NOT DESIGNATED FOR PUBLICATION

No. 98,791

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MICHELE FOITLE,
Appellee,

and

JOHN D. FOITLE,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; R. WAYNE LAMPSON, judge. Opinion filed July 11, 2008. Affirmed.

John D. Foitle, appellant pro se.

Sheryl A. Bussell, district court trustee, and *W. Fredrick Zimmerman*, deputy district court trustee, for appellee.

Before BUSER, P.J., MALONE and McANANY, JJ.

Per Curiam: John D. Foitle (Father) appeals an order to pay one-half the expense of braces for his minor child. Father maintains Michele Foitle (Mother) was obligated under a divorce decree and separation agreement to obtain his consent prior to such care. We affirm.

The divorce decree provides: "The parties shall share equally any unreimbursed medical or dental expenses of the minor children." The district court, therefore, had subject matter jurisdiction over the payment of the minor child's dental care, contrary to Father's position on appeal. See *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006) (jurisdiction is a question of law subject to unlimited appellate review). *In re Marriage of Blagg*, 13 Kan. App. 2d 530, 531, 775 P.2d 190 (1989), upon which Father relies, is distinguishable because in that case, "the original divorce decree had not ordered either party to provide health insurance coverage for the child."

The parties' substantive dispute focuses on a prior consent provision in the divorce decree: "[T]he parties shall discuss and mutually agree upon all matters of importance with regard to the children's health care, discipline, religious training and welfare." Father argues: "If [Mother] is looking to the Divorce Decree provisions with respect to

the cost to be borne by each parent, then she must comply with the part of the Divorce Decree that requires mutual agreement upon all matters of importance with regard to the children's health and welfare (this would include elective braces)."

Aside from this passing comment, Father does not brief why the braces were a "matter[] of importance under the prior consent provision. This is not sufficient to raise an issue on appeal. See *Crawford v. Board of Johnson County Comm'rs*, 13 Kan. App. 2d 592, 594, 776 P.2d 832 (1989). Moreover, Father provided no evidence on this point.

Three substantive hearings were held below, but we have a transcript of only one. Judging from a court reporter's letter on file with this court, no record was taken at two of the hearings. Father could have provided a statement of any evidence produced at these hearings, but he did not do so. See Supreme Court Rule 3.04 (2007 Kan. Ct. R. Annot. 25). While Father has appeared pro se:

> "A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented

to the court." *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986).

Moreover, neither the sole transcript in the record nor any of the journal entries refer to evidence. The district court also made no findings on Mother's alleged failure to consult with Father or any other fact relevant to the prior consent provision.

As a result, it is impossible to determine from the existing record whether Mother violated the prior consent provision. Father bore the burden to designate a record affirmatively showing error in the district court. "'Without an adequate record, the claim of alleged error fails.' [Citation omitted.]" See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Father also argues that the braces were not reasonable or necessary. This was his main contention below, as he admits on appeal: "My initial point was I did not owe these expenses because they were not reasonable or necessary." Judging from the record before us, Father did not raise the prior consent provision until oral arguments on his motion to reconsider.

We cannot agree with Father that the district court improperly imposed upon him "the burden . . . to make an adequate showing as to the reasonableness and necessity of

the dental expenses." Father raised reasonableness and necessity as a defense below. The district court considered the defense even though the divorce decree did not explicitly require the minor child's medical and dental expenses to be reasonable or necessary. See *Tyler v. Tyler*, 203 Kan. 565, 572, 455 P.2d 538 (1969) ("Any provision in a separation agreement entered into by the parties for the . . . support . . . of their minor children remains subject to the control of the district court.").

The record on appeal does not contain a transcript from the March 9, 2007, hearing, but the journal entry records the following: "[Father] shall be given the opportunity to present further evidence from the dentist or orthodontist that would support his contention that the braces (which are the general point of contention) are/were not necessary, and upon such presentation, the Court will determine that issue at that time."

Father then moved for reconsideration. He attached an unsigned and unverified document which purported to be an affidavit from the minor child's orthodontist. Father quoted the text of this purported affidavit in his motion for reconsideration, alleging "the orthodontist who performed this service . . . has said that the braces were not necessary."

The record on appeal contains a transcript from the April 20, 2007, hearing on Father's motion for reconsideration. It shows the district court denied Father's motion, explaining in part:

> "I gave you an opportunity that if this doc[tor] would come in here or that doctor would sign an affidavit, but the doctor doesn't quite answer my question. What I need him to say is your daughter didn't need these things. . . . You indicated, your ex denied, that your daughter was beautiful without the braces, and she thought that she needed them. I don't know. And I'm not going to get myself in the posture of being the doctor."

In its journal entry of this hearing, the district court explained further: "[Father] has not provided anything to the court from the orthodontist that indicates that the braces for the minor child were unnecessary and for cosmetic purposes only. . . . Due to [Father's] failure to provide any new evidence, the Court hereby sustains its previous ruling on the matter."

We are in essentially the same situation as the district court. Father vehemently denies that the braces were needed, but we have no evidence on the point. Not only does the record lack any evidence from a dentist or orthodontist, we have nothing under oath from *any* witness regarding the braces. We cannot guess at the reasonableness or

necessity of specific dental care for this particular minor child, assuming that is the test we would apply.

Finally, Father asserts "the fix was in." The neutrality of a court is demonstrated in part by a litigant's opportunity to submit relevant evidence and make proper arguments in support of his or her claims. Judging from the record before us, Father was provided such an opportunity in the district court.

Affirmed.

McANANY, J.: Concurring in part and dissenting in part.

First, I agree with the majority's conclusion regarding John Foitle's claim that he did not consent to the expense for the braces, but I must take issue with the majority's route in reaching its conclusion. Second, I must respectfully dissent from the majority's conclusion that the district court did not err in placing the burden on John to establish that the expense was unreasonable.

On the issue of consent, the majority criticizes John for providing no evidence that the issue of braces was a "'matter[] of importance'" that required the mutual agreement of

the parties in advance of incurring the expense. Slip op. at 3. I would characterize as self-evident the fact that the costs of braces for a child is a matter of importance requiring the agreement of the parties. Since reasonableness is, I believe, implicit in the contract between the parties, Michele Foitle would be justified in incurring this expense without John's consent if his consent was unreasonably withheld. Thus, Michele bore the burden to establish either that the expense was agreed upon or that John was unreasonable in refusing to agree to it. Nevertheless, as the majority points out, John had the burden of designating a record that affirmatively shows the district court erred. He has not demonstrated that Michele failed to meet this burden. Thus, I agree with the majority's conclusion on this point.

On the issue of the reasonableness of the expense, I am not persuaded that the lack of any reference to "reasonable" medical or dental expenses in the Property Settlement and Separation Agreement is significant. I believe that reasonableness is implied in the contract between these parties. Thus, Michele, as the movant, bore the burden of presenting some evidence of reasonableness to justify imposing half of this unreimbursed dental expense on John. John claims the braces are cosmetic and, therefore, not necessary. I am not prepared to say that braces that serve a cosmetic function are an unnecessary dental expense. But the court should have required some showing of

necessity from Michele and not placed the burden on John, the nonmovant, to show that the expense was unnecessary.