

NOT DESIGNATED FOR PUBLICATION

No. 97,675

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JAMES M. LEE,
Appellant,

and

MARILYN A. LEE,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GUNNAR A. SUNDBY, judge. Opinion filed November 2, 2007. Affirmed.

Gary A. Nelson, of Gary A. Nelson, P.A., of Leavenworth, for appellant.

Terri L. Harris, of Lansing, for appellee.

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

Per Curiam: James M. Lee appeals the trial court's denial of his petition for annulment and the grant of Marilyn's petition for divorce. We affirm.

James and Marilyn met through the Internet. Marilyn resided in Canada and James sent her an airline ticket so that she could come to Kansas.

James testified that Marilyn represented that she was 46 years old; however, Marilyn was born in 1954. Marilyn testified that James became aware of her birthdate prior to their marriage when she wrote it on their marriage license application. Marilyn also claimed that she told James the picture she posted on the Internet was old and she had gained weight since the photograph was taken.

James testified that Marilyn told him she was an accountant; however, he felt it would be best if Marilyn did not work for a few months after her arrival in the United States. He claimed that he was unaware she did not drive and it would take approximately 1 year to procure the paperwork to allow her to work legally in the United States. Marilyn testified that James knew she worked at an \$8 per hour job. She testified that she told James she was going to school to learn accounting but did not know much about the American tax system.

James and Marilyn were married January 16, 2006. According to Marilyn, in July

2006, their two dogs jumped the fence and she did not want to look for them. James allegedly told Marilyn that she had 3 minutes to get out of the house. She thought he was kidding, but after the time elapsed, James allegedly grabbed Marilyn by her arm and leg and dragged her through the house and pushed her out of the back door.

James disputes that he physically removed Marilyn from the home, but does acknowledge that he told her she could not return until the dogs came home. Marilyn claimed that her arm was injured during the incident. She filed an application to remain in this country pursuant to the Battered Wives Act.

In July 2006, James filed a petition for annulment claiming that the marriage was voidable because it was induced by fraud. Marilyn filed a cross-petition for divorce. The trial court entered a lump sum temporary maintenance award of \$2,500 for Marilyn.

After a hearing to consider James' annulment petition, the trial court found that James failed to prove fraud and denied the annulment.

After the required 60-day waiting period, the trial court granted the divorce and awarded all property to James with the exception of one automobile which was awarded to Marilyn. The credit card debt was assigned to James. The trial court made the \$2,500

temporary maintenance award a final order and awarded Marilyn \$800 for her attorney fees.

In October 2006, the trial court issued a show cause citation for James' failure to pay maintenance and attorney fees. James claimed that his failure to pay was not a willful refusal but was rather an issue of ability. After hearing arguments from counsel, the trial court noted that James was living rent-free and the circumstances surrounding his presence in the home suggested that he "ha[d] the benefit" of the assets. The trial court found James guilty of civil indirect contempt after he stipulated to the charges. The trial court awarded Marilyn an additional \$350 for her attorney fees and ordered James' truck be held in the Justice Center parking lot so that Marilyn could sell it and apply the proceeds to the outstanding court orders. James appeals.

On appeal, James argues that the trial court should have granted his petition for annulment because he and Marilyn never had sexual relations, Marilyn misrepresented that she was self-sufficient, and she made a conscious effort to do what it took to remain in this country.

K.S.A. 60-1602 establishes statutory grounds for an annulment. It reads:

"(a) The district court shall grant a decree of annulment of any marriage

for either of the following grounds: (1) The marriage is void for any reason; or (2) the contract of marriage is voidable because it was induced by fraud.

"(b) The district court may grant a decree of annulment of any marriage if the contract of marriage was induced by mistake of fact, lack of knowledge of a material fact or any other reason justifying rescission of a contract of marriage."

If fraud is proven, a marriage can always be annulled. *In re Estate of Gardiner*, 29 Kan. App. 2d 92, 127, 22 P.3d 1086 (2001), *rev'd in part on other grounds* 273 Kan. 191, 42 P.3d 120, *cert. denied* 537 U.S. 825 (2002).

James admitted that Marilyn's earning potential was not "the reason that I asked her to come down" to live with him. James testified that he did not realize the time or expense involved in obtaining the paperwork for Marilyn to legally work in this country and it did not enter his mind that it might take some time for Marilyn's accounting credentials to transfer to this country.

Fraud is a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary 685 (8th ed. 1999). The evidence James put forth suggested nothing more than misunderstandings, unfulfilled expectations, and lack of communication.

James testified that the marriage was never consummated because Marilyn slept downstairs in a chair after breaking her foot. Marilyn seemed to suggest there was some sort of marital intimacy. It is undisputed that James is in poor health. He is morbidly obese and suffers from Type II diabetes and hypertension. James testified that, at times, it is difficult for him to get out of a chair or out of bed. This court does not weigh conflicting evidence or pass on the credibility of witnesses. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003).

In the absence of fraud and with a marriage that was not statutorily void, there were no grounds for an annulment.

The trial court granted Marilyn a lump sum maintenance award of \$2,500 because she moved here to be with James, had no way to earn money, and had no transportation. The trial court granted Marilyn one automobile and ordered James to pay \$800 of Marilyn's attorney fees. On appeal, James argues that any monetary award for Marilyn was improper because the trial court should have granted the annulment. In the alternative, James contends that he had no money and there was no evidence to support the trial court's order.

The trial 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). The trial court has similarly broad discretion regarding spousal maintenance. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003).

James' initial domestic relations affidavit shows that he owns a home worth approximately \$350,000 and personal property valued at approximately \$30,000. However, James submitted an amended affidavit which listed personalty of approximately \$23,000 and claimed that his father owned the house. James testified that he does not pay rent. Marilyn testified that James' father planned to deed the house to James, but those plans did not materialize after the annulment petition was filed. However, James apparently had an ownership interest in the house because he used it as collateral when he applied for a \$15,000 home improvement loan.

It is undisputed that James' sole income is a disability payment of \$1,375 per month and his medications cost \$500 per month. James also received a lump sum disability back payment of approximately \$15,000. He testified that the money was spent to start a home-based computer business that James and Marilyn were going to run. Marilyn testified that she has "no money at all."

The facts used in determining the need and amount of maintenance are: age of the

parties, present and prospective earning capacities, the length of the marriage, the property owned by each party, the parties' needs, the time, source, and manner of acquisition of property, family ties and obligations, and the parties' overall financial situation. *Day*, 31 Kan. App. 2d at 758. In *Day*, a panel of this court deemed it appropriate that the trial court consider the imbalance in the parties' earning power when awarding maintenance. 31 Kan. App. 2d at 759.

In the instant case, it is undisputed that Marilyn has no money and no ability to work legally. She is currently living in a battered women's shelter which provides her room and board. In September 2006, James told Marilyn that she could withdraw some money from one of their bank accounts, but when she went to the bank the account was empty.

We do not believe the trial court abused its discretion by awarding Marilyn a lump sum maintenance payment and the car.

K.S.A. 2006 Supp. 60-1610(b)(4) allows the trial court to award attorney fees to either party "as justice and equity require." The trial court's rationale for awarding maintenance and property would also apply to its order to James to pay \$800 of Marilyn's attorney fees. We do not believe the trial court's property award was an abuse of discretion.

James contends that the contempt award was an abuse of discretion because the truck belongs to his father. James continues to maintain that he has no money and he cannot borrow any.

There is a dual standard of review in an appeal from a finding of contempt of court. An appellate court applies a de novo review to determine whether the alleged conduct is contemptuous. An abuse of discretion standard is applied in reviewing the sanctions imposed. *In re M.R.*, 272 Kan. 1335, 1342, 38 P.3d 694 (2002). In this case, James did not dispute that his conduct was contemptuous. Therefore, we need only review the sanctions imposed.

At the divorce hearing, James testified that he referred to both the car and the truck as his, although he now claims they both belong to his father. James also listed the car and truck as his on both his original and amended domestic relations affidavits. James testified that he paid for the tags and taxes. James only claimed the items belonged to his father when pressed to make a monetary contribution to Marilyn.

We do not believe the trial court erred by awarding the truck to Marilyn so that she could use proceeds from the sale to satisfy the outstanding court order. There was sufficient evidence presented to the trial court that James was the owner of the truck. James' argument

that the contempt award was an abuse of discretion is rejected.

Affirmed.