NOT DESIGNATED FOR PUBLICATION

No. 107,641

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

CARROLL JANE NAUMANN,
Appellant,

and

GEORGE FREDERICK NAUMANN,
Appellee.

MEMORANDUM OPINION

Appeal from Jefferson District Court; GARY L. NAFZIGER, judge. Opinion filed November 21, 2012. Affirmed.

John R. Kurth, of Kurth Law Office Incorporated, P.A., of Atchison, for appellant.

George Naumann, appellee pro se.

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

Per Curiam: In this appeal we consider for the second time the propriety of the district court's division of the marital estate in this divorce action. More particularly, we are asked to consider the court's division of the farm where the parties lived. As made clear in appellant's brief: "It is from the Court's determination as to the division of the equity of the real estate (residence + 80 acres) which the Petitioner/Appellant appeals."

George and Carroll Naumann were married in 1998. This was the second marriage for each. Carroll sued for divorce in 2008. Carroll was age 71 at the time the divorce was

granted in 2009. She worked part time as a school bus driver and owned some rental properties. She had a monthly net income of $2,144. She also helped George on the farm. George was age 56 at the time of the divorce. He farmed and also drove a school bus but had become disabled from a heart attack during the marriage, and his income, if any, was uncertain.

The issues before the district court and before us relate solely to the disposition of the parties' homestead, an 80-acre farm. The farm had been part of George's parents' family farm. In 2001, the parties acquired the 80-acre parcel for $124,500. Most of the purchase price came from an $82,861 inheritance George received from his mother upon her death. The balance came from the proceeds of a $42,500 loan taken out by George and Caroll.

In dividing the marital estate the district court valued the farm at $205,000, subject to an outstanding mortgage of approximately $7,000. In making its overall division of the marital estate, the district court distributed the farm's net equity of $198,000 as follows:

> $42,500 marital contribution/$124,500 purchase price = 34.14% marital contribution.
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> 34.14% marital contribution X $198,000 net equity = $67,590 net marital equity.
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> $67,590 net marital equity/2 = $33,795 each to George and Carroll.

The district court set aside the farm to George and gave Carroll a $33,795 lien against the property.

Carroll moved for reconsideration. She argued, among other things, that George's inheritance had been commingled in the jointly held farm property, so the full $124,500 should have been treated from the outset as marital property, not merely the $42,500 loan proceeds. The district court denied Carroll's motion, and she appealed, contending, among other things, that the district court erred in not dividing equally between the parties the entire $198,000 net equity in the farm.

The Court of Appeals was not persuaded by Carroll's argument that the district court should have evenly divided between the parties the $198,000 net farm equity. But the court did determine that the district court abused its discretion in its treatment of the farm property because the district court went outside the proper legal framework in doing so. That is, the district court used "a mathematical formula to determine marital equity in the homestead rather than applying the statutorily required factors pursuant to K.S.A. 2010 Supp. 60-1610(b)(1)." *In re Marriage of Naumann*, No. 104,284, 2011 WL 2175947 (Kan. App. 2011) (unpublished opinion), at *1. Accordingly, the court remanded the case to the district court "for further consideration as to a proper division of the marital estate." 2011 WL 2175947, at *5.

On remand, Carroll's position was that the entirety of the farm property was marital property and the court must divide it equally between the parties by crediting her with half of its net value by (1) ordering the property sold and the proceeds divided equally or (2) setting aside to George the building and 10 acres of the homestead property and setting aside to Carroll the remainder of the farm.

George claimed he acquired the farm with inherited money and paid off the additional $42,500 loan without help from Carroll.

In deciding the matter following remand, the district court made findings regarding the duration of the marriage; the absence of children; the parties' ages,

occupations, and incomes; George's state of health and his disability; Carroll's health insurance coverage for George through her employer and the additional premium for George's coverage; Carroll's rental properties; the acquisition of the farm and the sources of the proceeds for its purchase; the current $205,000 value of the farm; and the $7,000 mortgage debt on the farm. The court then categorized these under the various factors to be considered pursuant to K.S.A. 2010 Supp. 60-1610(b)(1):

"The Court considers each as follows:

"1. The age of the parties:

"Petitioner is 71 years of age. Respondent is 56 years of age.

"2. The duration of the marriage:

"The parties were married for a period of 11 years; it was the second marriage for each party.

"3. The property owned by the parties:

"Petitioner owns other real estate that was awarded to her, a vehicle, and was awarded the personal property she brought into the marriage.

"Respondent owns no other real estate, has a vehicle, and some old farm machinery.

"4. The parties present and future earning capacities:

"The petitioner has income of $2,144.00 per month, is in much better health than Respondent, and is able to maintain her employment as she has in the past.

"Respondent has serious health problems which are unlikely to improve.

"This Court has observed Respondent's physical condition, cognitive function, and emotional distress, and it appears except for his farming endeavors on 80 acres, he is unlikely to maintain gainful employment in his current condition.

"5. The time, source, and manner of acquisition of property:

"The homestead was inherited by Respondent by a family agreement with his brothers incident to his mother's death. The acquisition was funded by Respondent trading them the $82,861.00 value of his inheritance from his mother's estate and paying an additional $42,500.00 from funds generated from mortgage payments on which were made during the marriage with marital income.

"The farming operation has been in conjunction with his brothers who shared in his inheritance of the family farm. They have shared equipment and labor for some time. The 80 acre homestead has been in Respondent's family for many years and was a part of the family farm.

"6. Family ties and obligations:

"Petitioner has family ties to relatives who farm in the same area as the Respondent. They have supported her during the divorce.

"Respondent has close ties with his brothers who own the rest of the original family farm. They have given him support during the divorce.

"7. Allowance of maintenance of lack thereof:

"No maintenance was awarded Respondent not withstanding his lack of income and health issues. This disparity is balanced by Petitioner's age.

"8. Tax consequences:

"Tax consequences were not an issue in the case.

"9. Such other factors as the Court considers making a just and reasonable division of the property:

"The acquisition of the homestead is a directly traceable transaction involving Respondent's inheritance in his own right from his mother. He and his brothers inherited real estate together. To distribute the real estate inheritance between them, appraisals were made and Respondent traded $82,000.00, the value of his inheritance, to his brothers and paid them an additional $42,500.00 to divide out the 80 acres and transfer it to him.

"The $82,000.00 is directly traceable to Respondent in his own right, and the $42,500.00 is directly traceable and was a joint effort of the parties acquired by a mortgage by the parties which was on which payments were made with martial assets acquired through the joint efforts of the parties.

"Thus the Court finds that for the homestead approximately 65% of the acquisition was made through traceable proceeds acquired by inheritance in the Respondent's own right and 35% through the Petitioner and Respondent's joint efforts.

"Considering the age of the parties, the duration of the marriage, the property owned and awarded to the parties, participation and future earning capacities, the time, source, and manner of acquisition of the property, family ties of the parties, lack of maintenance, and the traceability of contributions acquired in the Respondent's own right,

and contributions from the parties' joint efforts, the Court finds that Respondent is awarded the homestead."

The district court then distributed the farm property as follows:

"The Court finds it is fair, just, and equitable that each party is awarded one-half (1/2) of the equity accumulated by their joint spousal efforts; i.e. . . . equity $198,000 x 35% (the amount acquired by the parties' joint efforts) = $69,300 total accumulated joint spousal equity.

"Accordingly, Petitioner is awarded 50% of said total accumulated joint spousal equity or $34,650.00. Petitioner is granted a judicial lien in that amount against the real estate securing payment, together with interest, at the legal judgment rate from date of final judgment. Respondent is granted a period of eighteen (18) months from date of judgment to pay Petitioner said liquidated amount."

Carroll appeals the district court's division of the equity in the farm. She does not challenge the district court's allocation of the appreciation of the farm property during the course of the marriage. Her contention is simply this: When George contributed his inheritance to the purchase of the farm, the farm was acquired and held in joint tenancy. Thus, George's inheritance became comingled with the marital loan proceeds in the farm property. As a result, the only proper disposition of the farm was to divide its equity evenly between the parties. Carroll asks us to remand to the district court with directions to distribute to her one-half of the farm's value.

The district court has broad discretion in adjusting the property rights of parties 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). The party asserting that the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009).

In Kansas, a married person's inheritance remains his or her sole property. K.S.A. 23-201(a). However, any such property becomes marital property upon the commencement of an action for divorce. K.S.A. 23-201(b). Once the divorce action is commenced, it is the district court's task to make a "just and reasonable division" of the marital property. K.S.A. 2010 Supp. 60-1610(b). The statute enumerates the factors the district court is to consider, factors specifically discussed in the district court's decision upon remand. Those factors include "the time, source and manner of acquisition of property." K.S.A. 2010 Supp. 60-1610(b). But Carroll contends that in considering "the time, source and manner of acquisition" of the farm, the court must disregard George's use of inherited funds because the property, once acquired, was held by the parties in joint tenancy and became commingled with marital funds. She cites three cases for support.

The first is *In re Marriage of Hair*. How *Hair* supports Carroll's position is not exactly clear. In *Hair*, the wife contended that certain World Savings accounts that originally held husband's inheritance from his father had been commingled and largely spent. She argued that "the district court contradicted itself by finding that [husband's] inheritance was commingled and then awarding the World Savings accounts to [husband] as his separate property." 40 Kan. App. 2d at 481. The appellate court found no contradiction or abuse of discretion and stated:

> "Clearly the World Savings accounts . . . were individual assets given by [husband's] father to [husband] as inheritance. There was significant testimony, even from [wife], that [husband's] father had provided the couple with a CD . . . which remained a present asset traceable to [husband's] father.
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> . . . .
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> "Finally, [wife] misunderstands the commands of K.S.A. 23-201(b) and K.S.A. 2007 Supp. 60-1610(b) concerning the division of assets held in joint tenancy. These

> statutes do not prohibit the district court from setting aside joint accounts to one spouse where the district court can trace the funds to that party's inheritance." 40 Kan. App. 2d at 482.

We fail to see how *Hair* advances Carroll's cause. In any event, Carroll seeks to distinguish *Hair* by noting that in the present case, "[t]he inheritance could not be traced as it was commingled into the jointly held real estate." This ignores the direct holding in *Hair*. George's inheritance *was* commingled with loan proceeds, which were marital assets from the outset, in order to purchase the farm. Nevertheless, George's inheritance used as part of the farm purchase price remained clearly traceable and identifiable.

Next, Carroll likens her circumstances to that of the wife in *Almquist v. Almquist*, 214 Kan. 788, 522 P.2d 383 (1974). *Almquist* dealt with the division of inherited farm property. The parties in *Almquist* married young and lived on the husband's parents' property for 17 years. Husband's parents then deeded the property to the husband, and the parties continued to live there for 20 more years until the marriage ended. During this time, the parties raised four children on the property. In the divorce proceedings, the wife declined spousal maintenance, stating that she would prefer that her declining maintenance be considered by the court in its division of the property.

In dividing the Almquists' property, the district court set the farm over to the husband as his inheritance. On appeal, the Supreme Court found the district court abused its discretion in this decision and remanded the case with directions to give the wife a larger share of the property. In doing so the court stated:

> "The parties had made their home there for 36 years. Eileen Almquist went there as a teen-aged bride, and leaves there as a matron in late middle age. They raised their children to maturity there. The actual deed to Kenneth from his parents was almost 20 years old. This property, as we see it, was part and parcel of the family assets, regardless of its source." 214 Kan. at 792.

Carroll's circumstances are not comparable to those of Mrs. Almquist when considering the length of the marriage, the youthfulness of the parties when they married, whether the marriage was a first or second marriage, the length of time the parties lived on the property, and the rearing of her children on the property. Carroll argues that she, like Mrs. Almquist, did not request maintenance. But given George's disabled state and uncertain income, we do not view this as a major concession, particularly when the court apparently had to consider whether to require Carroll to pay maintenance to George. *Almquist* does not materially advance Carroll's cause.

Finally, Carroll asks us to consider our unpublished decision in *In re Marriage of Oakes*, No. 91,246, 2005 WL 217164, at *8 (Kan. App.), *rev. denied* 279 Kan. 1006 (2005). In that case, our court affirmed the district court's property division, rejecting one spouse's argument that generally each party should get half of the property inherited from one spouse's family. Although we noted, as Carroll points out, that neither party had commingled their assets with the other—something that's not true for the real estate at issue here—we also noted that the decisions in all of the cases cited to us in *Oakes* "turn on such a fact intensive analysis that they have little or no value as precedent in determining a property division under the facts presented here." 2005 WL 217164, at *8. The same is true in the case now before us.

Upon remand of this case to the district court, the panel noted that "we want to be very clear that on remand the district court has considerable discretion in determining a just division of the marital estate." *In re Marriage of Naumann*, 2011 WL 2175947, at *6. The panel further stated: "Our concern is that the district court enter detailed findings and conclusions of law consistent with the factors under K.S.A. 2010 Supp. 60-1610(b)(1)." 2011 WL 2175947, at *6.

On remand, the district court thoroughly discussed the factors enumerated in K.S.A. 2010 Supp. 60-1610(b)(1), including the time, source, and manner of acquisition

of the farm. The court did not divide the farm equity equally between the parties, but it was not required to do so. Thus, Carroll has failed to meet her burden of establishing an abuse of the district court's discretion in its division of the farm equity.

As a final note, George raises several complaints about the proceedings which we cannot consider. Those that were not presented to the district court for a ruling are not properly before us. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009) (stating that issues not raised before the trial court cannot be raised on appeal). Further, George has not cross-appealed with respect to any matter that was considered by the district court.

Affirmed.