

NOT DESIGNATED FOR PUBLICATION

No. 100,940

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

KENDON RINDELS,  
*Appellee,*

and

ANGELA RINDELS,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Saline District Court; JEROME P. HELLMER, judge. Opinion filed  
January 29, 2010. Affirmed.

*Bobby J. Hiebert, Jr.*, of Law Office of Bobby Hiebert, Jr., of Salina, for the  
appellant.

*Robert S. Jones*, of Norton, Wasserman, Jones & Kelly, L.L.C., of Salina, for the  
appellee.

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

*Per Curiam:* Kendon and Angela Rindels divorced after a marriage of almost 5 years. The district court divided their property after an evidentiary hearing. Angela appeals that order of division, arguing that the court unfairly and inequitably divided the parties' assets. We find the district court did not abuse its discretion and affirm.

*Factual and Procedural Background*

The relevant facts in this case are essentially undisputed.

The parties married in May 2002. At that time, they lived in Evansville, Indiana. Kendon worked for Blue Beacon International. He started there during his college years and earned various salary raises and promotions. In 2002, he made approximately \$80,000 yearly.

In early 2006, Blue Beacon offered Kendon the chance to relocate to Salina, Kansas. Upon his relocation, Kendon earned \$94,044 annually. In order to assist his relocation, Blue Beacon gave him a \$15,000 housing allowance for the purchase of a home. The terms of the allowance stipulated that if Kendon were to leave Blue Beacon prior to March 2011 (5 years from the date of the allowance), he would have to pay back the \$15,000 within 90 days.

In January 2006, Kendon and Angela purchased a home for \$255,000 in Salina. They borrowed \$185,000 and paid \$70,000 down. The down payment included the \$15,000 housing allowance and \$55,000 of their money.

At the time of the marriage in 2002, Angela worked at Fifth Third Bank in the Management Trainee Program, where she made approximately \$61,115 yearly. She later worked for Western and Southern Financial Group, where she made an average salary of \$47,000 to \$55,000 yearly. Angela resigned her job with Western and Southern in order to follow Kendon in his relocation.

Upon moving to Salina, Angela initially had difficulty finding work. Eventually, she obtained employment at Iron Street Securities, where she only earned \$200. She then began working at First State Kansas as a teller, where she made \$10 per hour. She subsequently gained employment at UMB Bank as a branch manager, where she earned an annual salary of \$38,000.

During the marriage, the parties maintained separate finances, checking accounts, annuities, and retirement accounts. They attempted to commingle their assets for a short period during 2004 to 2005 but quickly returned to a system of separated finances.

Kendon and Angela separated on January 3, 2007. Since then, Kendon has resided in the marital residence and has been responsible for mortgage payments. As of the separation date, the parties still owed \$186,739.73 on the residence.

In March 2007, Kendon filed a petition for divorce on grounds of incompatibility. Angela filed an answer and cross-petition for divorce on grounds of incompatibility. Prior to the trial, both parties filed various domestic relations affidavits (DRA) and settlement proposals. In December 2007, the district court entered a decree granting Kendon's petition for divorce on grounds of incompatibility. It then set an evidentiary hearing on the remaining issue of property division for January 2008. The parties had no children between them, and both waived their rights to spousal maintenance.

During the evidentiary hearing, both parties presented trial notebooks, which contained detailed financial statements and their respective proposed settlement terms as to property division. In addition, both testified. According to the evidence, both parties brought assets to the marriage.

The evidence reflected that Kendon owned the following items at the time of the marriage: a Blue Beacon 411(k) retirement plan worth \$16,315.83; a Trans America annuity worth \$1,102.49; a 2002 Dodge pickup truck with an unknown value (apparently, it had a value of \$30,200 as of October 31, 2001, and a lien against it of \$10,000 at the time of the marriage); Fifth Third Bank account worth \$7,111.71; and a Wells Fargo

checking account worth \$2,560. The value of these items owned by Kendon totaled \$27,090.03, not counting the unknown value of the truck.

The evidence also reflected that Angela owned the following assets at the time of the marriage: a Western and Southern Annuity worth \$4,916.47, a First National Bank CD worth \$1,000, savings bonds worth \$225, and a Chrysler Sebring with an unknown value. (Apparently, it was purchased on June 5, 2001, for \$24,615 and \$20,006.55 of that amount was financed.) Not counting the automobile, these items owned by Angela amounted to \$6,141.47 in value.

The foregoing items, excluding the vehicles each owned, had a combined value of \$33,231.50 at the time of the marriage. Considering the amount each party owned compared to the total, the percentage of the assets brought to the marriage by Kendon came to approximately 81.5% and the percentage brought to the marriage by Angela came to approximately 18.5%. Apparently, the only debts of either party were the amounts owed on the two vehicles.

By the time of the trial—5 1/2 years after the marriage—some of these assets had significantly increased in value, most notably, Kendon's Blue Beacon 401(k) Retirement Plan and Angela's Western and Southern Annuity. Others had significantly decreased.

Also, the parties acquired other assets, the most valuable of which was the marital home previously referred to. The other assets also included new acquired bank accounts worth, according to the evidence, approximately \$2,443.65. Sometime near the trial, the parties sold the Chrysler Sebring automobile that Angela had brought into the marriage for \$5,600. The parties also accumulated various household goods and furnishings. The parties differed significantly as to the value of these items. However, neither offered any appraisals or expert opinions on these values, and the only evidence the court heard on the issue was the personal opinions of each.

Following the trial, the district court took the matter under advisement and requested that the attorneys provide financial summaries of their respective positions. Following receipt of that information, the court issued a journal entry in February 2008, dividing the assets and debts of the parties. In the journal entry, the court did not make findings as to the individual values of any of the assets. However, one can establish the values of each of the *financial* assets from the testimony and documents presented into evidence, all of which was essentially undisputed. Those values are set forth in the next two paragraphs of this opinion.

The district court issued a journal entry in February 2008. In it, the court awarded to Kendon the following assets:

1. Bennington State Bank account—\$1,125.36;
2. Fifth Third Bank Account—\$3,979.49;

3. Blue Beacon 401(k) Retirement Plan--\$92,380.79;
4. Trans America Annuity--\$2,947.23;
5. 2006 Dodge Ram Pickup Truck--value unknown; and
6. marital home purchased 1 year prior to the separation--\$255,000,

The court also assigned the following debts to Kendon:

1. SW National Bank (outstanding loan on the Dodge Truck)--\$4,840.72 (as of September 13, 2007);
2. 2006 real estate taxes on the marital home--\$4,345.88; and
3. First Horizon (the mortgage on the home)--\$186,739.73

In that same journal entry, the district court assigned no debts to Angela and awarded her the following assets:

1. Proceeds from the sale of her Chrysler Sebring--\$5,600;
2. Sunflower Bank account--\$1,318.29;
3. First National Bank CDs--\$1,296.54;
4. Savings bonds--\$281.45;
5. UMB IRA--\$1,520.68;
6. UMB 401(k)--\$1,426.63;
7. Western & Southern Annuity--\$27,688.51;
8. UMB checking account--\$0.00; and
9. UMB Savings account--\$0.00.

Additionally, the district court ordered Kendon to pay Angela an equalization payment of \$35,367 in any one of the following manners: (1) a cash payment, (2) a sale of the marital home, (3) a refinancing of the marital home, or (4) an execution of a QDRO in Angela's favor. As to the personal property division, the court ordered that each party should retain the furniture and household goods currently in their respective possessions. Last, the court ordered that in the event Kendon terminated his employment with Blue Beacon prior to March 2011, he would be solely responsible for repayment of the \$15,000 housing allowance, \$3,000 of which would be counted as equity toward the marital residence.

Angela filed a motion to reconsider on the basis that the district court had not fairly and equitably divided the parties' marital estate. She specifically challenged the district court's division of personal property, retirement accounts, and the marital residence. For the first time, Angela also argued that Kendon committed fraud when he failed to list on the Domestic Relations Affidavit that he filed prior to trial his Fifth Third Bank Account, which contained evidence of loans from his family. Although Angela conceded that such evidence was admitted and available at trial, she argued that its late addition to the record made it impossible to adequately review the documents.

In her appeal, Angela raises essentially the same arguments she raised in her motion to reconsider. Kendon argues that the district court did not err in dividing the



parties' property because it ordered an equitable distribution while still adhering to the parties' request to exclude consideration of premarital assets.

*Relevant Legal Standards and Scope of Review*

Under K.S.A. 2008 Supp. 60-1610(b)(1), a district court conducting a divorce proceeding:

"[S]hall 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, by: (A) A division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale."

See K.S.A. 23-201(b).

At the time of filing the divorce petition, all property owned prior to the commencement of the action becomes marital property, of which each spouse holds a vested yet undetermined possessory interest, K.S.A. 23-201(b). See also *Nicholas v. Nicholas*, 277 Kan. 171, 177-78, 83 P.3d 214 (2004).

K.S.A. 2008 Supp. 60-1610(b)(1) also provides that in dividing the parties' property, the district court shall consider the following factors:

"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 lack 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."

Under this statutory framework, a district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002); *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480, 193 P.3d 504 (2008). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the district court, then it cannot be said that the district court abused its discretion." *Schuck v. Rural Telephone Service Co.*, 286 Kan. 19, 24, 180 P.3d 571 (2008). An abuse of discretion may be found if a district judge's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

In dividing the parties' property, the district court is required to make a fair and equitable division of the property. *In re Marriage of Hair*, 40 Kan. App. 2d at 480-81. However, this requirement does necessitate an equal property division. *In re Marriage of Roth*, 28 Kan. App. 2d 45, 48-49, 11 P.3d 514 (2000). Upon assigning property, the district court may consider all of the parties' property, regardless of the method of acquisition. *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 848, 32 P.3d 1212 (2001), *rev. denied* 273 Kan. 1035 (2002).

#### *Analysis*

Here, the district court found that the parties maintained a system of separate control over their respective assets and debts. In addition, the court found:

"The record is clear that each party came into the marriage with certain assets and obligations that with the exception of the family residence at 2508 Katherine, Salina, Kansas and the increase in value of the petitioners retirement plan with Blue Beacon, both testified that they did not wish to make a claim against the other for any assets owned by either party prior to the marriage."

Evidence from the record affirms the parties' desires for an exclusion of premarital property from the division. At trial, Kendon requested that each party be given credit for

their respective premarital property and that each desired an equal distribution of the parties' marital assets. Angela advanced a similar argument for an equal property division—"split fair and equitable, 50% of what I have helped to earn throughout the marriage." Angela also requested that each party retain their premarital assets. However, she also requested an equalization payment of \$48,023.

Clearly, the district court awarded each party the assets each brought into the marriage along with any increase or decrease in the value of those assets. It then awarded the largest asset, the marital home purchased after the marriage and valued at \$255,000, to Kendon along with responsibility for the mortgage on the property in the amount of \$186,739.73. This gave him a net value in real estate of \$68,260.27. The court also ordered Kendon to pay Angela an equalization payment of \$35,367, an amount slightly more than one-half of the value Kendon received in real estate.

As we stated previously, it appears that Kendon brought to the marriage approximately 81.5% of the total of the assets owned by the parties at the time of the marriage, and Angela brought to the marriage approximately 18.5% of the total of the assets. When we apply the values established by the evidence to the assets awarded to each party, not counting the personal property items which we will discuss later, it appears that Kendon received a net value of approximately \$156,915.47 (value of awarded assets minus his assigned debts) and Angela received assets valued at approximately \$39,132.10 (no debts). Then, when the amount of the equalization

payment (\$35,367) is subtracted from Kendon's net value and added to Angela's assets, it appears that the division ordered by the district court ultimately resulted in Kendon receiving \$121,548.47 and Angela receiving \$74,499.10. The percentage of the total that each received of these assets then comes to 62% for Kendon and 38% for Angela.

As we noted, K.S.A. 2008 Supp. 60-1610(b)(1) requires a court to consider certain factors when dividing property in a divorce case. It appears that the facts of this case raise two of those factors to a higher level of relevance than the others. They are the duration of the marriage, and the source and manner of the acquisition of the property. Both factors support the district court's division of property in this case.

We first note that the parties were only married for a relatively short time. This weighs heavily in favor of a property division more in line with the parties individual assets rather than an equal division. In considering the source and manner of acquisition of property, this suggests that the party who brought the majority of the assets into this relatively short marriage should receive the majority of assets at the end of the marriage.

Another relevant factor for consideration here in making a just and reasonable division of the property under K.S.A. 2008 Supp. 60-1610(b)(1) is the fact the parties maintained separate finances, checking accounts, annuities, and retirement accounts during this short marriage. This obviously weighs in favor of an order of division along similar lines to the one made by the district court.

As to personal property items and household goods and furnishings left in the home, Angela argues the district court erred in not placing a value on the property and in not awarding her one-half of that value.

In its journal entry, the district court ordered that the parties retain the furniture and household goods in each party's possession. The court declined to order any adjustments in the personal property each possessed at the time of trial on the premise that the parties had already divided the property prior to the hearing.

The evidence reflected that after the parties separated, they reached an agreement on personal property division and divided their property accordingly. At some point prior to the trial, Kendon learned from his attorney that Angela desired additional personal property items from the residence.

At the evidentiary hearing, Kendon valued the personal property in the home at \$2,080. Angela valued the same property at \$21,120 to \$22,355. Neither party offered any appraisals or expert testimony beyond their own bare opinions as to value of any of the property.

Under these circumstances, the district court did not err in declining to further adjust the parties' personal property possessions and in simply ruling that each should retain what they currently had in their possession.

In summary, it cannot be said that no reasonable person would have made a division of property similar to that made by the district court here. The court did not abuse its discretion. It was not unreasonable to award Kendon a larger share of the assets. Despite the fact that Angela only received an estimated 38% of the marital estate not counting personal property, the award was supported by the short duration of the marriage, the premarital nature of certain property, and the parties' pattern of keeping separate finances. This percentage Angela received was substantially higher than the percentage of total assets she brought to the marriage. As to personal property, the parties had agreed to a division prior the trial and neither presented any convincing, creditable evidence that the agreement did not provide each with fair value.

#### *Angela's Claim of Fraud*

In arguing her motion for reconsideration after the entry of the property division order, Angela raised for the first time to the district court a claim of fraud on the part of Kendon. In denying the motion to reconsider, the district court stated that Angela had not sufficiently proven any fraud at trial.

Kendon argues at the outset that this court lacks jurisdiction to consider the issue on appeal since Angela did not raise it at trial. However, as we stated, the district court did consider the issue during posttrial proceedings. The inquiry for this court, then, is whether the district court erred in denying Angela's motion for reconsideration in which she raised the claim of fraud. We answer the question, "No."

The evidence at trial that gives rise to this issue begins in the summer of 2007 (after the filing of the divorce petition) when Kendon borrowed \$20,000 from three family members. He deposited the funds into his Fifth Third Bank Account. This evidence was presented at trial. Also at trial, Kendon testified that the loans were given to him by his family in order to assist in the settlement of the divorce proceedings. According to Kendon, under the terms of his agreements with family members, the \$20,000 loans were temporary advances that required repayment. Angela made no objection to this evidence when it was offered at trial.

During the hearing on her motion for reconsideration, Angela for the first time argued that the checks totaling \$20,000 were not loans but instead money Kendon "had secretly given to family members to hold for him." She conceded that evidence regarding the Fifth Third Bank Account and the familial loans was admitted and available at trial, but she argued that its late addition to the record made it impossible to adequately review the documents.



Angela's arguments on this issue fail for three reasons.

First, after Angela failed to raise the fraud claim during trial, she was precluded from raising this new argument in her motion for reconsideration. A motion filed pursuant to K.S.A. 60-259(f) provides the district court the opportunity to correct prior errors, reconsider its findings of fact and conclusions of law, and to make appropriate amendments and alterations thereto. *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001). Consequently, a district court properly denies a motion for reconsideration "where the moving party could have, with reasonable diligence, presented the argument prior to the verdict." *Wenrich v. Employers Mut. Ins. Co.*, 35 Kan. App. 2d 582, 590, 132 P.3d 790 (2006).

Second, the district court did not err in denying Angela's motion for reconsideration on her fraud claim because she failed to present any legal basis for her claim. In her written motion for reconsideration, at the evidentiary hearing on the motion, and again in this appeal, Angela has failed to mention any legal theory of fraud, why Kendon's actions constituted fraud, or whether such fraud constituted sufficient grounds for the district court to reconsider its judgment. Her failure to support her fraud claim with pertinent authority or to show why it is sound in the face of contrary authority is akin to a failure to brief the issue. See *State v. Conley*, 287 Kan. 696, 703, 197 P.3d 837 (2008). Her argument is arguably waived.

Third, Angela has failed to offer evidence proving that Kendon acted fraudulently. Fraud is never presumed but must instead be proven by clear and convincing evidence. *Cool v. Cool*, 203 Kan. 749, 755-56, 457 P.2d 60 (1969); *In re Estate of Latshaw*, 194 Kan. 747, 750, 402 P.2d 323 (1965). Clear and convincing evidence is not a quantum of proof but rather a quality of proof. Evidence is clear "if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." [Citations omitted.]" *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831, 837, 184 P.3d 967 (2008). Here, the only evidence presented at trial on this issue established that under the terms of the agreements between Kendon and his family members, their \$20,000 loans were temporary advances that required repayment. The only basis for the argument that Kendon secretly gave money to family members to hold for him is the bald, unsupported allegation of Angela and her attorney made after trial of this matter.

The district court did not err in denying Angela's motion for reconsideration.

Affirmed.