

NOT DESIGNATED FOR PUBLICATION

No. 96,466

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MARY MAE ZIMMERMAN,
Appellee,

and

ADAM PAUL ZIMMERMAN,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed July 3, 2008. Affirmed.

Joe L. Norton and Allan E. Coon, of Norton, Hubbard, Ruzicka & Kreamer, L.C., of Olathe, for appellant.

David K. Martin, of Payne & Jones, Chtd., of Overland Park, for appellee.

Before BUSER, P.J., MARQUARDT and STANDRIDGE, JJ.

Per Curiam: Adam Paul Zimmerman (Paul) appeals the district court's decree of divorce. We affirm.

Mary Mae Zimmerman (Mary) filed a petition for divorce from Paul on July 22, 2004. The parties owned numerous properties and businesses. A divorce trial was held on December 1 and 5, 2005, and the district court entered a decree of divorce on January 26, 2006. The district court attached a spreadsheet to the decree which listed the parties' assets and to whom each asset was awarded. The district court adopted Mary's proposed division of assets.

Paul filed a motion to alter or amend the judgment, in which he claimed that certain items were improperly valued by the district court. Paul requested that the division of property in the divorce decree be modified. The district court denied Paul's motion. Paul filed a timely notice of appeal.

On February 5, 2007, Paul filed a motion in the district court asking that the court compel Mary to execute quitclaim deeds to the real estate that was awarded to him in the divorce decree. The district court held a hearing on the motion. Mary argued that Paul's

actions in filing this motion constituted acquiescence in the divorce decree. Paul responded that his actions did not constitute acquiescence because his appeal did not concern the property for which he was currently requesting title. He also stated that acquiescence was an issue for the appellate court. The district court found that it had ordered Mary to execute the deeds in the decree of divorce, and she had not done so. The district court granted Paul's motion to enforce the divorce decree.

After the hearing but before the district court issued a journal entry of its ruling on the motion, Paul filed a motion to withdraw his motion to compel and to rescind the district court's oral ruling at the hearing. Paul stated he did not believe ordering Mary to execute the deeds constituted acquiescence, but in order to avoid further litigation on the issue, Paul requested that his motion to compel be withdrawn and that the district court set aside its ruling on the motion. The district court issued a journal entry on April 12, 2007, granting Paul's motion to compel Mary to execute the quitclaim deeds. The district court found that Paul's motion to withdraw was moot because it was filed after the hearing and after the district court's ruling was announced.

Mary filed a motion to dismiss Paul's appeal with this court, claiming that he had acquiesced in the judgment. Paul filed a response. This court denied Mary's motion but left the issue of acquiescence to this panel.

In Mary's motion to dismiss, she notes that Paul received the deeds to the property he was awarded in the divorce which he is now appealing. Mary claims Paul accepted the benefits of the judgment when he sold a house he was awarded in the divorce for substantially more than the value it was assigned by the district court. Mary also claims Paul will benefit upon the sale of one of the businesses he was awarded because he has listed it for sale at an amount in excess of the value it was assigned by the district court.

Because acquiescence involves a question of the appellate court's jurisdiction, it is a question of law. Acquiescence necessarily occurs after a judgment is rendered. This court considers acquiescence under the same standard as it would with any other question of law. *Layne Christensen Co. v. Zurich Canada*, 30 Kan. App. 2d 128, 137, 38 P.3d 757 (2002). A party acquiesces in the judgment when he or she voluntarily accepts the benefits or assumes the burdens of the judgment. *D.A.N. Joint Venture III v. Turk*, 36 Kan. App. 2d 353, 357, 138 P.3d 1253 (2006). A party who voluntarily complies with a judgment cannot thereafter adopt an inconsistent position and appeal that judgment. *Layne Christensen Co.*, 30 Kan. App. 2d at 137. However, this rule is not strictly applied in divorce cases because of the peculiar situations of the parties and the equitable considerations involved. *In re Marriage of Powell*, 13 Kan. App. 2d 174, 176, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989).

Paul argues his request for execution of the deeds to the property he was awarded did not constitute acquiescence because it was not inconsistent with his position on appeal. He states his argument on appeal is not that the district court erred in awarding him property in the division of assets; he claims that he should have been awarded *additional assets*.

However, the argument in Paul's response to Mary's motion to dismiss does not correspond with his argument on appeal. Paul argues on appeal that the district court abused its discretion in adopting Mary's entire valuation, even though the district court found each party had manipulated the value of assets to that person's benefit. Specifically, Paul stated in his appellate brief: "[T]he district court's property division judgment must be reversed in all respects and must be remanded . . . for recalculation in light of appropriate legal principles and the notions of fairness and equity that are supposed to underlie any division of marital net worth." Paul's brief includes arguments concerning specific property he believes was improperly valued, but he states that his list of improperly valued properties is not exhaustive. Paul claims that if even one of the values of the numerous properties is unsupported by the evidence, the case should be remanded for further proceedings. Paul ignores the standard that the district court uses in dividing assets in a divorce.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and the district court's 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). Discretion is abused only where no reasonable person would take the view adopted by the district court. If reasonable persons could differ as to the propriety of the district court's action, then it cannot be said that the district court abused its discretion. *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992). The district court does not have to make an equal division of the marital property. *Sadecki*, 250 Kan. at 8. The party who asserts an abuse of discretion bears the burden of showing it. *Vorhees v. Baltazar*, 283 Kan. 389, Syl. ¶ 2, 153 P.3d 1227 (2007). Paul has not carried that burden.

Our Supreme Court has stated that the exceptions to the application of acquiescence in domestic cases "essentially revolve around the severability of the provision of the judgment under which the benefits have been accepted or the consistency with which the beneficiary may attack the judgment on appeal." *Gordon v. Gordon*, 218 Kan. 686, 690-91, 545 P.2d 328 (1976). In *Gordon*, the wife challenged the evidence establishing incompatibility. The court held that the husband's payment of alimony and the wife's acceptance of it did not constitute acquiescence under these circumstances. The court did note, however, that an example of when a party might waive his or her right

to appeal would be if the party was awarded specific property and the party voluntarily accepted the property awarded. 218 Kan. at 692; see *Martin v. Martin*, 5 Kan. App. 2d 670, 672, 623 P.2d 527, *rev. denied* 229 Kan. 670 (1981).

Paul voluntarily accepted the benefits of the divorce decree and thereby acquiesced in the judgment. Although acquiescence is not strictly applied in divorce cases, Paul does not argue that any equitable considerations are present that would make the rules pertaining to acquiescence not apply to this situation. See *Powell*, 13 Kan. App. 2d at 176.

Affirmed.