NOT DESIGNATED FOR PUBLICATION

No. 101,455

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

TIM W. GIESICK,
Appellee,

and

CAROL A. BERNING,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MICHAEL L. QUINT, judge. Opinion filed January 22, 2010. Affirmed.

John M. Lindner, of Lindner & Marquez, of Garden City, for appellant.

Robert E. Keeshan and *Paige J. Eichert*, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellee.

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

Per Curiam: Carol A. Berning appeals an order by the Honorable Michael L. Quint denying reinstatement of maintenance after her divorce from Tim W. Giesick. We affirm.

Factual and Procedural Background

In September 2002, Tim filed for divorce. He and Carol were married for 24 years and had three children. At the time of the divorce, the youngest child, born in November 1986, was still a minor.

In September 2003, the Honorable Robert J. Frederick entered the divorce decree, divided the property, and ordered maintenance for 5 years. According to Judge Frederick's journal entry, he ruled after a "presentation of evidence by both parties." No transcript of the divorce hearing or any exhibits admitted at the hearing were included in the record on appeal.

The record does contain bankruptcy documents admitted at the evidentiary hearing in the reinstatement matter. Judge Frederick's journal entry shows the bankruptcy proceedings directly related to his original ruling on maintenance. In the reinstatement matter, Judge Quint stated he would read Judge Frederick's journal entry "in its entirety and take that into consideration."

In June 2001, Tim and Carol filed for bankruptcy as joint debtors under Chapter 13. The bankruptcy petition listed their assets, the most substantial of which were their house in Leoti, farming equipment and tools, and a 1997 Ford Taurus. It appears these assets were subject to secured claims in excess of their combined value, and there were numerous unsecured creditors as well. In total, Tim and Carol had $221,400 in assets, and $315,997.88 in debts.

The bankruptcy petition stated Tim's monthly income from Collingwood Grain, Inc., in Leoti as $2,800 per month. Carol made $1,200 per month as a secretary for the Leoti school district, based on a 10-month contract. Both Tim and Carol had high school educations with some vocational training or college credits.

Much of the couple's indebtedness came from a farming operation they conducted on rented land. In April 2003, Tim decided to convert to a Chapter 7 bankruptcy, effectively abandoning the farming operation. Carol remained in Chapter 13 proceedings because she wished to continue farming. Carol's plans did not alter upon receiving a May 13, 2003, notice that Tim had "agreed in writing to terminate the lease" on 320 acres of land, about half their acreage. According to Judge Frederick's findings, Carol owed Chapter 13 plan payments totaling $138,579. Her decision also meant that she would bear the whole mortgage on the house, which Judge Frederick found totaled $67,000.

Judge Frederick awarded Carol the associated assets, *i.e.*, the farm equipment and tools, the crops, and the house. Tim, in contrast was awarded much less in terms of assets, mainly his personal effects, nonfarm tools, some firearms, and a 1999 pick-up worth $13,000. Judge Frederick distributed the unsecured debts between the parties.

On appeal Carol states her net value of the property division as a negative $11,792 and Tim's as a negative $8,893. Tim does not address this calculation.

Judge Frederick was critical of Carol's decision to continue the Chapter 13 plan, stating in his journal entry that the plan "was no longer . . . worthwhile in any economic sense." He also indicated his unwillingness to award Carol maintenance simply to see her through Chapter 13:

> "[Carol] readily admits that the only way to keep her reorganization plan afloat is through the use of borrowed funds. If in fact this is what [Carol] chooses to do, the circumstances of the parties are such that she should be required to do so at her own expense and sole risk in the sense that what is left of the farming operation has not and will not be taken into account in assessing either [Carol's] needs or [Tim's] ability to pay as the same relate to the issue of maintenance."

Focusing on Carol's "reasonable and necessary living expenses," Judge Frederick found them to be "at least $2,500.00 per month," or $30,000.00 per year. By the time of

the divorce Carol was still working as a secretary for the school district, but she had also been elected to the Leoti City Counsel, raising her gross annual income to "$18,031.00 per year." Judge Frederick concluded: "With these amounts in mind, it is painfully obvious, for some period at least, that [Carol] is deserving of spousal maintenance in order to regain her financial footing."

"Based upon [Carol's] need and [Tim's] ability to pay," Judge Frederick ordered Tim to pay $185 per month, or "one-twelfth 1/12 of five percent (5%)" of his gross income for the prior year, from July 1, 2003, until May 1, 2004. Because the judge anticipated Tim would reduce his own debt, and also because child support would end once the youngest child reached majority, he ordered Tim to pay "one-twelfth (1/12) of ten percent (10%)" of his income for the second year, and then "one-twelfth (1/12) of twenty percent (20%)" for "at least" the third through fifth year.

Judge Frederick made no findings on Carol's need and Tim's ability to pay after 5 years, but instead reserved:

> "the power to hear subsequent motions for reinstatement of maintenance if such a motion is filed prior to the expiration of the stated period of time for maintenance payments. Upon motion and hearing, the Court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the Court, but the reinstatement shall be limited to a period of time not exceeding one

hundred twenty-one (121) months. [Carol] may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the Court may exceed one hundred twenty-one (121) months."

There was no appeal from Judge Frederick's orders.

In March 2008, Carol filed for reinstatement of maintenance. In August 2008, Carol and Tim, now 48 and 50 years of age respectively, were the sole witnesses at an evidentiary hearing before Judge Quint. Tim testified that he was the vice president of crop production for the Garden City Co-op. This was his second job change since the divorce; from 2004-2006 he had worked at a grain facility in Shallow Water, Kansas. Tim said his gross income in 2007 was $98,792.

At the hearing, Carol's counsel objected to any questions about the divorce, itself. Carol's counsel argued "what happened back at the time of the divorce" was irrelevant, and that the only issue was the parties "circumstances now . . . the future income, and needs." Judge Quint disagreed, stating, "I don't see in the statute the circumstances now being listed as the terminology. Circumstances would in my opinion include how the parties separated in the divorce and the property they carried away."

The rest of the hearing largely focused on the 5 years since the divorce, with only occasional reference to events before the divorce. Beginning with the division of property, Tim testified that Judge Frederick had assigned him $31,000 in debt, which was the gross figure, not the net figure which was reduced by the inclusion of some assets. Tim lived with his parents for 2 months after the divorce and then moved into low-income housing. In 2004, a friend cosigned Tim's mortgage on a house he purchased upon being transferred.

Tim then sold that house when he moved to his employment in Garden City. The new house was more expensive, but Tim believed he could afford it because he "thought maintenance was over." Tim testified:

> "Carol's had the same opportunity, has had the same time to better herself, like I have over the last five years. I have worked my rear end off, being able to move, take on more responsibility, and take all the risks, the health risks, the whole thing. I mean, I have been able to improve myself by determination."

Carol continued to work as a secretary in Leoti. She remained with the school district until December 2004, when she went to Seaboard Farms, and in March 2006, she moved to her latest employment at Western State Bank. Carol increased her wage and benefits slightly with each move, but she knew of no better paying jobs in Leoti for which she was qualified. Her gross income in 2007 was $21,722, which included

$1,405.16 for the last 6 months of her final term as city commissioner.

Carol described how she converted her Chapter 13 plan to a Chapter 7 proceeding in October 2003. Bankruptcy documents show Carol converted to Chapter 7 after the trustee had twice moved to dismiss the Chapter 13 case for failure to make plan payments, and a day after the bankruptcy court had actually dismissed the case.

Tim asserts in this respect that "the bulk of [Carol's] divorce debts, if not all of them, were satisfied in 2004 when [she] obtained her Chapter 7 bankruptcy discharge and shortly thereafter when [her] parents purchased the marital homestead and paid off the mortgage and past due taxes." While Tim cites Carol's testimony that "[e]verything from the bankruptcy would have been discharged," Carol also testified that she remained liable for all debts incurred after filing for bankruptcy, but no precise figure was provided.

With regard to post-divorce financial developments, Carol testified she found a job in Garden City with a slightly higher wage, but the increase would not "make up for a difference in living expenses." Moreover, most of her family lived around Leoti.

Carol's parents bought the house she had received in the property division, liquidated the indebtedness associated with it, and then sold or exchanged that house for another, smaller house in Leoti. Carol's parents allowed her to live in the smaller house

rent free, with Carol paying utilities and insurance.

As for Carol's post-divorce debts, she stated that she had incurred slightly over $24,000 in debt since March 2003. $16,000 of this debt was a loan for a new Jeep purchased in November 2006. Carol testified that her previous automobile had "150,000 miles, and it needed some extensive repairs." Carol's payments on the Jeep were $392.44 per month, and at the time of the hearing she had already refinanced this loan because of missed payments. Carol also testified that she had purchased the Jeep with the expectation that maintenance would continue.

Carol testified about a $4,000 loan from Western State Bank obtained in June 2007 and refinanced in 2008 for an additional $1,000. Carol used the first $4,000 to pay medical and dental expenses for two of her adult daughters and for herself, and the additional $1,000 paid living expenses after maintenance payments stopped in May 2008. Carol also received an $800 gift from an individual during the summer of 2008.

Carol had three credit cards, on which she owed a total of $3,300. She had used the credit cards to travel to Wichita and Manhattan to see her daughters, and to purchase Christmas presents. She visited Disney World and paid for the expenses from a tax refund. Although she traveled to Mexico, she testified "that was not paid for by me."

Carol's domestic relations affidavit showed she spent $52 per month for a newspaper and cable television, $173 per month for telephone service, $49.95 per month for internet service, $85 per month on pets, and $100 per month on entertainment.

Carol asked the district court to order the same rate of maintenance "that was in the original decree," for another 121 months. She stated her intent to "clean up some of the debt that I have." She conceded, however, that she had incurred this debt while receiving maintenance.

Judge Quint took the matter under advisement and on October 9, 2008, he filed a journal entry. With regard to the original division of property, Judge Quint found the "[d]ivision of assets at that time seems to have produced an award to [Carol] in the amount of $202,248. [Tim] seems to have received approximately $22,239. The house does not show any mortgage debt and several assets appear to be free and clear."

Judge Quint also stated it was important that Judge Frederick had "established a rather limited time frame for maintenance as opposed to the statutory limitation of 121 months." He later cited to *In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 827 P.2d 1222, *rev. denied* 251 Kan. 938 (1992), for the factors district courts should consider in setting maintenance, and stated "the [party's] needs and current overall financial situation" were the only factors not "available for consideration by the original trial court in setting the 5 year limit on maintenance."

As for the "financial consideration and conditions" Carol "now finds herself in," Judge Quint held they had "nothing to do with the marriage." He concluded, "[Carol] has overextended herself and relied upon an income source that had a . . . termination date. There is no legal obligation on [Tim] to bail her out of a situation that she has created for herself." Judge Quint denied the motion, and Carol appeals.

The Standard Used by the District Court to Consider the Reinstatement Motion

Carol contends a district court considering a motion to reinstate maintenance may weigh only "the circumstances of the parties as they exist at the time of the hearing, the future income of the parties and the needs of the parties." She complains Judge Quint "went well beyond this scope, including not only a reexamination of the matters determined in the original divorce action in 2003 but also allowing what amounted to an achievement award hearing with kudos going to [Tim] and criticism and punishment going to [Carol]."

District courts have wide discretion in setting maintenance and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003). The power to grant maintenance is strictly statutory. *Marshall v. Marshall*, 208 Kan. 63, 66, 490 P.2d 388 (1971). "This court has plenary review when interpreting a statute." *In re Marriage of Evans*, 37 Kan. App. 2d 803, 805, 157 P.3d 666 (2007).

K.S.A. 60-1610(b)(2) provides, "[t]he [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*." (Emphasis added.) Contrary to Carol's assertion, the plain statutory language does not limit the district court's consideration to only those circumstances temporally present on the day of the reinstatement hearing. Although Carol cites cases from foreign jurisdictions, the question is answered by the plain and unambiguous language of the Kansas statute. See *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009) (courts do not speculate or apply broad readings where the statutory language is plain and unambiguous.). There is no need to look further. See *In re Marriage of Monslow*, 21 Kan. App. 2d 386, 388, 900 P.2d 249 (1995), *aff'd* 259 Kan. 412 (1996) (where question regarding maintenance was what "Kansas statutes do and do not permit" this court does "not view the decisions of our sister states as carrying great significance.").

Next, Carol attempts to limit K.S.A. 60-1610(b)(2) to initial awards of maintenance based on language from *In re Estate of Dahlstrom*, 26 Kan. App. 2d 664, Syl. ¶ 4, 992 P.2d 1256 (1999), *rev. denied* 268 Kan. 887 (2000): "[T]he court's determination of *reinstatement* of maintenance must be based on a realistic evaluation of the parties' circumstances, future income, and needs." (Emphasis added.) Carol suggests this language applies to "present circumstances as they exist at the time of the hearing," and that the "past circumstances of the parties at the time of the original divorce decree" would be out of bounds because they "have already been considered by the original Trial

Court."

While *Dahlstrom* appears to be the only Kansas case dealing with reinstatement, Carol's supposition of a special rule in reinstatement cases is unwarranted. At the outset, *Dahlstrom* construed K.S.A. 60-1610(b)(2), and the plain language of that statute is contrary to Carol's suggestion. Second, there is no conflict between *Dahlstrom*, which considers "the parties' circumstances" upon reinstatement, and the language of K.S.A. 60-1610(b)(2), which speaks of "all of the circumstances." Finally, *Dahlstrom* took its language from *Sedbrook*, which was not a reinstatement case. See 26 Kan. App. 2d at 667; 16 Kan. App. 2d at 669. There is no standard for maintenance other than K.S.A. 60-1610(b)(2).

Moreover, Judge Quint did not reexamine "the matters determined in the original divorce action in 2003," as Carol insists. Judge Quint could not have done so, given that Carol did not support reinstatement with evidence from the marriage itself, such as asserting any sacrifice she might have made to her own career prospects, or any assistance she might have provided to Tim with his career. See, *e.g.*, *Day*, 31 Kan. at 759 (maintenance was proper where parties were married for 28 years, husband earned twice that of wife, and wife worked on farm so husband could work full-time for telephone company); *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 850, 32 P.3d 1212 (2001), *rev. denied* 273 Kan. 1035 (2002) (no abuse of discretion where district court ordered maintenance to achieve equal incomes and parties were in "a long-term relationship . . .

where each contributed substantially to the relationship").

Carol objected even to consideration of events *after* the marriage, and she continues this objection on appeal:

> "[B]y allowing evidence of and assessing the achievements and failures of the parties between 2003 and 2008 and then issuing his decision that [Carol] has 'over extended herself' and that [Tim] is under no obligation 'to bail her out of a situation that she has created herself' the court has clearly undertaken a fault-finding mission that appears to be directly contrary to the ruling of [*In re Marriage of Sommers*, 246 Kan. 652, 792 P.2d 1005 (1990)], that it is the legislative intent of the legislature of the State of Kansas that fault not be considered by the trial court in considering the financial aspects of a marriage dissolution."

Although Carol objected below to consideration of evidence other than the parties' current circumstances and future prospects, her objection was solely temporal, *i.e.*, that the district court was considering past events. She did not specifically object—as she now does on appeal—that the evidence showed fault. It is well settled that, "a party may not object to evidence on one ground at trial and then assert a different objection on appeal." *Butler v. HCA Health Svcs. of Kansas, Inc.*, 27 Kan. App. 2d 403, 435, 6 P.3d 871, *rev. denied* 268 Kan. 885 (1999).

Even if this court were to consider the issue, Judge Quint did not consider fault as that word was used in *Sommers*. Our Supreme Court defined "'fault'" in *Sommers* as "a term of art relating to the only fault ground contained in K.S.A. 60-1601(a) (failure to perform a material duty or obligation)." 246 Kan. 652, Syl. ¶ 1. Thus in *Sommers* the issue was whether a trial court had erred in "admitting evidence of . . . alleged infidelity . . . and in considering the same" when making the property division. 246 Kan. at 659. Our Supreme Court held the trial court had erred in admitting evidence of fault:

> "The decision to seek a divorce on the grounds of incompatibility or on fault should not be made on the basis that an allegation of fault might result in a party being awarded a greater share of the parties' accumulated hoard of nuts or a lesser share of accumulated debt." 246 Kan. at 659.

There was no similar fault at issue here. Judge Quint, therefore, did not consider fault in violation of *Sommers*.

In a related argument, Carol specifically challenges Judge Quint's understanding of Judge Frederick's 2003 journal entry. Carol first attacks Judge Quint's finding that Judge Frederick had awarded her $202,248 in the property division, calling it "simply wrong."

Preliminarily, Carol merely identifies the error and moves on, listing it among others as she complains of Judge Quint's willingness to consider prior events: "When

another judge goes back 5 years later and tries to look at the findings previously made for use in a motion which should be based solely upon present circumstances, that judge has very little chance of getting it right." Although Carol identifies ways in which Judge Quint allegedly misconstrued Judge Frederick's orders, she does not explain how the errors were reversible. Issues not briefed are deemed waived or abandoned. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009).

Tim does not address Judge Quint's finding regarding the total value of the award, but he acknowledges: "Clearly the homestead . . . had a mortgage debt at the time of the original divorce in 2003." Tim maintains Judge Quint's apparent finding to the contrary was "irrelevant and harmless in light of the later purchase of [Carol's] home by her parents and her living there rent free." Indeed, without reference to a particular date, Judge Quint's order did find, "The house does not show any mortgage debt." Based on testimony presented at the hearing on Carol's motion for reinstatement, there was substantial competent evidence to support this finding. At the time of her motion for reinstatement, as a consequence of her parents' generosity, Carol was not burdened by any home mortgage debt.

Carol also speculates that certain findings originally made by Judge Frederick and restated by Judge Quint in his order regarding the bankruptcy proceedings suggest the district court improperly considered factors apart from those set forth in K.S.A. 60-1610(b)(2). This argument is speculative. As discussed more fully below, Judge Quint's

order properly cited the relevant statute and case law applicable to his decision. Given that Judge Quint's order made several findings regarding Carol and Tim's current financial circumstances, anticipated future income and needs, his recitation of certain aspects of Judge Frederick's journal entry does not imply any impropriety in decision making.

Whether the Denial of Reinstatement of Maintenance Was an Abuse of Discretion

Finally, Carol contends the district court's denial of her motion was an abuse of discretion. As already noted, district courts have wide discretion in setting maintenance. Judgments on maintenance are not disturbed absent a clear abuse of discretion. See *Day*, 31 Kan. App. 2d at 758. "Discretion is abused if no reasonable person would take the view adopted by the court." *In re Marriage of Hedrick*, 21 Kan. App. 2d 964, Syl. ¶ 7, 911 P.2d 192 (1996).

"Many of the statutory considerations relating to the division of property by case law are required to be considered in the determination of maintenance." *Sedbrook*, 16 Kan. App. 2d at 670-71.

> "The facts which may be considered in determining the need and amount of maintenance are age of the parties, present and prospective earning capacities, the length of the marriage, the property owned by each

party, the parties' needs, the time, source, and manner of acquisition of property, family ties and obligations, and the parties' overall financial situation." *Day*, 31 Kan. App. 2d at 758 (citing *Sedbrook*, 16 Kan. App. 2d at 671).

The evidence produced at the hearing established that Carol was 48 years old while Tim was 50 years old. They had a 24-year marriage. At the time of the hearing their three children had emancipated.

For the 5 years following their divorce, Tim had provided maintenance totaling $53,053.90. While Carol's income had slightly increased from $18,031 to $21,722 over the past 5 years, Tim's income had almost doubled, with gross earnings of $98,792 in 2007. Both parties had similar education and training. Tim, however, pursued job opportunities in new communities that resulted in higher income while Carol chose to remain in her home community of Leoti.

The district court heard evidence that Tim had accepted the financial realities of the divorce by taking Chapter 7 bankruptcy, living with his parents, living in low-income housing, and then working his way back to financial independence.

On the other hand, Carol's acquisition of new debt was uncontroverted. As Judge Quint found,

> "None of the debts reflected in the Domestic Relations Affidavit of [Carol] are identified as debts in the Decree of Divorce. The $24,356 of new debt was incurred after the divorce and is solely as a result of [Carol's] voluntary choice to incur such debt beyond her assets or apparently, ability to pay."

The record shows that Carol borrowed for her daughters' benefit, for nonessential trips and entertainment, and spent a tax refund on a vacation. While it appears that Carol needed to replace an aging motor vehicle, it is less clear why she chose to purchase a new vehicle which resulted in considerable debt that, within a short period of time, required refinancing. Considering that Carol was living rent free in a small town on about $21,000 of annual income, a reasonable person could conclude it was fair, just, and equitable for her to bear the costs of her own maintenance rather than to continue relying upon Tim.

A fair, just, and equitable determination of maintenance must be based on the facts of each case. *Clugston v. Clugston*, 197 Kan. 180, 184, 415 P.2d 226 (1966). In reviewing this matter, "it is irrelevant whether this court would have made the same determination," *Baumgardner v. Baumgardner*, 207 Kan. 66, 71, 483 P.2d 1084 (1971) as the district court. We conclude, however, that Carol has failed to show how no

reasonable person would take the view adopted by the district court. *Hedrick*, 21 Kan. App. 2d 964, Syl. ¶ 7.

Affirmed.