify about any of the other specified items on the domestic relations affidavit such as food, clothing, utilities, personal care, or taxes. Testifying about apartment rental, volleyball, and school

expenses for Natalie does not give the trial court sufficient evidence to make a maintenance award and, therefore, the trial court abused its discretion in its award of maintenance. The maintenance award is reversed.

Interest on Loans from Christian's Family

Christian argues that the trial court erred in ordering that interest on loans made by his family would cease to accrue when Janet moved out of the house. He contends that the loans were documented by promissory notes between Christian and his father providing for an annual interest rate of 5 percent, and that by terminating the interest, the trial court improperly rewrote contracts involving third persons who are not parties to the divorce litigation.

Janet responds that the decision to terminate interest was within the discretion of the trial court and was part of the "balancing act" required in cases such as this.

At trial, Christian testified that his sister had loaned him and Janet $150,000 for a supersedeas bond for an appeal regarding their house. Additionally, there were $250,000 in loans made by Christian's parents for house expenses for which Christian signed promissory notes providing for 5 percent annual interest. Janet admits that these were loans from his family that needed to be repaid.

The trial court's memorandum opinion stated that once the house was sold, the net equity would be distributed by first paying the Brennan mortgage, and then setting aside the next $250,000 "to the husband, to repay his parents for the loan they made the parties to effect the repairs on the house." The trial court ordered the next $150,000 to be set aside to Christian to "repay his sister for the loan that she made to the parties for the supersedeas bond." The trial ordered that Christian has the responsibility for paying these loans.

In a motion to settle the journal entry, Christian asked the trial court to determine whether the loans would be repaid with interest, according to the terms of the promissory notes. At the motion hearing, Janet argued that there was no evidence about the interest on the loans, especially on the loan from Christian's sister. Christian responded by referring the trial court to the above evidence and testimony presented at trial, and stated that his sister's loan had actually come from their parents, and is reflected in the promissory note for $150,000 that was included in the exhibits. The trial court found that the loan contracts included a provision for 5 percent interest and stated that its intent in the memorandum opinion was the loans be paid according to the loan contracts. Accordingly, the trial court ruled that the interest would be paid. However, the trial court then ruled that interest would stop accruing when Janet moved out of the house.

The amended journal entry and decree of divorce stated in relevant part:

> "The $150,000.00 cash bond shall be released and repaid to the Petitioner's sister with any accrued interest at 5% per annum, but interest shall cease to accrue January 20, 2006 when Wife moved out of the house. Petitioner is assigned the sole responsibility for repaying the debt to his sister. After all of the reasonable and necessary costs of sale have been paid, and the above-described amounts have been disposed of, the remainder shall be paid as follows: First, $250,000.00 plus accrued interest at 5% per annum until January 20, 2006 when Wife moved out of the house, paid to the Petitioner to repay his parents. Petitioner is assigned the sole responsibility for repaying the debt to his parents[.]"

The trial court has broad discretion in adjusting the property rights and financial obligations of the parties involved in a divorce action, and its decisions in such matters will not be disturbed by this court unless there is a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002); *In re Marriage of Monslow*, 259 Kan. 412, 414, 912 P.2d 735 (1996). A trial court necessarily abuses its discretion when it makes an error of law, and so this court reviews whether the trial court's discretion was guided by erroneous legal conclusions. *State v. Gary*, 282 Kan. 232, 236, 144 P.3d 634 (2006).

The trial court's statements at the hearing and the lack of any language explicitly stating that Christian would be responsible for finding other funds to pay interest that accrued after Janet moved out suggests that the trial court's intent, as Christian argues, was to actually stop the accruing of interest under the promissory notes.

This presents personal jurisdiction and due process issues, as neither Christian's sister nor his parents were parties to the divorce proceedings. Under constitutional guaranties of due process, a judicial process can be made effective only if the concerned parties are provided with sufficient notice. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1273, 136 P.3d 457 (2006). Due process is required in an action affecting a person's property, and the basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. 281 Kan. at 1275; see *Kempke v. Kansas Dept. of Revenue*, 281 Kan. 770, 787, 133 P.3d 104 (2006).

Here, it appears that the trial court altered Christian's parents' and sister's property interests in the accrual of interest under the promissory notes. Furthermore, there is nothing in the record on appeal to show that the trial court had acquired personal jurisdiction over Christian's parents or sister. The trial court's termination on the accrual of interest could leave Christian with additional debt if interest accrues until the house is sold. The trial court does not explain how this is fair, just, and equitable; therefore, we reverse the cessation of the interest on the loans when Janet moved out of the house.

Home Equity/Gifts

Christian argues that the trial court abused its discretion in not assigning him the house equity from the $600,000 down payment that he alleges was a gift from his family.

However, the trial court recounted Christian's testimony to this effect and Janet's conflicting testimony that the $600,000 was earned income sent to them through the tax avoidance gifting scheme, and ordered that the equity would be divided equally after payment of the mortgage and the $400,000 in loans from Christian's family.

The trial court has broad discretion in adjusting the property rights of the parties and has the authority to divide all property regardless of its derivation. See K.S.A. 2006 Supp. 60-1610(b)(1). The trial court did not abuse its discretion in its division of the down payment and equity in the parties' home.

RAV4 Vehicle

Christian argues that the trial court abused its discretion in giving Janet the RAV4 vehicle but ordering him to make the payments that total almost $18,000. He asserts this resulted in an unequal division of the property. However, the trial court awarded Christian the woodworking tools valued at $17,000 to equalize assigning the car payments to him. The trial court is not required to make equal distribution of assets; however, it is required to make a fair, just, and equitable division. The trial court did not abuse its discretion in making this division.

Natalie's Tuition

Christian argues that the trial court abused its discretion in ordering him to pay for Natalie's private school tuition. He contends these costs should have "remained discretionary" for the parties.

The evidence at trial was that Natalie was a sophomore at St. Thomas Aquinas. Janet testified that Natalie did not handle change well and that having to deal with the divorce in the middle of school was especially difficult, resulting in her having to drop out of an honors class.

The trial court ordered the parties to pay for Natalie's tuition at St. Thomas Aquinas in proportion to their incomes on the child support worksheet. In light of the evidence before the trial court, such a decision was not an abuse of discretion. However, because we do not find substantial competent evidence to support the trial court's decision regarding Christian's income, this issue is remanded to the trial court to be decided after it determines Christian's income.

Crediting Christian with Health Insurance Premiums

On cross-appeal, Janet argues that the trial court erred in crediting Christian for health insurance premiums paid for Natalie for purposes of child support calculations, when

Christian's employer actually paid the premium and Christian incurred no out-of-pocket expense.

Christian responds that the trial court properly credited him for Natalie's health insurance premiums.

The standard of review of a trial court's order determining the amount of child support is whether the trial court abused its discretion; however, the interpretation and application of the Guidelines is subject to unlimited review. *In re Marriage of Cox*, 36 Kan. App. 2d 550, 553, 143 P.3d 677 (2006).

At trial, Christian testified that the $202 a month he asked to be credited for the health and dental insurance premium for Natalie was paid by his company.

The Guidelines, Section IV, D.4.a., reads as follows:

"Health, Dental, Orthodontic and Optometric Premiums

"The cost to the parent or parent's household to provide for health, dental, orthodontic or optometric insurance coverage for the child is to be added to the Gross Child Support Obligation. If coverage is provided without

> cost to the parent or parent's household, then zero should be entered as the amount. If there is a cost, the amount to be used on Line D.4 is the actual cost for the child or children if it is itemized. . . .
>
> "The court has the discretion to determine whether the proposed insurance cost is reasonable, taking into consideration the income and circumstances of each of the parties and the quality of the insurance proposed, and to make an adjustment as appropriate. The cost of insurance coverage should be entered in the column of the parent or parent's household which is providing it . . . ." 2006 Kan. Ct. R. Annot. 115.

Janet argues that under the plain language of the Guidelines and Christian's testimony that his company paid for the insurance, the trial court's order crediting Christian for the premium was error.

Under the language of the Guidelines, if coverage is provided without cost to the parent, then zero is entered as the amount on the worksheet. However, if, in calculating Christian's income, the insurance cost is included in his gross income, then he is entitled to a credit for that portion of the premium attributable to Natalie. On the other hand, if the cost of the insurance is not included in Christian's gross income, he should not receive credit for the portion attributable to Natalie. Until a determination on Christian's income is made, there is no way to resolve this issue and it is reversed.

We affirm the trial court's award of the RAV4 to Janet and its payments to Christian, and its division of the down payment and equity of the house.

We reverse and remand the trial court's determination of Christian's annual income; the amount of child support to be paid by Christian; the amount of maintenance awarded to Janet; the interest on Christian's family loans; and the trial court's credit of Natalie's health insurance premiums to Christian with directions consistent with this opinion. We order that these issues are to be tried to a different judge.

BUSER, J.: concurring in part and dissenting in part. I concur with the majority's affirmance of the trial court's award of the RAV4 to Janet with payments to be made by Christian, and the trial court's division of the down payment and equity in the house. I also concur with the majority's reversal of the trial court's order regarding interest payments made to Christian's family and its reversal of the trial court's order giving Christian a credit for health insurance premiums paid for Natalie.

I dissent from the remainder of the majority's holdings. First, I would find there was substantial competent evidence supporting the trial court's finding that Christian earned $120,000 per year in income. During the trial, Janet testified that Christian had told her "for the last maybe 10 years" that his annual income was $120,000. Christian told Janet that he

would receive some of his compensation in Switzerland and some of his salary was sent to him in the United States. The funds that remained in Switzerland would go to his parents, who would send Christian money as gifts and reimburse themselves from his compensation that was deposited in Switzerland. The amount sent directly to Christian in the United States as salary (about $60,000) was the only amount reported on tax returns. At trial, Christian admitted that he had previously participated in such an arrangement the first few years he lived in the United States, gifting his earnings as a professional skater to his father, who would later gift them back to Christian and Janet.

In addition to Janet's testimony, consulting and marketing agreements from 1994 through 1996 which were admitted into evidence appeared to corroborate her testimony regarding the amount of Christian's income.

Finally, the trial court's observation that the Kunzle family's standard of living was more representative of Christian earning $120,000 rather than $60,000 per year was not, as characterized by the majority, "conjecture," but more properly viewed as circumstantial evidence corroborating Janet's testimony and the documentary evidence admitted at trial.

With regard to the trial court's award of child support and order that the parties pay for Natalie's high school tuition in proportion to their individual incomes, I can find no error

in the trial court's award because of the substantial competent evidence of Christian's annual income of $120,000.

As to maintenance, the trial court heard detailed testimony regarding the parties' financial situation and lifestyle prior to the divorce and anticipated financial circumstances after the divorce. Although Janet did not testify regarding every specific monthly expense category listed on the domestic relations affidavit, she did testify about her education, work history, recent reintroduction into the workforce, family lifestyle, and Natalie's activities. In addition, the trial court specifically referenced the *Williams* factors relating to the parties' ages, respective earning capacities, and the duration of the marriage. *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976). Taken together, the trial court's award of maintenance was based upon substantial competent evidence.

Finally, I dissent from the majority's *sua sponte* order that a different judge should preside over this case upon remand. This was a difficult and highly controverted case. The record reveals the trial judge diligently reviewed the evidence and arguments prior to writing a 10-page opinion detailing her findings of fact and conclusions of law. Importantly, neither Christian or Janet have asked this court to order a different judge to rule upon these matters on remand. Assuming arguendo that the majority holding is correct, I can find no rationale for having a different judge preside over this case at this

late stage in the litigation.