

NOT DESIGNATED FOR PUBLICATION

No. 105,862

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF,
KATHLEEN ANN ASHER,
Appellant,

v.

TIMOTHY W. ASHER,
Appellee.

MEMORANDUM OPINION

Appeal from Barton District Court; RON L. SVATY, judge. Opinion filed June 8, 2012. Affirmed.

Kip Johnson, of Hays, and *David J. Lund*, of Dewey & Lund, of Wichita, for appellant.

John T. Bird and *Carol M. Park*, of Glassman, Bird, Braun & Schwartz, L.L.P., of Hays, for appellee.

Before MALONE, P.J., PIERRON and BRUNS, JJ.

Per Curiam: This appeal arises out of a divorce action between Kathleen Asher and Timothy Asher. Kathleen appeals from the district court's division of assets and debts as well as from its award of spousal maintenance. She contends that the district court's division of the parties' debts and assets was not fair, just, and equitable. She also contends that the spousal maintenance awarded by the district court was inadequate. Finally, she contends that the district court should have granted her a new trial. Because we find that Kathleen has failed to show that the district court misconstrued the language of the prenuptial agreement and has failed to show that it abused its discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kathleen and Timothy were married on January 14, 1984. Prior to the wedding, on January 11, 1984, Kathleen and Timothy entered into a prenuptial agreement. The agreement stated that if the parties divorced, each party would receive "the property owned by each of the parties prior to their marriage including both real and personal property and including the property owned by each of the parties as described in Exhibit 'A' attached hereto." Exhibit "A" was a list of property owned by Timothy or Kathleen as of January 1984. At the time of the marriage, Timothy owned a substantial amount of farmland.

The prenuptial agreement noted that Timothy was receiving land as a gift from his mother, on which he and Kathleen were building a house (marital home). In the event of a divorce, the marital home was to be appraised by three appraisers to determine its fair market value. From that value, any indebtedness was to be subtracted and Timothy was to pay Kathleen one half of any equity in the marital home. Moreover, any personal property, cash, or items owned as joint tenants with right of survivorship acquired by the parties during their marriage was to be divided—with each party getting half and any debt on this property was also to be divided in half.

On March 30, 2009, Kathleen filed a petition for divorce from Timothy. Kathleen requested that the court make a fair and equitable division of the property accumulated during the marriage and order Timothy to pay maintenance to Kathleen. In her domestic relations affidavit, Kathleen asserted that she made \$2,000 a month and that Timothy made \$8,583 a month. The district judge entered temporary orders, which included that Timothy pay Kathleen \$2,000 a month in maintenance.

On May 5, 2009, Timothy filed a motion to set aside or modify the temporary orders, arguing the orders were excessive. On June 23, 2009, the district judge entered a

journal entry ordering that temporary maintenance payments be continued but awarding temporary possession of the marital home to Timothy. On March 4, 2010, Timothy filed another motion in an attempt to terminate or modify the temporary maintenance. In response, Kathleen also filed a motion to modify the temporary maintenance, arguing that she was unable to meet her monthly obligations on the amount provided. On August 31, 2010, the district judge reduced the amount of temporary maintenance to \$400 a month and stated he would take any overpayment into consideration at trial.

A trial was held on September 16, 2010. On the day of the trial, Timothy filed proposed findings of fact and conclusions of law in which he suggested that each party should keep the personal property currently in their possession and that Kathleen should receive a lump sum equalization payment of \$17,400. Timothy also proposed that he pay Kathleen \$300 per month for maintenance, based an income of \$50,000 for him and an imputed income of \$30,000 for her. Timothy further proposed that he keep all of the debt on the farm equipment and land, the debt to his mother, and any consumer debt in his name. Likewise, he suggested that Kathleen keep all of the consumer debt incurred by her in her name. Following the trial, Timothy filed a supplement to his proposed findings and conclusions, in which he reiterated his position and stated that \$333 per month would be a proper amount of maintenance.

~~Kathleen also submitted proposed findings of fact and conclusions of law~~

following the trial. Kathleen suggested that Timothy should pay her \$25,740.66 within 30 days of the district judge's decision and another \$25,740.67 in 6 months. Kathleen also suggested that she be awarded a one-fourth royalty interest in a certain real property and a three-fourths interest in another property. But she did agree that Timothy should be given credit for excess maintenance payments. Further, Kathleen requested that she receive monthly maintenance payments of \$1,555.06, based on Timothy earning in excess of \$93,000 and her being unemployed. In addition, Kathleen requested that Timothy pay her attorney fees in the amount of \$12,000.

After considering the evidence presented by the parties, the district judge granted the divorce on November 17, 2010. In the journal entry, the district judge adopted the findings of fact and conclusions of law proposed by Timothy in his trial brief and supplemental pleading. Specifically, the district judge found that Timothy should "receive as his sole and separate property the Barton County land and minerals, the residence, the Wallace County real estate, the Stafford County real estate, all machinery and equipment, cattle, and all personal property in his possession, and that testified to by the parties that should be his" The journal entry also set out the personal property to be awarded to Kathleen and set forth the debt for which each party was to be responsible. Further, the district judge ordered Timothy to pay Kathleen an equalization payment in the amount of \$33,500, but gave him credit for \$26,672 for the overage paid in temporary maintenance during the pendency of the divorce action, leaving a balance of \$6,828. Finally, the district judge ordered Timothy to pay spousal maintenance in the amount of \$333 a month for a period of 120 months.

Subsequently, Kathleen filed a motion for a new trial and/or to alter or amend the judgment. Kathleen argued that she was surprised by Timothy's allegation at trial that she had agreed to use only one appraisal to value the marital home. Kathleen also alleged that Timothy failed to disclose certain assets prior to trial. Moreover, Kathleen asserted that the district judge had failed to consider the factors set forth in K.S.A. 2010 Supp. 60-1610 when making the division of property. Further, she contended the district court failed to independently review the evidence to make a fair, just, and equitable division.

In a journal entry filed on March 8, 2011, the district judge made more specific findings regarding the parties' financial situation. In addition, the judge stated that he had taken into consideration all of the factors set forth in K.S.A. 2010 Supp. 60-1610(b). The judge concluded that after reconsideration, Timothy owed Kathleen an equalization payment of \$33,500 reduced by \$30,500, which was the value of jewelry still in

Kathleen's possession as shown on her income tax return, leaving a balance of \$3,000 owed to Kathleen by Timothy.

In addition, although Timothy was ordered to pay \$300 per month in maintenance for 120 months, he was not required to begin these payments until he reached the point when he used up a \$27,200 credit for the overage paid in temporary maintenance. The judge ordered that Timothy pay and hold Kathleen harmless against all the agricultural debt, farm debt, debt to his mother, and any consumer debt incurred by him and that Kathleen pay and hold Timothy harmless for any credit card and other debt incurred by her. Finally, the district judge ordered that the parties equally divide their co op credits and Midwest Energy REA stock.

ISSUES PRESENTED AND ANALYSIS

On appeal, there are three issues presented. First, whether the district court abused its discretion when it divided the assets and debts of the parties. Second, whether the district court erred by failing to consider the appropriate factors in awarding maintenance. Third, whether the district court erred in denying Kathleen's motion for new trial.

Division of Assets and Debts

Because this case involves a prenuptial agreement that does not cover all of the parties' assets and debts, our standard of review is mixed. To the extent that we are required to interpret the parties' prenuptial agreement, we apply a de novo standard of review. See *Estate of Draper v. Bank of America*, 288 Kan. 510, 517, 205 P.3d 698 (2009); *Ranney v. Ranney*, 219 Kan. 428, Syl. ¶ 1, 548 P.2d 734 (1976). But we review the division of assets and debts not covered by a prenuptial agreement under an abuse of discretion standard. See *Vorhees v. Baltazar*, 283 Kan. 389, Syl. ¶ 2, 153 P.3d 1227 (2007) (the party asserting abuse of discretion bears burden of showing it). In adjusting

property rights in a divorce action, the district court is vested with broad discretion that will not be disturbed on appeal absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

Here, Kathleen contends that the district judge failed to consider factors set out in K.S.A. 2010 Supp. 60-1610(b) when dividing the property. But in the journal entry ruling on Kathleen's motion for new trial, the district judge expressly stated:

"Taking into account all of the factors in K.S.A. 60-1610(b) including the ages of the parties, the duration of the marriage, the property owned, the parties earning capacities, the time, source and manner of acquisition of the property, family ties and obligations, tax consequences, dissipation of assets, maintenance awarded and the prenuptial contract of the parties herein, the Court makes the following award of properties and debts."

Based on our review of the record, we find that the district judge reasonably interpreted the prenuptial agreement and applied the K.S.A. 2010 Supp. 60-1610(b) factors in an appropriate manner. As such, to the extent that the division of assets and debts were covered by the prenuptial agreement, we find that the district judge reasonably interpreted the contract as a matter of law. Likewise, to the extent that certain assets and debts were not covered by the prenuptial agreement, we find that the district judge appropriately exercised his discretion.

The marital home, which the parties built on real property given to Timothy by his mother prior to the marriage, is covered by the prenuptial agreement. In the event of a divorce, the prenuptial agreement provided that the value of the marital home was to be evaluated by three appraisers, and after deducting any secured indebtedness on the property, the balance was to be divided equally between the parties. But the record reflects that the parties—through their attorneys—agreed to use a single joint appraiser.

Because there was no debt on the marital home at the time of the divorce, each party was entitled to \$43,000 under the terms of the agreement. Although Kathleen argues that she should have received a payment in this amount "separate and apart" from the property and debt division, we do not find such a requirement in the prenuptial agreement. From a review of the record, it appears that the district judge appropriately gave Kathleen a \$43,000 credit when he divided the property and debt.

It is important to recognize that the farm-related debt incurred by the parties was not specifically addressed in the prenuptial agreement. Moreover, Timothy testified at trial that he had very little debt when he married Kathleen. He also testified that during the marriage, the couple had to borrow money against the line of credit on the farm to cover Kathleen's personal spending habits.

Furthermore, after considering the evidence, the district judge found that Timothy was a good and efficient farmer who came from a family of Kansas farmers. On the other hand, the district judge found that Kathleen had "used the farm line of credit to fund ill-advised and unprofitable ventures" and had diverted money for "non-essential and purely personal purposes." For example, the judge noted that Kathleen had used Timothy's name to obtain credit cards and then used the cards online to make purchases.

Ultimately, the district judge exercised his discretion to assign the majority of the farm debt to Timothy and to assign Kathleen that portion of the debt which she incurred using the farm line of credit as collateral. The district judge also exercised his discretion to treat the cattle and equipment owned by the parties at the time of divorce as replacements for the cattle and equipment owned at the time of the marriage. Based on the evidence presented at trial, we find that the allocation of the assets and debts was reasonable and we will not replace our judgment for that of the district judge.

We, therefore, conclude that the district judge appropriately interpreted the prenuptial agreement as a matter of law and that he properly exercised his discretion in dividing the assets and indebtedness.

Spousal Maintenance

The award of spousal maintenance is discretionary. K.S.A. 2011 Supp. 23-2902; see *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 706-07, 229 P.3d 1187 (2010). "The purpose of spousal maintenance is to provide for the future support of [a] divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other to pay." *In re Marriage of Hair*, 40 Kan. App. 2d 475, Syl. ¶ 3, 193 P.3d 504 (2008), rev. denied 288 Kan. 831 (2009).

In awarding maintenance, a district judge should take into consideration:

"(1) the age of the parties; (2) the parties' present and prospective earning capabilities; (3) the length of the marriage; (4) the property owned by the parties; (5) the parties' needs; (6) the time, source, and manner of acquisition of property; (7) family ties and obligations; and (8) the parties' overall financial situation." 40 Kan. App. 2d at 484.

Here, Kathleen contends that the district judge did not consider her contributions as a farm wife or her providing for the family. The record reflects, however, that the district judge considered Kathleen's contributions but found that her spending habits had caused the farming operation to incur additional debt. Kathleen also argues that the district judge did not consider the parties' future earning capacities or her health. But a review of the record reveals that the district judge was made aware of Kathleen's health condition but still concluded that she was capable of earning \$30,000 a year while Timothy was capable of earning \$50,000 a year. Accordingly, we find that the district

judge appropriately considered all of the pertinent facts and circumstances in deciding whether to award spousal maintenance and in deciding the amount to be awarded.

Motion for New Trial

Kathleen contends that the district court erred in denying her motion for a new trial under K.S.A. 60-259. Specifically, she contends that she was surprised by Timothy's position that the parties had agreed to use a joint appraiser and by his testimony that he had some assets at the time of the marriage that were not identified in the prenuptial agreement. Kathleen also contends that she did not have adequate time to present her case. We review the denial of a motion for new trial under an abuse of discretion standard. K.S.A. 2011 Supp. 60-259(a); see *City of Mission Hills v. Sexton*, 284 Kan. 414, 421, 160 P.3d 812 (2007).

Based on our review of the record, we do not find that Kathleen was unduly surprised or prejudiced concerning Timothy's position about the use of a joint appraisal to be used at trial. Additionally, we do not find that Kathleen was unduly surprised or prejudiced regarding the additional assets owned by Timothy prior to the marriage and liquidated during the marriage. According to the prenuptial agreement, Timothy would have received these assets had they still existed at the time of divorce and he did not ~~request any setoffs or other compensation. Moreover, the parties had more than 17~~ months to complete discovery regarding these issues, and Timothy was subject to cross-examination at trial.

Finally, Kathleen contends that she was not provided with sufficient time to present her case at trial. Evidently, Kathleen made an off-the-record request that the trial be set for 3 days instead of 1 day. Although she argues that she could have called other witnesses had the trial been longer, Kathleen does not identify who she would have called

or why their testimony was required. Thus, we conclude that the district judge did not abuse his discretion by placing a reasonable time limit on the presentation of evidence.

Affirmed.