NOT DESIGNATED FOR PUBLICATION

No. 102,641

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

WAYNE R. SMETANA
Appellant,

and

ELLEN R. SMETANA,
Appellee.

MEMORANDUM OPINION

Appeal from Geary District Court; MARITZA SEGARRA, judge. Opinion filed December 10, 2010. Affirmed.

John W. Thurston, of Addair Thurston, Chtd., of Manhattan, for appellant.

Susan C. Jacobson, of Jacobson & Jacobson, Chtd., of Manhattan, for appellee.

Before LEBEN, P.J., PIERRON, J., and BUKATY, S.J.

LEBEN, J.: At the August 2008 divorce trial between Wayne and Ellen Smetana, Wayne testified that he would be retiring from the military the following month and that he had received a job offer for about half of his military pay. Based on that testimony, which left Wayne and Ellen with approximately equal earnings, the district court awarded no maintenance to Ellen even though Wayne had been earning nearly twice what she earned. But Wayne did not retire from the military in September 2008. Although he

apparently didn't mention it at the trial, his retirement was contingent upon acceptance of a request that he be given a medical retirement. That medical retirement was denied, and Wayne withdrew the request rather than appear personally before an appeals board.

When Ellen learned that Wayne had not retired from the military, she filed a motion under K.S.A. 60-260(b) for relief from the final judgment. The district court granted that motion and then granted both maintenance and some attorney fees to Ellen. Wayne has appealed to this court.

K.S.A. 60-260(b) allows the district court to provide relief from judgment in several circumstances. In its oral ruling, the district court said that it was granting relief under subsection (1), which covers mistake, inadvertence, surprise, and excusable neglect, and subsection (2), which applies when there is newly discovered evidence that could not have been discovered with reasonable diligence in time to file a motion for new trial, which is 10 days after judgment. The district court also noted in its oral ruling that it was also "considering" subsection (3), which covers fraud or misconduct by an opposing party. But the district court's written order recited only subsections (1) and (2) as the bases for granting relief.

We review the grant of relief under K.S.A. 60-260(b) for abuse of discretion. *In re Marriage of Leedy*, 279 Kan. 311, Syl. ¶ 1, 109 P.3d 1130 (2005). Generally, we cannot find an abuse of discretion unless no reasonable person would agree with the district court's conclusion. *In re Marriage of Zodrow*, 240 Kan. 65, 68, 727 P.2d 435 (1986); *In re Marriage of Estrada*, 2010 WL 1882149, at *3 (Kan. App. 2010) (unpublished opinion).

To orient the reader as we discuss the facts, we first note the sequence of events before the district court. The parties' divorce trial took place on August 25, 2008. Although the district court apparently made its initial rulings that day, the parties couldn't agree on the terms of the written journal entry and decree of divorce. Those disputes were resolved in a hearing held December 5, 2008, and the decree was filed 5 days later. Wayne's attorney sent a letter to Ellen's lawyer on January 22, 2009, advising that Wayne had decided not to pursue medical retirement from the military. Ellen filed her motion for relief from judgment on February 6, 2009.

On appeal, Wayne contends that Ellen's motion was based solely on K.S.A. 60-260(b)(2), and he contends that she could have discovered through reasonable diligence within 10 days of the filing of the decree that he had not retired. Accordingly, he argues that her motion should have been dismissed. We cannot determine from the appellate record whether Wayne is correct that the motion cited only to subsection (2); the motion has not been included in our record. Wayne, as the appellant, has the burden to provide an appellate record sufficient to show the error he claims. *City of Mission Hills v. Sexton*, 284 Kan. 414, 435, 160 P.3d 812 (2007). Moreover, so long as a motion under K.S.A. 60-260(b) is timely filed, it need not specify the specific ground for relief as long as it does demonstrate a right to relief under one or more of the grounds found in the statute. *In re Marriage of Hunt*, 10 Kan. App. 2d 254, Syl. ¶ 2, 697 P.2d 80 (1985). The district court clearly relied upon subsections (1) and (2) as bases for its ruling. Based on Wayne's failure to include the motion in the appellate record, the rule set out in *Hunt*, and the district court's reliance on both subsections (1) and (2), we will consider the propriety of the court's ruling under both subsections. We will not separately consider subsection (3) because it was not mentioned in the district court's written order and Ellen has not argued on appeal that it forms a basis to uphold the district court's judgment.

The district court made several significant findings in its oral ruling on Ellen's motion. First, the court concluded that Wayne had intended to withdraw his application to retire, apparently as of the time of the divorce trial when he testified that he was retiring the next month: "I don't believe for one second that this gentleman didn't already intend to withdraw his application to retire." Second, the court found that Wayne had voluntarily withdrawn his request to retire. Third, even though Wayne testified in the hearing held in April 2009 on Ellen's motion that he had submitted a new request for nonmedical requirement, the court concluded that it had "absolutely no [credible] evidence that he is once again requesting to withdraw from the military." Before making those findings, the court heard testimony from both Wayne and Ellen regarding events related to Ellen's motion; the court had heard the same parties testify during the divorce trial.

On these facts, we cannot find that the district court abused its discretion. That court heard the testimony of the parties, and from that testimony it concluded that Wayne had intended to withdraw his retirement application although at trial Wayne led the court to believe he would be retiring in September 2009. That finding supports granting relief under subsection (1) for mistake or surprise and under subsection (2) for newly discovered evidence. Though Wayne suggests that Ellen could have discovered through reasonable diligence that he hadn't actually retired, Ellen could not have discovered Wayne's unexpressed intention to withdraw his retirement application. We also note that the application was not formally withdrawn until after the filing of the December divorce decree and that Wayne did not advise Ellen of its withdrawal until more than 1 month after filing of the decree.

Wayne argues that the decree required that he send notice to Ellen of his retirement and that when she didn't get such a notice she should have known that he hadn't retired in September. But he fails to note that the decree wasn't filed until

December 10, and he also fails to note the district court's finding that "there were requests that were made from opposing counsel . . . asking whether he had retired or not. He hadn't turned that [information] over." We find no abuse of discretion in the granting of relief from judgment under K.S.A. 60-260(b)(1) and (2).

In the alternative, if we found that the district court properly granted relief from judgment under K.S.A. 60-260(b), Wayne argues that the district court abused its discretion by awarding maintenance and some attorney fees to Ellen. We review both issues for abuse of discretion. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 707, 229 P.3d 1187 (2010) (award of maintenance); *In re Marriage of Risley*, 41 Kan. App. 2d 294, 300, 201 P.3d 770 (2009) (award of attorney fees). Once again, we cannot find an abuse of discretion under that standard unless no reasonable person would agree with the district court's conclusions.

As to maintenance, the district court noted that its initial ruling denying maintenance was premised on the assumption that Wayne was retiring a month after trial. According to Wayne's testimony, that would have reduced his income from nearly $120,000 per year to $50,000 per year; Ellen earned about $60,000 per year. Thus, in the absence of Wayne's retirement, a substantial income disparity remained—and the district court had previously awarded $800 per month in temporary maintenance based on that disparity and the other available evidence of the parties' income and needs.

We also note two other key points on Wayne's challenge to the maintenance order. First, the district court's maintenance award was specifically limited to the time period lasting until Wayne does retire from active duty and files a motion to terminate maintenance. Second, Wayne has not provided a transcript of the parties' divorce trial as part of the appellate record; we therefore cannot review all of the evidence that was

available to the district court when it made the maintenance order. Given the continuing income disparity between the parties, we cannot find an abuse of discretion in the award of future maintenance.

As to attorney fees, Wayne challenges the district court's award of some of Ellen's attorney fees. Wayne's brief suggests that the district court awarded $2,947.50, but our record does not contain a specific order referencing that amount. K.S.A. 60-1610(b)(4) provides that the district court may award fees in a divorce case "as justice and equity require." The district court has wide discretion in making this decision, *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 534-35, 920 P.2d 450 (1996), and should consider the need of the party requesting fees against the ability of the other party to pay them. *Dunn v. Dunn*, 3 Kan. App. 2d 347, 350-51, 595 P.2d 349 (1979). Once again, without the full record of the parties' divorce trial, we cannot comprehensively review the district court's decision. But given the continuing income disparity between the parties, we cannot find an abuse of discretion in the award of some of Ellen's attorney fees. The appellant has the burden to provide a record showing error, *City of Mission Hills v. Sexton*, 284 Kan. 414, Syl. ¶ 16, 160 P.3d 812 (2007), and Wayne has not done so on this point.

We must address one further issue. Ellen has filed a motion before us for the award of her attorney fees incurred in this appeal. She seeks an award of $3,520, which is supported by the affidavit of her attorney and itemized time entries showing the work performed by her attorney on appeal.

Supreme Court Rule 7.07(b) provides that an appellate court "may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees." (2010 Kan. Ct. R. Annot. 62). We have already noted that the district court has the authority to award attorney fees in divorce cases. We also find that the fees

requested by Ellen are reasonable both as to the amount of time charged and as to the hourly rate.

As we have already noted, however, we do not have the full record of the parties' divorce trial. Accordingly, we are not in as good a position as the district court to assess whether "justice and equity require" an award of these fees in whole or in part. We will therefore remand that issue for determination by the district court. Should the district court decide to award less than all of the requested fees, that decision must be based on considerations of justice and equity, not upon the reasonableness of the attorney fee charges, which have already been determined by this court.

The judgment of the district court is therefore affirmed. The case is remanded to the district court with directions to determine whether attorney fees on appeal should be awarded to Ellen and, if so, in what amount.