NOT DESIGNATED FOR PUBLICATION

No. 100,014

IN THE COURT OF' APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE Marriage OF:

JAMES GINA VAN,
Appellee,

and

SABINE GINA VAN,
Appellant.

MEMORANDUM OPINION

Appeal from Pottawatomie District Court; MICHEAL A. IRELAND, judge. Opinion filed May 15, 2009. Reversed arid remanded with directions.

Russ Roe, of Oriaga, for appellant.

Arvid V. Jacobson~ of Jacobson & Jacobson, Chtd., of Manhattan, for appellee.

Before McANANY. P.J., GREEN and EUSER, .11

Per Curiam: Sabine Gina van appeals the district court's division of property and maintenance order in this divorce action. Her former husband, James, acknowledges in his appellate brief that the factual statement of the case in Sabine's brief is correct. Nevertheless, those facts conflict with the court's findings in certain respects, and we will attempt to note those conflicts in our narrative.

Facts

James Gina van met Sabine, a German national, while he was stationed with the military in Germany. He returned to the United States, and Sabine followed in October 1992. The parties were married on December 17, 1992. They have two children, born in 1996 and 2000.

James was a student at Kansas State University at the time of the marriage. He continued with his education and obtained degrees in fine arts and education in 1997. Since 2003, he has been the executive director of the Columbian Theater Foundation in Wamego, Kansas, where he earns $40,000 a year

Sabine completed her education in Germany before moving to the United States, It is not clear whether she has the equivalent to an American college degree. Sabine worked full time until their first child was born and part time for periods of time thereafter until she was laid off in 2003. She now works as a paraprofessional for the Wamego School District where she earns about $12,000 per year. (Though this is the amount stated in Sabine's uncontested statement of facts. James testified that she earned about $1,800 per month and the court determined her annual income to be $19,520).

During the course of the marriage, Sabine's parents gave her various monetary gifts for the purchase of a home and to supplement Sabine's income during the time she was not working. The gifts totaled $138,400. The largest of these gifts was *$116,545,* which was given in May 2000, for the purchase or construction of a home.

Sabine testified that, based upon a letter she received from her parents, it was her parents' intent that if the parties did not purchase or build a home, the money was to be returned. James does not challenge that this was the intent of Sabina's parents as expressed in Sabine's statement of facts in her appellate brief. Nevertheless, the parents' letter, dated April 21, 2000, was written in German. No translation was provided to the court at trial. When the letter was offered into evidence at trial, the court stated:

> "I will take a copy and have it figured out in English. At the same token I want you to have [Sabine] translate to English as she understands it and its off that it is true and correct and then I'll compare the translations, I'll make my decision. At this point in time that's the best I can do."

Before taking the matter under advisement, the trial judge stated, "I'm going to get somebody to translate it for me. See if we can come up with the same translation." James' counsel indicated he would do the same. The court did not wait for Sabine's translation. The court issued its memorandum decision 2 days before Sabine filed her translation and supporting affidavit, in its decision, the district court disregarded the testimony of Sabine's parents' intent because it was expressed in a copy of a letter written, in German which had not been translated into English, and the date the letter was sent was undetermined.

The gifts from Sabine's parents were in the form of checks payable to Sabine, not to Sabine and James jointly. The money was placed in a joint bank account referred to as the Ultra Market account. The parties made joint decisions on spending funds in the Ultra Market account. This account was segregated from other marital funds. The parties' paychecks were not placed in the Ultra Market account.

The parties withdrew $13,500 from the Ultra Market account to purchase a vacant lot in Wamego upon which they intended to construct a home. The home was never built. The court found that the value of the lot at the time of the divorce was $26,000. The parties also used $4,000 from the Ultra Market account in 2001 to invest in individual retirement accounts for the parties. At the time of the divorce, these IRAs were valued at $2,400 each.

At the end of 2004, the parties used about $14,000 in the Ultra Market account to purchase a new automobile for James. James intended to purchase it with the proceeds of a workers compensation settlement of about $20,000 he anticipated receiving. The $14,000 was withdrawn from the Ultra Market account with James' assurance that it would be restored to the account upon receipt of the settlement proceeds. When those settlement proceeds arrived, they were placed in the Ultra Market account. At the time of the divorce the court set the vehicle over to James at a value of $11,000.

The Ultra Market account was also used for various family expenses, including the real estate taxes on the Wamego vacant lot.

In June 2007, James commenced this action for divorce. He withdrew about $4,000 from the Ultra Market account at that time, without Sabine's knowledge, to pay his attorney and to pay rent and a rent deposit on a new residence. Since it was readily apparent that the parties would not be buying or building a home, Sabine withdrew the $73,487.45 balance in the Ultra Market account and returned these funds to her parents in Germany.

The parties settled the issue relating to their children and reserved for trial the division of their property and the issue of maintenance. The court took the matter under advisement upon completion of the testimony. Before doing so, the court observed:

> "Now my position has always been, and I'll tell both of you this, and it's the position I've always had is I treat a marriage as a partnership and when they don't want to be partners to the best of my ability with the marital assets I'm going to split *50/50.* I'm going to try and let each walk away with they have an equal amount of debts and equal amount of assets. That is my philosophy."

In its memorandum decision filed 6 days later, January 9, 2008, the court divided the property as follows:

Asset	Value	James	Sabine
Wamego lot	$26,000 gross/ $ 19.000 net[t]	$14,400*	$4,600*
IRAs	$4,800	$2,400	$2,400
James'car	$11,000	$11,000	
Sabine's van	$4,000		$4,000
BBQ grill, camera, & software			
Computer			
James' separate retirement account	$16,000	$16,000	
Savings account	$5,000	$5,000	
Ultra Market account	*$77,569*	$2jL0QQ	*$.57~569*
Total:		68,800	$68,769

(* The district court ordered the lot to be sold and the net proceeds divided 70/30. The court did not estimate selling expenses but stated, with respect to this asset, "The Court, after expenses, has used a $241,400 figure for property equalization purposes." We do not understand what this means, where this figure came from, or how it was applied, in any event, the court arrived at a $68,800 total for property set over to James and $68,769 for property set over to Sabine. We have used those totals to arrive at a net value for each party's share in the proceeds from the lot sale.)

The court ordered maintenance of $291.33 per month for 60 months. However, the court ordered that if Sabine does not return to James $20,000 for his share of the Ultra Market account as set over to him in the division of property, James is entitled to offset this amount over the 60 months of his maintenance obligation by reducing his maintenance payments by $333 per month.

The court entered further orders with respect to child support, arrangements for trips for the children to visit grandparents in Germany, tax deductions, and the like, Each party was ordered to pay his or her own attorney fees.

Sabine moved the court to clarify the maintenance order with respect to the possible $20,000 maintenance offset. The docket sheet does not indicate that there was any action taken on this motion. Sabine appeals.

Property Division

Sabine argues that the district court abused its discretion in its division of the parties' property. The district court has broad discretion in adjusting the property rights of the parties in a divorce action, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. Sabine bears the burden of showing that the district court abused its discretion. IN re Marriage of Wherell, 274 Kan 984. 986, 58 P.3d 734 (2002),

Sabine argues that the district court erred in refusing to take into account the source and manner of acquisition of the major marital assets. Instead, the district court applied its philosophy of making a 50/50 distribution of the marital assets.

K.S.A. 23-201(b) provides:

> "All property owned by married persons . . . shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce... Each spouse has a common ownership in marital properly which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-16 10 and amendments thereto.[4]"

K. S .A. 60-1610(b)(1) sets forth the standards by which the respective interests of the parties in marital property described in K. S .A. 23-201(b) are to be determined in divorce proceedings. It provides:

> The decree shall divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts. ... In making the division of property *the court shall consider* the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; *the time, source and manner of acquisition of property;* family ties and obligations; the allowance of maintenance or Jack thereof; dissipation~ of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property." (Emphasis added.) K.S.A. 60-1610(b)(J),

It is certainly not an abuse of discretion for the district court, in making an equitable division of the marital property, to take into account how the marital property was acquired and to restore to one party the entry value of property acquired from that party's parents by gift or inheritance. See, for example. In re Marriage of Hair, 40 Kan. App. 2d 475, 193 P.3d 504 (2008). The practice is common in a number of our jurisdictions and, in fact, is recommended by the family law committees of local bar associations in at least two of our more populous jurisdictions. See 2003 Shawnee County Family Law Guidelines, 5.02 B; Johnson County Family Law Guidelines. 3.3(B). While these guidelines are not binding and have not been adopted by any court, they are frequently relied upon by judges and practitioners in arriving at equitable resolutions of property disputes and have much to commend them.

But here the issue involves the converse: the district court's failure to restore to Sabine the gifts from her parents. The wide discretion district courts are afforded in making an equitable division of the marital estate is bounded by the statutory mandate of KSA 60-1610(b)(1) which courts cannot purposefully ignore. The proper exercise of judicial discretion in considering such an issue is predicated upon the district court weighing and examining the evidence in light of the applicable legal standards and not acting arbitrarily. See State v. Foren, 78 Kan. 654, 658, 97 Pac. 791 (1908). Here, K.S.A. 60-1610(b)(1) controls. It requires the court to consider, among other things, the source and manner of

acquisition of the property. The district court cannot arbitrarily disregard consideration of this factor. When the district court disregards controlling legal standards it abuses its discretion.

This is not a situation in which the district court simply failed to articulate and to discuss each of the relevant factors in K.S.A. 60-1610(b)(1), a failure which is not fatal to the court's decision. See in re Marriage of Whipp, 265 Kan. 500, 508-09, 962 P.2d 1058 (1998). To the contrary, the district court specifically disregarded the mandatory standards of K.S.A. 60-1610(b)(1) when it announced that its sole criterium in the dissolution of this marital partnership is to arrive at a 50/50 distribution of the marital estate. To apply a 50/50 standard without regard to the factors set out in K.S.A. 60-1610(b)(1) is an abuse of discretion. Accordingly, we must reverse the court's division of property and remand for reconsideration of the factors in K. S .A. 60-161 0(b)(1) in arriving at an equitable division.

Maintenance

Sabine challenges the propriety of the court's order for maintenance, particularly with respect to the offset provision. As we conclude below, we find nothing improper in providing for such an offset. Nevertheless, because the offset provision in the court's maintenance order is predicated on $20,000 from the Ultra Market account being set aside to James in the property division, and because we find it necessary to set aside that property division, we must also set aside this provision in the maintenance order and remand to the district court for further consideration consistent with its reconsideration of the property division.

In remanding the maintenance order to the district court, we note that there is nothing inherently improper in permitting funds set over to James to be used as a credit against his maintenance obligation if Sabine fails to return those funds, when the amount of the credit win be treated for tax purposes as maintenance paid by James arid received by Sabine. K.S.A. 60-1610(b)(2) provides in relevant part:

> "The [divorce] decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. . . . Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis."

The statute gives the district court wide discretion in fashioning a maintenance order that fits the circumstances of the parties. Under the set-off arrangement described in the court's memorandum decision, the funds set over to James as his separate property are treated as maintenance received by Sabine and paid by James if she fails to return them. The tax liability is spread over the duration of the maintenance period, just as would occur if Sabine returned these funds to James and he paid monthly installments of maintenance in the original amount.

Finally, Sabine complains that the district court abused its discretion in calculating the amount and duration of maintenance using guidelines from some other jurisdiction. The district court calculated the amount of maintenance to be 20% of the difference between the earnings of the parties. With respect to the family law guidelines noted earlier in this opinion, the district court's calculation was consistent with the Johnson County guidelines and somewhat more favorable to Sabine than an order consistent with the Shawnee County guidelines. The duration of maintenance was calculated based upon the duration of the marriage: an approach used in both of these guidelines.

In Kansas, maintenance is predicated on financial need and financial ability. In re Marriage of Kuzanek, 32 Kan. App. 2d 329, 330, 82 P.3d 528 (2004), reversed on other grounds 279 Kan. 156, 105 P3d 1253 (2005). We presume the district court took into consideration all relevant factors in establishing an appropriate amount of maintenance and its duration, notwithstanding the district court's failure to

explicitly enumerate all appropriate factors. The district court is presumed to have made the findings necessary to support its judgment. See In re Marriage of Tripp, 265 Kan. 500 at 508-09. We find no abuse of discretion in the manner in which the district court calculated the amount and duration of maintenance.

Reversed and remanded with directions.