

NOT DESIGNATED FOR PUBLICATION

No. 107,773

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

TIA T. O'NEAL,  
*Appellant,*

and

PATRICK O'NEAL,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed December 14, 2012. Affirmed.

*Daniel C. Walter*, of Ryan, Walter & McClymont, Chtd., of Norton, for appellant.

*Benjamin J. Fisher*, of Hutchinson, for appellee.

Before HILL, P.J., BUSER, J., and KNUDSON, S.J.

*Per Curiam:* This is an appeal from a divorce proceeding. Tia T. O'Neal and Patrick O'Neal were married almost 3 years—from March 8, 2008, to December 22, 2010—with one child born prior to the marriage. Tia appeals the trial court's division of property and its order which did not include an award of maintenance. Finding no error, we affirm the trial court.

## FACTUAL AND PROCEDURAL BACKGROUND

The division of property was contested in the district court. Patrick is employed by the City of Hutchinson, apparently as a firefighter. He testified to three retirement accounts—a "KP&F" account, a Roth IRA, and a 457 deferred compensation account. Tia requested half of these funds.

Patrick testified that the three accounts predated their marriage, that he contributed to the KP&F account but not to the Roth IRA and 457 deferred compensation accounts during the marriage, and that these last two accounts had actually declined in value. Neither party produced evidence regarding the amounts in the accounts, however, so the trial judge ordered Patrick to produce within 10 days

"the approximate value of his three retirement accounts at . . . the year end . . . January 1, 2011 [*sic*] . . . All I know is there [are] three accounts and I have no idea how much is in them. Since I'm supposed to make a decision based on how much is in them that might assist the Court in that endeavor."

The record does not show whether Patrick provided this information. The trial court made no findings regarding the amounts. As a result, on appeal, the amounts are unknown, as Tia acknowledges in her brief.

Tia also asked for "1/2 [e]quity" in the 1502 Willow Road property or "1/2 of [p]ayments from 8/2004-8/2010 (\$43,200)—5 payments of \$8,640 yearly." This property is a house that Patrick's father purchased in 2004. Tia and Patrick resided in the house beginning in 2004, making payments to Patrick's father equal to his mortgage payments.

Tia testified that Patrick's father was "financing it as a rental property because they could get a cheaper interest rate," with the expectation that at some point she and Patrick "were to finance it later in our names when we had a better credit rating." Tia

characterized this as a "verbal land contract," though some written evidence of the arrangement was produced at trial in the form of a document signed by Patrick and Tia acknowledging a debt of approximately \$15,000 to Patrick's father, including an unspecified amount for "[a]ll arrears in house payments for the years of 2008 & 2010." Because Tia and Patrick never resolved their credit issues, they never took over financing the house.

Patrick essentially agreed with Tia's account of the housing arrangement. Patrick testified that his father was not pooling their payments but using them to pay the mortgage, that his father needed the payments to pay the mortgage, and that if his father had sold the house the couple would have received nothing. There was no other testimony relating to the arrangement, such as whether the purchase price to Tia and Patrick would have been adjusted for payments already made. At the time of trial, Patrick lived in the house, but he was not asked about the current arrangement with his father.

There was considerable testimony regarding various items of personal property and debts that Tia and Patrick had accrued. The trial court complained "both parties testify as to what they pay, what they wanted the other to pay, what they will pay and quite honestly, it's virtually impossible for the Court to keep track." The trial court also noted that "on [Tia's] side, it's fairly easy because she wants all the bills paid by [Patrick] and she wants all the property she has and has listed out the property that she wants still yet." The trial court ordered Patrick to produce his own list of the property, debts, and how he proposed to divide them. The list is in the record, setting out items Patrick requested from Tia, items he would return, and his proposed division of the debts.

With regard to maintenance, Tia did not request any such support in her petition for divorce or in her motion for ex parte orders. The pretrial order included "[m]aintenance—amount and duration" as an issue, but at the start of trial on September 23, 2011, Tia's counsel advised the district court, "[W]e are here to divide the property

and the indebtedness." Patrick's counsel added, "[T]he only other issue that I'm aware of besides the property and debt assignment would be child support." Significantly, Tia did not testify to a need for maintenance, and in questioning, Tia's counsel referred to his client's "current husband." Tia's counsel also did not request maintenance in closing arguments. The record shows that the trial court did not rule on any request for maintenance.

After considering the evidence and listening to argument, the trial court awarded Patrick his retirement accounts. The trial court did not make a distribution of the house or the amounts Tia and Patrick had paid to Patrick's father. The trial court reasoned that since Tia and Patrick did "not own any real estate as no contract was ever signed," there was "no equity in the real estate to distribute." The trial court did order Patrick to pay the \$15,000 debt to his father, which included the missed payments. The trial court distributed the personal property and the remaining debts, making some adjustments based on arguments which continued after the initial journal entry. Tia appeals.

#### DISCUSSION

Tia argues the trial court abused its discretion in dividing the property and denying her maintenance.

At the outset, and as detailed earlier, the trial court did not *deny* maintenance for the simple reason that Tia did not request it. The trial court did consider "the allowance of maintenance or lack thereof" when dividing property, as it was required to do by statute. K.S.A. 2010 Supp. 60-1610(b); see K.S.A. 2011 Supp. 23-2802(c)(7). The trial court also considered the other statutory factors, and Tia does not allege the trial court applied the wrong legal standards. As a result, this court will consider whether Tia makes a "clear showing of abuse" by the trial court of its "broad discretion in adjusting the property

rights of parties in [a] divorce action[]." *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

First, Tia contests the trial court's finding that her "marriage [is] of short-term." Tia points out that she lived with Patrick for 4 years before marriage, a fact the trial court also noted. Tia then compares the total duration of her relationship with Patrick (which she counts as 7 years) to the courtship and marriage at issue in *St. Clair v. St. Clair*, 211 Kan. 468, 507 P.2d 206 (1973) (which she counts as 11 years). Tia concludes on this basis that, like in *St. Clair*, the trial court's division of the property "should shock the conscience."

In *St. Clair*, the parties met in 1958 and were married in 1960, after a "courtship of moderate length." 211 Kan. at 469-70. The divorce action was filed on April 3, 1970, and the decree was issued on January 4, 1971. In short, the duration of the marriage in *St. Clair* was a few months longer than 10 years, while Tia and Patrick were married a few months short of 3 years. Tia counts 9 years for the marriage in *St. Clair*, presumably based on the date of filing the divorce petition, but if the date Tia filed her petition were considered here, July 12, 2010, her marriage to Patrick lasted a little longer than 2 years. Quite simply, the durations of the two marriages are dissimilar.

Moreover, Tia provides no legal reason to equate the time she lived with Patrick before marriage with the time the parties in *St. Clair* were married. While a trial court must consider property "owned by either spouse prior to marriage," a trial court does not abuse its discretion by considering "the duration of the marriage," which is a statutory factor. K.S.A. 2010 Supp. 60-1610(b); see K.S.A. 2011 Supp. 23-2802(a),(c)(2). Indeed, the issue in *St. Clair* was whether the trial court had made "an inequitable distribution of the property accumulated by the parties *since the marriage*." (Emphasis added.) 211 Kan. at 469. Once again, the cases are dissimilar.

Tia next points out that the trial court found Patrick has a "higher earning capacity and will continue to do so for the foreseeable future." On the other hand, Tia claims she testified regarding "physical disabilities that do not allow her to enjoy full time employment." Since Tia does not cite the record for this claim, it is presumed to be without support. See Supreme Court Rule 6.02(d) (2011 Kan. Ct. R. Annot. 39).

Tia did testify that she "got injured two days after filing for divorce and haven't been able to work." She worked at the post office, and though she mentioned a denied Workers Compensation claim, it is unclear whether the injury in question occurred at work. Regardless, when asked whether she was currently working, Tia testified, "No, I'm [a] stay-at-home mom." When asked whether she could work, she responded, "I do still have physical disabilities with my back that I still seek treatment for." When asked to specify the disabilities, she answered, "It just depends on the job, you know. I can't sit for eight hours. I can't stand for eight hours. I have physical limitations ordered by my doctors."

Given this testimony, it is notable that Patrick presented a child support worksheet at trial which showed his annual income was \$53,064 and Tia's income was \$33,672. It is unclear how Patrick determined Tia's income, but the trial court accepted the worksheet and ordered child support based on it, a ruling Tia does not appeal. The trial court also specifically found: "Both parties have many years of earning capacity before them." Thus, while the trial court acknowledged Patrick's greater earning capacity, it did not find that Tia was disabled. Because Tia does not dispute the factual basis for this finding but only refers without citation to her own testimony, her argument regarding an alleged disability is waived or abandoned on appeal. See *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011).

Whatever Tia's earning capacity, it is certainly closer to Patrick's than the disparity found in *St. Clair*. The wife in *St. Clair* was employed as a stenographer at \$340 per

month before the marriage and had no employment while married. In contrast, her husband was a president of two banks, a partner in an insurance agency, and also traded stocks, earning \$95,465.82 in 1968 and \$86,337.38 in 1969. Contrary to Tia's legal argument, *St. Clair* is inapposite.

Tia makes further assertions in an attempt to show the district court's ruling in this case was "even more arbitrary than in *St. Clair*." She argues generally that the trial court failed to order reimbursement of "the expenses . . . she paid for [Patrick] after she left the marital home." For example, Tia claims Patrick and his son "ran up their cell phone bills to over \$300 a month each." Patrick denied this allegation at trial, testifying he paid about \$700 on the account after Tia filed for divorce and that when he tried to pay the following month his name was no longer on the account. The trial court split the cell phone charges between Tia and Patrick which, given the conflicting testimony, was not arbitrary or shocking to the conscience.

Tia claims that "she left the utilities to the home in her name" and Patrick "neglected to pay the utility . . . bills to the point where they became delinquent." As a result, Tia complains that the trial court failed to reimburse her for those bills. Tia does not, however, provide the amount of these bills. Moreover, our review of the record located no claimed debt to a utility company. Patrick did testify, "Tia's family as well as my family loaned us money from time to time to pay utilities," and the trial court ordered that "[e]ach party will be responsible for the debts owing their respective family members." Given the record on appeal, this ruling was neither arbitrary nor shocking to the conscience.

Tia asserts she wanted a pickup truck but Patrick refused, instead giving her a minivan titled in his name. According to Tia, "[t]his allowed [Patrick] to harass [her] by threatening to call her in for driving a stolen vehicle whenever he discovered that she

might be traveling." Tia argues that "[i]n *St. Clair*, the wife was at least allowed to keep her car that she had been driving."

It is true that the wife in *St. Clair* was permitted to keep a Cadillac she possessed at the time of trial. But Tia did not possess the pickup truck at the time of trial. According to Patrick, Tia took the minivan when she left because it was the vehicle she was regularly driving. And even the minivan was not in Tia's possession at the time of trial because she had returned it to Patrick.

Tia claimed she returned the minivan "because I was tired of the threats of being turned in as a stolen vehicle," but Patrick denied making any threats and testified Tia returned the minivan after wrecking it. Patrick also testified the pickup was not running at the time of trial. The trial court awarded Tia the minivan along with its title which, given the disputed testimony, was neither arbitrary nor shocking to the conscience.

Finally, Tia's complaints about the house should be mentioned in light of her request for a constructive trust. Tia did not request a trust below, so it is improperly raised for the first time on appeal. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). On the merits, Tia does not dispute her lack of equity in the house. She claims an interest in the payments made, but the legal basis is unclear. Tia testified that Patrick's father purchased the property "as a rental house." If that described the arrangement Tia and Patrick made with Patrick's father, Tia would lack any interest in rental payments. See *Walgreen Co. v. City of Madison*, 311 Wis. 2d 158, 185, 752 N.W.2d 687 (2008) ("Rent is not a right in realty, it is what is exchanged for an encumbrance upon a right in realty."); Black's Law Dictionary 1410 (9th ed. 2009) (rent: "Consideration paid, usu. periodically, for the use or occupancy of property."). But the record is inadequate to determine the precise arrangement. Tia has, therefore, failed to designate a record affirmatively showing error. See *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 283, 225 P.3d 707 (2010).

A review of the record shows Tia's remaining complaints may be similarly resolved. Her characterizations are either incomplete or not substantiated by the record. Because the trial court apparently considered the amounts in Patrick's retirement accounts and these amounts are unknown on appeal, the record is arguably insufficient to consider the division of property at all. For all of these reasons, Tia has not shown the trial court abused its discretion.

Affirmed.