NOT DESIGNATED FOR PUBLICATION

No. 106,037

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

KAREN SUE JOHNSTON,
Appellee,

and

CHRISTOPHER LYN JOHNSTON,
Appellee.

(STEVEN C. ALBERG and ALBERG & ASSOCIATES, CHTD.,
Appellants.)

MEMORANDUM OPINION

Appeal from Linn District Court; MARK ALAN WARD, judge. Opinion filed May 4, 2012. Affirmed.

Steven C. Alberg, of Alberg & Associates, Chtd, of Olathe, appellant pro se.

Before LEBEN, P.J., STANDRIDGE and ARNOLD-BURGER, JJ.

LEBEN, J.: Attorney Steven Alberg filed an attorney's lien, or claim, for a fee of more than $180,000 after he completed his representation of Karen Johnston in her divorce case. But the district court denied him any fee because it concluded—after an evidentiary hearing—that Alberg had agreed to represent Johnston under a contingent-fee agreement. Under such an agreement, an attorney receives a percentage of the client's recovery rather than a more typical fee based on hours worked to be compensated at an

agreed-on hourly rate. But in divorce cases, attorneys are prohibited by law from entering contingent-fee agreements.

Alberg has appealed, claiming that his agreement with Johnston was for payment at an hourly rate and that he should receive a judgment against Johnston for that amount. But we must uphold a district court's factual findings whenever they are supported by substantial evidence, and the district court's finding that this was a contingent-fee agreement is supported by Johnston's testimony and other evidence. We therefore affirm the district court's judgment.

FACTUAL BACKGROUND

Karen Johnston hired Steven Alberg in 2007 to represent her in her divorce case. There was no written attorney-fee agreement. In April 2009, Alberg gave Johnston a letter that he said summarized his understanding of their oral fee agreement. The letter referenced both contingent-fee and hourly-fee arrangements: "[W]e have agreed that you will be responsible for attorney's fees at the rate of $175.00 per hour *or* I will receive fees consisting of 1/3 of any and all proceeds of any kind or nature received or recovered from Respondent." (Emphasis added.)

After the September 2009 trial of the divorce case, Johnston fired Alberg. In November 2009, Johnston and Alberg exchanged letters about the fee arrangement. While Alberg's April 2009 letter had referenced *either* fees at an hourly rate *or* one-third of "all proceeds" recovered, his November 2009 letter said that he and Johnston had agreed that he would receive both: "[W]e were doing the divorce itself for an hourly fee. We also agreed that I would be entitled to 1/3 of any recovery we could make in collection of the award." Johnston replied that her understanding had been that Alberg was working under a contingent fee for one-third of any recovery. Alberg filed an attorney's lien for unpaid fees of more than $180,000.

Both Alberg and Johnston testified during a January 2011 hearing. Alberg said that the one-third contingent fee would only kick in if he had to exert effort to collect on the judgment; otherwise, he was to be paid for his work at an hourly rate. Johnston said that she had never received billing statements in the mail and had paid Alberg only once for expenses, not for his hourly work. She said that their agreement was for Alberg to take one-third of the recovery instead of an hourly rate. Johnston said that it had been her proposal to pay Alberg a third of the recovery as incentive to work harder on the case. In a written ruling, the district court concluded that Alberg had entered into a contingent-fee arrangement, which is prohibited in divorce cases by the ethics rules that govern lawyer conduct. The district court extinguished the attorney-fee lien and set aside previous awards of attorney fees to Alberg. Alberg asked the court to reconsider, it declined, and Alberg appealed to this court.

ANALYSIS

The District Court Didn't Err in Finding a Contingent-Fee Agreement or in Denying Any Attorney Fees to Alberg.

The district court found that the parties had entered into a contractual agreement regarding payment of attorney fees and that they had agreed on a contingent fee. Whether a contract exists and what terms were agreed upon are questions of fact. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 901, 220 P.3d 333 (2009). We review the trial court's findings of fact to determine whether they are supported by substantial evidence and are sufficient to support the trial court's conclusions of law. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). "Substantial . . . evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion." 288 Kan. at 65. We do not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *Board of Miami County Comm'rs*

v. Kanza Rail-Trails Conservancy, Inc., 292 Kan. 285, 325, 255 P.3d 1186 (2011). After considering the district court's factual findings to see whether they are supported by substantial evidence, we then review its conclusions of law—such as the legal effect to be given the contract—without any required deference. See *Oliver*, 289 Kan. at 900; *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1141, 192 P.3d 614 (2008).

The district court's conclusion that Alberg and Johnston had a contingent-fee arrangement was based on substantial evidence: a letter written by Alberg, and Johnston's testimony. Let's start with the letter. Alberg sent it to Johnston to confirm the fee arrangement, though the letter was sent nearly 2 years after the representation had begun and only about 4 months before the divorce trial. Alberg referenced alternative fee arrangements, one of which was a one-third contingent fee on amounts recovered from Johnston's husband:

> "Karen, in light of my relationship with your family, we have continued on this case/quest for quite some time without formally rendering our longstanding oral agreement into writing as to my fees, costs and representation. In that regard we have agreed that you will be responsible for attorney's fees at the rate of $175.00 per hour *or I will receive fees consisting of 1/3 of any and all proceeds of any kind or nature received or recovered from Respondent*. As you know there are also 'costs' involved for which you will be ultimately responsible. In regards to any attorney fees awarded me by the court you need to know that does not remove your ultimate responsibility for the fees which will remain as above without credit or offset of your responsibility hereunder. In the event no proceeds are collected you are still responsible for the hourly fees as a minimum." (Emphasis added.)

Alberg contends that he was charging only an hourly rate for work on the divorce case and that the reference to a contingent fee "merely established a framework of intent" for fees related to future post-decree collections, if necessary. But nothing in the letter

limited the contingent-fee arrangement only to collection efforts taken after a divorce decree was obtained, and the phrase "any and all proceeds of any kind or nature" expressly would apply under the language to a property settlement or money judgment awarded in the divorce.

Johnston's testimony also supported the district court's conclusion. Johnston testified that Alberg "was going to get one-third of the property, not the maintenance, not the child support, instead of the hourly rate." She said she understood that she wasn't responsible for the hourly fees as a minimum and that "[w]hen [Alberg] handed me this letter, . . . he said, 'Don't worry, Karen, this is only for the Court,' when he handed it to me in his office."

Having determined that there's substantial evidence in support of the district court's factual finding that Alberg entered into contingent-fee agreement to represent Johnston in her divorce case, the district court's legal conclusion that Alberg may not recover *any* fee for his work is the correct result under Kansas law.

First, Kansas law clearly prohibits contingent fees in divorce cases: "A lawyer shall not enter into an arrangement for, charge, or collect . . . [a]ny fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement[.]" Supreme Court Rule 226, Kansas Rules of Professional Conduct, Rule 1.5(f)(1) (2011 Kan. Ct. R. Annot. 471-72). The rule is based on strong public-policy grounds. Public policy favors marriage, and making a lawyer's fee dependent upon the parties going through with a divorce so that there can be proceeds of a divorce settlement could put the attorney's interests in recovering a fee in conflict with the public policy of encouraging reconciliation. See *In re Jarvis*, 254 Kan. 829, 833-34, 869 P.2d 671 (1994); Rotunda & Dzienkowski, The Lawyer's Deskbook on Professional Responsibility § 1.5-3(e) (2010). Alberg counters that the Johnstons weren't likely to reconcile, but the ethics rules for

lawyers don't allow lawyers to charge contingent fees, which may pay the lawyer more, whenever the lawyer suspects the parties won't reconcile. Additionally, there are other public-policy reasons supporting the rule, *Jarvis*, 254 Kan. at 834; and the rule itself provides no exceptions. Contingent fees in divorce actions have long been considered void as against public policy in Kansas. *Dannenberg v. Dannenberg*, 151 Kan. 600, 603-04, 100 P.2d 667 (1940).

Second, because Alberg entered into a fee contract that's void as against public policy, he cannot recover a fee. Sometimes, when parties fail to agree on a contract but one provides services to the other, the party providing services may recover a reasonable fee under the legal theory that the other party has been unjustly enriched. Alberg has never expressly sought recovery in this case for unjust enrichment. But even if he did, Kansas follows the rule that there can be no recovery for unjust enrichment for services performed under a contract that's void as against public policy or otherwise prohibited by statute. *Ridgway v. Wetterhold*, 96 Kan. 736, 737-38, 153 P. 490 (1915); *Railway Co. v. Service*, 77 Kan. 316, 318-20, 94 P. 262 (1908); see *Woodmont Corp. v. Rockwood Center Partnership*, 852 F. Supp. 948, 955 n.12 (D. Kan. 1994).

In sum, we must accept the district court's factual finding that Alberg entered into a contingent-fee agreement in Johnston's divorce case. Because Alberg entered into an agreement that is void as against clearly established Kansas public policy, Alberg may not recover any fee for his work in the case. We therefore affirm the district court's judgment.