

NOT DESIGNATED FOR PUBLICATION

No. 95,609

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF
THOMAS E. MUNKER,
Appellee,

and

JULIE K. MUNKER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; EVELYN Z. WILSON, judge. Opinion filed
November 2, 2007. Affirmed.

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, L.L.C., of
Topeka, for appellant.

Holly A. Theobald and *Alan F. Alderson*, of Alderson, Alderson, Weiler, Conklin,
Burghart & Crow, L.L.C., of Topeka, for appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

Per Curiam: Thomas E. Munker (Tom), filed for divorce from respondent Julie K. Munker (Julie) on June 30, 2004, after 21 years of marriage. At that time, Tom and Julie had two daughters, ages 18 and 14. On July 7, 2005, the district court entered a divorce decree.

In this appeal, Julie challenges the district court's calculation of child support and maintenance. Specifically, she asserts the district court erred in utilizing Tom's adjusted gross income from his 2003 tax return to calculate its maintenance and support awards. Further, Julie challenges the district court's determination that it lacked jurisdiction to order Tom to maintain existing life insurance in order to preserve maintenance and child support in the event of Tom's death. Julie also appeals the district court's method of dividing the couple's personal property and its order requiring the sale of the cash assets of two of Tom's businesses.

We have set forth below, as relevant, the parties' factual and legal allegations and the trial court's rulings as to the issues on appeal.

Calculation of child support and maintenance

On appeal, Julie first challenges the district court's calculation of support and maintenance. Specifically, she takes issue with the district court's reliance on the 2003 tax return as evidence of Tom's income; the characterization of Tom's auto restoration hobby as a business; and the reduction, as a business expense, of Tom's office manager's salary. She also argues the court failed to consider the economic effect of the income tax exemption for the couple's minor child, which the court assigned to Tom until the couple's marital residence was sold.

We review a district court's order determining the amount of child support for abuse of discretion, while interpretation of the Kansas Child Support Guidelines is subject to unlimited review. See *In re Marriage of Cox*, 36 Kan. App. 2d 550, 553, 143 P.3d 677 (2006). Similarly, the trial court has wide discretion in determining spousal maintenance, and we will not disturb that calculation absent an abuse of discretion. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003).

At all times relevant hereto, Tom was self-employed as a financial planner/insurance salesperson. He earned commissions for selling financial planning services through his company, Kansas Health and Financial, a sole proprietorship, and by

selling insurance through his company LTC Pro, an S corporation. Tom also operated an automotive restoration business.

In establishing maintenance, the court noted that during much of the marriage Julie did not work outside the home, but at her most recent job she had earned \$8 per hour. At the time of the hearing, Julie was unemployed and had no job offers. The district court found Tom's monthly income to be \$4,641, relying in part upon Tom's adjusted gross income as set forth on his 2003 federal income tax return—\$55,693 for a monthly gross income of \$4,641. The court established maintenance at 20 percent of the difference between the parties' relative incomes, resulting in an award of \$750 per month maintenance until further order or until all payments were made. The court imputed minimum wage to Julie and ordered Tom to pay maintenance for 90 months beginning August 1, 2005, with credit for months in which he had already paid temporary maintenance. The district court retained jurisdiction over the maintenance issue.

Regarding custody, the district court memorialized the mutual agreements of the parties, including joint legal custody; primary residence with Julie; and "reasonable and liberal, unsupervised" parenting time to Tom. The court assessed 75 percent of the cost of the conciliator's services to Tom and 25 percent to Julie. Tom was ordered to pay child support in the amount of \$504 per month based on the child support guidelines.

Tom's monthly income

Julie takes issue with the district court's decision to give extra weight to the adjusted gross income figure from Tom's 2003 tax return to establish the amount of maintenance and child support. Julie asserts the adjusted gross income figure in the tax return was "inconsistent" with other financial information Tom provided to the court. Specifically, Julie points out that in his domestic relations affidavit, Tom claimed \$16,000 as the amount of his monthly "domestic gross income."

However, Tom testified that when he completed his domestic relations affidavit, he did not understand the term "domestic gross income," and the \$16,000 amount he claimed as monthly domestic gross income was actually gross revenue and did not reflect reductions for taxes, business, or personal expenses. Based on the 2003 tax return, Tom testified his gross domestic pre-tax income was \$4,835 per month. He claimed his actual "in-pocket" monthly income, after taxes, was closer to \$3,500.

This testimony was consistent with records and testimony not substantially in dispute which indicated Tom had acquired numerous loans through Educational Credit Union. He shared a mortgage with Julie, and he personally held four vehicle loans, and three business accounts containing six loans associated with Kansas Financial and Health

Services. When securing these loans, Tom had submitted various 1099 receipts indicating his total gross income in 2003 was \$191,202.30, resulting in a monthly gross income of \$15,930.

When confronted with the disparity between his income and his expenses, Tom admitted his income fluctuated greatly from one month to the next, and little or nothing was left over each month. Tom agreed he was living beyond his means.

The district court found this testimony credible. Additionally, in finding Tom's income to be \$4,641 per month, the district court placed extra weight on the 2003 tax return. On that return, Tom reported business income of approximately \$4,641 monthly.

Our Supreme Court recently reviewed the district court's income assessment to a self-employed Subchapter S shareholder and noted: "Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating support." *In re Marriage of Brand*, 273 Kan. 346, 356, 44 P.3d 321 (2002). However, "[e]ven in those states with particularized formulas for determining the income available to self-employed payors, the calculation of income is highly fact specific." 273 Kan. at 356. For many jurisdictions, as in Kansas, the absence of evidence that the

spouse or parent manipulated income or wished to shield income from support obligations is highly persuasive. 273 Kan. at 357.

Here, we find no evidence indicating Tom was deceitful in claiming the amount of his earnings or that he attempted to shield his income to lessen his support obligations. Further, inconsistencies in the financial information were explained to the satisfaction of the district court.

A district court is charged with evaluating all the relevant evidence before it. A wealth of evidence was presented regarding Tom's income, including itemized business expenses. In denying Julie's motion to reconsider, the court stated:

"The Respondent has asked the Court to reconsider what has been assigned to the Petitioner as income for support purposes. There was no expert testimony given regarding that matter; the Court gave extra weight to income as shown on tax returns; some evidence was more suspect than others; and this matter was quite complicated. However, the Court is convinced that the conclusions regarding Petitioner's income [are] fully supported by the evidence presented. In any event, the Respondent's spousal maintenance is protected under the escalator factor of the *Monslow* case"

We may not reweigh the evidence, substitute our evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses. *In re S.M.Q.*, 247 Kan. 231, 234, 796 P.2d 543 (1990).

Moreover, as the district court noted, Julie is protected from any discrepancy between the income found by the court and the actual income Tom may later earn. The court did not order that a specific amount of maintenance be paid. Rather, the court set maintenance on an income-dependent sliding scale, *i.e.*, 20 percent of the difference between the parties' relative incomes. This has been held to be an appropriate method by which to award maintenance. See *In re Marriage of Monslow*, 259 Kan. 412, 414-15, 912 P.2d 735 (1996) (upholding escalator clause in maintenance award).

Thus, we hold the district court did not abuse its discretion in relying significantly upon the income figures in the 2003 tax return in determining the amount of Tom's monthly income for purposes of calculating maintenance and child support.

Tom's automotive restoration business

Julie also argues the district court erred in utilizing the 2003 tax return figures because it included a loss of \$9,515.40 with respect to Tom's automotive restoration

business. Julie terms this business a "hobby" and suggests this amount should not have been considered in calculating Tom's income.

As Tom points out, Julie did not object at any point to the treatment of Tom's automotive restoration business as a "hobby," nor did she specifically object to the trial court's consideration of these expenses by utilizing Tom's 2003 tax figures. Thus, we decline to consider this claim here.

Office manager's income

Julie also complains that the 2003 income tax returns include inappropriate expenses for the salary of Tom's office manager. Julie points to testimony from Tom that he paid his business manager \$623 per week and commissions. She also points out that Angela Parra, Tom's business manager, testified her salary was 25% of her income.

On appeal, Julie infers from this testimony that Parra's income was \$120,000. She then suggests the district court "blindly" allowed Tom to expense a salary in excess of his own income and that this should not have been permitted "for an employee, let alone a possible girlfriend."

Julie bases this last assertion upon the fact that both Tom and Parra testified they were "just friends," yet, according to Julie, they subsequently became husband and wife. (Apparently, this event occurred after the trial court's rulings, as Julie's brief conspicuously lacks a citation to the record as to this assertion.)

In response, Tom suggests his relationship with Parra is completely irrelevant. Further, he points out that Parra testified she had just begun earning commissions from Tom's business, and she continued to receive commissions directly from previous clients and carriers, not from Tom. Tom further points to Parra's deposition testimony, where she testified she had worked for Edward Jones for 6 years and had approximately 300 clients of her own, which she was in the process of gradually transferring to Tom's business.

Finally, Tom points out the record contains absolutely no support for Julie's assertion that Tom's 2003 return somehow reflected a salary expense of \$120,000 for Parra. We agree and find this assertion to be without merit.

Use of 2003 income

Julie also argues that even if the 2003 income tax figures were accurate, the district court erred in utilizing 2003 figures rather than 2004 or current income. Tom responds that at the time of trial, he did not have final 2004 figures available, but that he conceded in his testimony that his 2004 income might well be higher than his 2003 income.

Importantly, the trial court anticipated the potential income fluctuations of Tom's businesses when it set maintenance on an income-dependent sliding scale, or 20 percent of the difference between the parties' relative incomes. Thus, we also find this assertion without merit.

Income tax exemption

Finally, with respect to the calculation of income, Julie asserts the trial court erred in permitting Tom to claim the couple's minor child as a dependent in 2005 and every year until the couple's residence was sold. Julie suggests this was a "*sua sponte*" action by the trial court and that the court prepared no worksheet or findings to "compensate" for granting the dependency exemption to Tom.

As Tom points out, in ruling on the motion for new trial, the trial court stated its reasons for allowing Tom the income tax exemption. Specifically, the court pointed out it

had ordered that Tom be responsible for all prior year tax penalties. Plus, the court noted it was troubled by Julie's disincentive to sell the marital residence and determined it was appropriate to award Tom the exemption until the residence was sold. We find no abuse of discretion with respect to this ruling.

In summary, we find the district court did not abuse its discretion in determining the amount of Tom's monthly income for purposes of calculating maintenance and child support.

Maintenance of life insurance policy to secure post-motion maintenance

Julie requested in a posttrial motion for modification that the court order Tom to maintain a life insurance policy to guarantee payment of both maintenance and child support in the event of Tom's death. Tom argued the district court lacked jurisdiction to adjudicate post-mortem maintenance and support payments.

In its post-judgment decision, the district court specifically held Tom "should not be required to provide life insurance to secure child support or spousal maintenance." The court further stated, however, that it "probably lack[ed] jurisdiction" to require [Tom] to do so.

Although the district court specifically ruled Tom was not required to provide life insurance to ensure support or maintenance, Julie nevertheless appeals the district court's ruling that it "probably" lacked jurisdiction to require Tom to do so.

Whether jurisdiction exists is a question of law over which the appellate court's scope of review is unlimited. *In re Marriage of Harbutz*, 279 Kan. 359, 361, 109 P.3d 1191 (2005). However, because the district court did not require Tom to maintain a life insurance policy to secure maintenance and support payments, Julie's request for a ruling on the court's comment regarding jurisdiction seeks an advisory ruling.

Our function as an appellate court is to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case before us and to adjudicate those rights in such a manner that our determination will be operative, final, and conclusive. *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005). Appeals are not for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant. *Blank v. Chawla*, 234 Kan. 975, 978, 678 P.2d 162 (1984) (citing *Anderson v. Carder*, 159 Kan. 1, 4, 150 P.2d 754 [1944])

Because the district court did not require Tom to maintain life insurance to secure his child support and maintenance payments, the district court's comment that "it probably [lacked] jurisdiction" to do so, did not give rise to a justiciable controversy and we decline to consider this issue.

Division of personal property by lottery

Julie next argues the district court erred in the method it designated for division of the couples' personal property.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and we will not disturb that exercise of discretion absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

The parties disagreed as to the value of their personal property, but at the close of trial they agreed to hire an appraiser to place values on all items of personal property. Ultimately, the district court ordered a division in kind of personal property. Specifically, relying on the expert appraiser's inclusive list, the court ordered the parties to divide the property using a method whereby Tom would first select an item, then Julie would select

two items; Tom would then select another item, then Julie would select an item, and so on until all of the items were chosen and each party presumably possessed approximately 50 percent of the property.

On appeal, Julie refers to the court's method of dividing property as a "snake order lottery," and concedes this method may have "resulted in an equitable distribution of the net value" of the property. Nevertheless, she also suggests this method was akin to "flipping a coin" and "would probably result in about equal division of the property." Julie further argues the district court failed to consider the factors set forth in K.S.A. 60-1610(b) in ordering this division of the couple's personal property.

Tom argues Julie is precluded from raising this issue on appeal because she did not object to this method of property division and she acquiesced in the order by participating in the method the court ordered for dividing personal property.

While the issue of the value and division of personal property was contested at trial, Julie did not object to the method of property division ultimately designated by the court. Nor did Julie object to the district court's failure to consider the factors set forth in K.S.A. 60-1610(b).

Generally, a litigant must object to inadequate findings of fact and conclusions of law before the trial court to preserve the issue for appeal. This allows the trial court an opportunity to correct its findings and conclusions. If no objection is made, we must presume the trial court found all facts necessary to support its judgment. *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

Moreover, as Tom points out, the property is now divided, and Julie has not alleged she suffered harm as a result of the property division. Julie concedes she has "partially acquiesced" in the judgment. Citing *Martin v. Martin*, 5 Kan. App. 2d 670, 672, 623 P.2d 527, rev. denied 229 Kan. 670 (1981), Julie nevertheless contends acquiescence does not strictly apply in divorce cases.

In *Martin*, the plaintiff argued the defendant had acquiesced in the divorce decree by his remarriage and thus was barred from challenging orders for the division of property and alimony. The *Martin* court recognized that the general rule pertaining to acquiescence in judgments should not be strictly applied in divorce cases because of "the peculiar situations of the parties and the equitable considerations involved." 5 Kan. App. 2d 670, Syl. ¶ 2. The court held, however, that "when the complaining party cannot show prejudice, the determinative factors of acquiescence in a domestic relations case revolve around the consistency with which the litigant is attacking the judgment or the

severability of the provision of the judgment under which the benefits have been accepted or burdens assumed." 5 Kan. App. 2d at 672. Because neither party challenged the marriage dissolution, which would be the only portion of the decree inconsistent with remarriage, the *Martin* court found the marriage dissolution was not affected by the appeal and was a final judgment. 5 Kan. App. 2d at 672.

Here, Julie complains about a provision of the divorce decree that she acquiesced in, *i.e.*, the method of property division. And she does not assert any prejudice resulted from that aspect of the judgment.

Julie's acquiescence to the property division, her failure to suggest prejudice from the method of distribution, and her failure to object to the district court's method of distribution lead us to conclude Julie is precluded from raising this issue on appeal.

Sale of businesses

Next, Julie argues the district court erred in ordering the sale of Tom's businesses and in failing to divide certain savings accounts and CDs. As stated above, we review the district court's determinations as to property rights for abuse of discretion.

Tom testified that after subtracting debt from assets (including checking and savings accounts, desks, file cabinets, and computers) the value of Kansas Health and Financial Services was \$7,738.25; and the value of LTC Pro, which Tom operated out of his home, was \$10,034.15. These numbers represented the hard assets of the businesses; they did not represent any future commissions or assign any intangible value to client files. Tom suggested that beyond the hard assets, the businesses had little to no value; he estimated the businesses would be valued at no more than \$17,772.

In contrast, Julie testified that using the Shawnee County Family Law Guidelines for business valuation, she calculated the value of Tom's businesses to be over \$1,000,000. She claims she based this estimate on the businesses' gross revenues using a multiple factor of 3.5.

On appeal, Julie argues the district court "should have required the division of the cash assets, divided the accounts receivable and then either valued the remaining assets or had them sold." She urges this court to remand to the district court with an order to "divide the liquid assets, account for the accounts receivables received, and either value the business, appoint a master or take more evidence in a timely fashion."

Julie also devotes much argument in her brief on this issue to a discussion of whether goodwill is an asset subject to division by the court. She contends the district court erred as a matter of law in finding goodwill was not subject to division. However, our review of the court's order indicates the district court merely cited Tom's testimony estimating the value of the hard assets of the business and recognized Tom's allegation that "anything over and above that [amount] would consist of nonmarital 'goodwill' that is not subject to division." The district court did not accept that allegation, but rather cited the allegation in its summary of the highly disparate evidence as to the value of Tom's businesses.

Faced with these irreconcilably disparate valuations and no expert testimony, the district court set about to fulfill its task under K.S.A. 60-1610(b)(1), citing its options for division under subsections (A) through (C) and stating:

"The Court is not an expert in valuation of a business. Neither party chose to call such an expert to provide insight to the Court. There is no evidence beyond the petitioner's conclusory testimony to prove the business is worth nothing more than its 'hard assets.' There is no evidence to justify multiplying a year's net profit by 3.5, or any other number, as respondent wishes.

"Consequently, the Court finds that the only choice available to it which will assure an equitable division of these businesses is to order their sale in an arm's length transaction. If the petitioner is correct, and their value is no more than the value of cash, receivables, and tangible personal property, there will be no loss to him. If he is not correct, the net sales price will determine an equitable division of these businesses. In any case, the net amount realized by the parties from this sale should be equally divided."

In a subsequent journal entry, the district court rejected Julie's request to rescind the order to sell the businesses, but clarified that "[t]hose accounts [that] are savings accounts belonging to the Petitioner's businesses . . . shall be sold with Petitioner's businesses." Further, the court declined Julie's invitation to value the businesses according to her estimated values. Finding the evidence insufficient to establish the value of the businesses, the court affirmed its order requiring the businesses be sold.

Julie essentially seeks to relitigate a number of factual questions on appeal, and she asks this court to reevaluate the evidence and reweigh the credibility of certain testimony. This court is not at liberty to do so. See *In re Marriage of Kuzanek*, 279 Kan. 156, Syl. ¶ 3, 105 P.3d 1253 (2005). Nor is it the prerogative of this court, absent an abuse of discretion, to impose a different method or procedure for selling Tom's businesses.

Accordingly, we hold that given the evidence presented to the district court, the district court's order to sell the businesses and divide the proceeds was reasonably designed to insure a just division under K.S.A. 60-1610, and the district court did not abuse its discretion in so ordering.

Finally, we note that Julie has filed a motion to assess attorney fees pursuant to Supreme Court Rule 7.07(b) (2006 Kan. Ct. R. Annt. 57). In light of our decision today, we deny Julie's motion.

Affirmed.