

NOT DESIGNATED FOR PUBLICATION

No. 106,912

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JAMES J. MARTIN,  
*Appellant,*

and

TINA M. MARTIN,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Geary District Court; DAVID R. PLATT, judge. Opinion filed March 15, 2013.  
Affirmed in part, reversed in part, and remanded with directions.

*N. Trip Shawver*, of Wichita, for appellant.

*V. Linnea Alt*, of Altenhofen & Alt, Chartered, of Junction City, for appellee.

Before PIERRON, P.J., BUSER and LEBEN, JJ.

*Per Curiam:* James and Tina Martin were divorced, and a marriage settlement agreement was incorporated in the final divorce decree. Several years later, Tina filed a motion and affidavit under K.S.A. 20-1204a, alleging that James failed to comply with several provisions of the divorce decree. After a hearing, the district court found James in contempt. James filed a timely appeal. We affirm in part, reverse in part, and remand with directions.

### FACTUAL AND PROCEDURAL BACKGROUND

James and Tina were married on October 28, 1988. Two children were born of the marriage. On December 21, 2004, after about 16 1/2 years of marriage, James filed a petition for divorce in Geary County District Court. James had entered the United States Army in February 1990, and during the divorce proceedings, he was on active duty in Iraq.

On May 9, 2005, the parties executed a settlement agreement. A few days later, on May 20, 2005, the district court granted the divorce, approved the agreement, and incorporated it into the final divorce decree. The settlement agreement disposed of the parties' personal property and marital indebtedness. Relevant to this appeal, James agreed to be "solely responsible" for the couple's Discover card debt totaling \$5,423.37. The parties also agreed to designate a 2005 Ford Escape as Tina's property, and James agreed to pay the outstanding indebtedness on this vehicle as spousal maintenance.

Under the settlement agreement, Tina was entitled to receive a standard percentage share of James' disposable military retirement equal to half of the retirement accrued during the marriage. The parties also agreed that James would designate Tina as his beneficiary under the Survivors Benefit Plan (SBP), and Tina would reimburse James for the costs associated with this arrangement.

The settlement agreement established joint legal custody of the two minor children, with Tina serving as the custodial parent. The agreement also defined the parties' obligations and rights regarding the care and custody of the children. Relevant to this appeal, James agreed to provide the children with medical and dental benefits to which they were entitled because of his military service or retirement. James also agreed to pay a 65.5% share and Tina agreed to pay a 34.5% share of their children's necessary medical expenses not covered by insurance.

Almost 6 years after the divorce, on March 18, 2011, Tina filed a motion and affidavit under K.S.A. 20-1204a, alleging that James failed to comply with certain provisions of the divorce decree. In particular, Tina contended that James breached the settlement agreement with regard to the Ford Escape and Discover card indebtedness, distribution of his military retirement benefits, and payment of an outstanding dental bill for their children. On March 24, 2011, the district court ordered James to appear and show cause why he should not be held in contempt.

A show cause hearing was held on June 28, 2011. After hearing James' testimony and reviewing the file and admitted exhibits, the district court found James in contempt for failing to comply with the divorce decree as alleged by Tina. On September 7, 2011, the district court journalized its ruling and reiterated its findings.

James filed a motion to reconsider the district court's judgment relating to the issues of James' military disability retirement benefits and survivor benefit plan premiums. Before the district court could docket the motion to reconsider, however, James filed a timely appeal. Because the judgment was not yet final, our court remanded the case to allow the district court to rule on James' posttrial motion. The district court denied James' motion on all grounds except to correct a mathematical error. We retained jurisdiction over James' appeal.

#### STANDARDS OF REVIEW

James appeals the district court's contempt findings and sanctions. Civil contempt is "the failure to do something ordered by the trial court for the benefit or advantage of another party to the proceeding." *In re Marriage of Brotherton*, 30 Kan. App. 2d 1298, 1301, 59 P.3d 1025 (2002). In our consideration of this appeal, several legal standards are applicable.

When reviewing a contempt proceeding, an appellate court examines the factual findings underlying the district court's decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those factual findings, *i.e.*, whether the alleged conduct is contemptuous, under a *de novo* standard. See *Hodges v. Johnson*, 288 Kan. 56, Syl. ¶ 7, 199 P.3d 1251 (2009); *In re Marriage of Brotherton*, 30 Kan. App. 2d at 1301. "Whether a particular act or omission is contemptuous depends upon the nature of the act or omission as well as all surrounding circumstances, including the intent and good faith of the party charged with contempt. [Citation omitted.]" *In re Marriage of Brotherton*, 30 Kan. App. 2d at 1302.

"Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined. [Citation omitted.]" *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009). "If there is substantial evidence to support the findings, it is of no consequence that there may have been contrary evidence adduced which, if believed, would have supported a different finding. [Citation omitted.]" *Clark v. Clark*, 236 Kan. 703, 704, 696 P.2d 1386 (1985). When reviewing factual findings, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility. *Frick Farm Properties*, 289 Kan. at 709.

Finally, appellate courts review the appropriateness of the sanctions imposed for contempt under an abuse of discretion standard. *In re Marriage of Brotherton*, 30 Kan. App. 2d at 1301. A judicial action constitutes an abuse of discretion,

"if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

### FAILURE TO PAY A PORTION OF MILITARY DISABILITY RETIREMENT BENEFITS

James contends the district court erred when it held him in contempt for failing to pay a portion of his military disability retirement benefits to Tina. He asserts that under federal law his benefits are not divisible marital assets subject to the jurisdiction of Kansas courts. Whether jurisdiction exists is a question of law over which our court's scope of review is unlimited. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 609, 244 P.3d 642 (2010).

Before addressing the merits of James' argument, it is necessary to review the federal statutory scheme governing military retirement and the divisibility of such benefits in divorce proceedings.

Under federal law, members of the Armed Forces may retire after serving for a specified period. *Mansell v. Mansell*, 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). A United States Army officer qualifies for retirement after at least 20 years of service, provided the officer spent at least 10 years in active service as a commissioned officer. 10 U.S.C. § 3911(a) (Supp. V 2011).

The Secretaries of the Military Departments also have authority, under Title 10, U.S.C. Chapter 61, to retire or separate a member of the Armed Forces if the member suffers from a physical disability, which renders the member unfit to perform the duties of their office, grade, rank, or rating. A servicemember may receive a permanent disability retirement—commonly referred to as Chapter 61 retirement—if the Secretary makes the following determinations: (1) Based upon accepted medical principles, the disability is of a permanent and stable nature; (2) The disability is not the result of intentional misconduct or willful neglect by the member; and (3) The member has either a Department of Defense disability rating of 30% or greater or at least 20 years of service. 10 U.S.C. § 1201 (Supp. V 2011).

Servicemembers may select the more favorable of two available options for calculating their monthly disability retirement pay. 10 U.S.C. § 1401 (Supp. V 2011). Specifically, the benefit may be calculated by either multiplying the servicemember's retired pay by 2 1/2% of the years of service creditable to the member, or by multiplying the member's retired pay by the percentage of disability on the date when the member retired. 10 U.S.C. § 1401. The portion of the member's retirement pay which is attributable to his or her disability is tax exempt. As a result, if the servicemember chooses to calculate his or her pay according to length of service, any benefits received above and beyond the amount of pay computed on the basis of the percentage of disability formula is subject to federal income tax. 10 U.S.C. § 1403 (2006); 26 U.S.C. § 104 (2006).

If a service member suffers from a disability with a Department of Defense rating of at least 30%, but the disability has not yet been determined to be of a permanent and stable nature, the Secretary may place the member on the Temporary Disability Retired List (TDRL). 10 U.S.C. § 1202 (2006). While on the TDRL, the servicemember is entitled to receive "retired pay." 10 U.S.C. § 1202.

In addition to Chapter 61 benefits, disabled servicemembers may also be eligible to receive disability benefits from the United States Department of Veterans Affairs (VA). See 38 U.S.C. § 1101 *et seq.* (2006). To avoid "double dipping," however, a military retiree may only receive VA disability benefits if the retiree waives a corresponding amount of military retirement pay. 38 U.S.C. §§ 5304-5305 (2006). Of note, retirement pay waivers are common because VA disability benefits are nontaxable. *Mansell*, 490 U.S. at 583-84. In 2004, however, Congress introduced two types of disability benefits, Concurrent Retirement and Disability Pay (CRDP) and Combat Related Special Compensation (CRSC), which permit eligible military retirees to concurrently receive a specified portion of their military retirement pay and VA disability compensation with no reduction. See 10 U.S.C. § 1414 (Supp. V 2011); 10 U.S.C. §

1413a (Supp. V 2011). Importantly, under 38 U.S.C. § 5301(a) (2003), VA disability benefits

"shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary . . . shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

In *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the United States Supreme Court held that federal law prohibited the states from classifying military retirement benefits as marital property, as the Court reasoned that "Congress intended that military retirement pay reach the veteran and no one else." *Mansell*, 490 U.S. at 584. One year later, in direct response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), which affirmatively grants to states the authority to treat "disposable retired pay" as marital property. 10 U.S.C. § 1408 (2009); *Mansell*, 490 U.S. at 583, 588-89.

Following the passage of USFSPA, the Kansas Legislature amended K.S.A. 23-201 to include military pensions in the definition of marital property. See *In re Marriage of Harrison*, 13 Kan. App. 2d 313, 315, 769 P.2d 678 (1989). Specifically, K.S.A. 23-201(b) reads as follows:

"All property owned by married persons, *including the present value of any vested or unvested military retirement pay*, . . . shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment." (Emphasis added.)

Under the USFSPA, state courts only have the authority to treat "disposable retired pay" as marital property. 10 U.S.C. § 1408 (Supp. V 2011). The USFSPA defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled"

minus the following: (1) any amounts owed to the United States for previous overpayments of retired pay or recoupments required by law; (2) any deductions from retired pay due to forfeitures ordered by a court-martial or waivers required to obtain VA disability compensation; (3) in the case of a member retired under Chapter 61, any amounts which "are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)"; or (4) any deductions due to an election to provide an annuity to a spouse or a former spouse. 10 U.S.C. § 1408(a)(4).

Accordingly, although Congress intended to create new benefits for former spouses when it enacted the USFSPA, these benefits do not encompass a military retiree's total retirement pay. *Mansell*, 490 U.S. at 594. In fact, in *Mansell*, the United States Supreme Court interpreted the USFSPA's definition of "disposable retired or retainer pay," with respect to the divisibility of VA disability benefits, and concluded that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 588-89, 594-95. Although the Court found USFSPA's plain language and legislative history dispositive, the Court noted the unfortunate ramifications of its holding:

"We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it." 490 U.S. at 594.

In the present case, the divorce decree, which incorporates the parties' settlement agreement, provided:

"The parties have been married for 16.5 years (198 months) and the Petitioner entered the United States Army in February 1990 totaling 15 years 2 months (182 months). Upon the Petitioner's retirement from the United States Army to include separation pay or any other form of compensation to which he may become entitled as a result of his early separation from the military service, the Respondent shall be entitled to receive a standard percentage portion of the Petitioner's entitlement equal to one-half (1/2) of the retirement accrued during the parties' marriage. The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying the percentage times a fraction, the numerator of which is 182 months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service. For example: one-half of the fraction whose numerator is the total number of months of military service during the marriage and whose denominator is the total number of months of service at retirement and/or discharge and/or early separation. . . . The Respondent shall be entitled to direct payment of her percentage benefit under the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 *et seq.* The Petitioner shall notify the Respondent in writing 30 days prior to retirement, separation or discharge.

"The Petitioner shall not take any action that would defeat, reduce, or limit the Respondent's right to receive her share of the Petitioner's military pension benefits, including the combination of retired pay with other pensions or waiving any portion of retired pay in order to receive increased disability pay. If the Petitioner breaches this provision, he shall compensate directly to the Respondent any sums reduced by such action. The court shall have continuing jurisdiction to enforce the parties' agreed standard formula retirement division."

In summary, under the terms of the settlement agreement, Tina was entitled to receive a standard percentage share of James' disposable military retirement equal to half of the retirement accrued during the parties' marriage. The parties agreed that the term "military retirement" included James' "disposable military retired pay" and any "separation pay or any other form of compensation to which [James] may become entitled as a result of his early separation from the military service." James agreed not to take any action that would defeat, reduce, or limit Tina's right to receive her share of his

military pension benefits. In the event James breached this promise, he was obligated to compensate Tina for "any sums reduced by such action."

Sometime after the divorce, James was seriously injured while serving in combat. As a result, on March 24, 2009, the Department of the Army placed James on TDRL. Seven months later, on October 26, 2009, the Army removed James from TDRL and discharged him from military service "because of permanent physical disability." The Army advised James by letter that he was "permanently retired," pursuant to 10 U.S.C. § 1201 after 19 years and 1 month of Army service.

At the show cause hearing, James testified that he started receiving his "physical-disability pay" in April 2009. According to James' "Retiree Account Statement" from the Defense Finance and Accounting Service (DFAS), James currently receives "Gross Pay" in the amount of \$3,070 with a "VA Waiver" deduction of \$1,886. Although James acknowledged that since his discharge, he has not paid any of his disability retirement benefits to Tina, he claimed that he was not required to do so because he did not receive any "disposable [retired] pay."

As support for this contention, James' counsel pointed out that his Retiree Account Statement indicated that his benefits are "exempted from taxes due to [his] disability status." James' counsel further argued that James did not *intentionally* take any action that would "defeat, reduce or limit [Tina's] right to receive her share of his military retirement" in contravention of the settlement agreement terms. On the contrary, as a result of a serious combat injury, he was medically discharged from the military.

Tina's counsel countered that James is clearly "receiving retirement pay with a VA waiver." Tina's counsel explained that on the Department of the Army's letter informing James of his disability discharge, it states "Disability retirement: Not Applicable." Furthermore, Tina's counsel explained that "[i]f there's an SBP requested, there should

[also] be a retirement amount." Accordingly, Tina's counsel contended that Tina was entitled to her share of James' gross retirement pay, listed as \$3,070, because under the settlement agreement, James was obligated to compensate Tina for his decision to accept VA benefits in lieu of retirement pay.

At the conclusion of the hearing, the district court found that "per the intent of the parties," as expressed in the settlement agreement, Tina was entitled to receive her share of James' "benefits from military service, including the combination of retired pay, or any other waiver, and those types of things." The district court held:

"As to the military retirement, the Court finds that [James] commenced receiving retirement pay in April 2009 in the amount of \$3,070.00 per month. [Tina's] entitlement to the military retirement is in the amount of 43.2% for each month (198 months of marriage/229 months of service x 50%) based upon the formula method as set forth in the parties' Settlement Agreement. The Court finds that [Tina] shall have a domestic support judgment against [James] in the amount of \$50,397.12 calculated as \$3,070 x 38 months x 43.2%. Said calculation covers the months of April 2009 to June 2011. [Tina] shall be paid the military retirement from [James] for the month of July 2011."

James filed a motion to reconsider, challenging the district court's ruling regarding his retirement pay on several grounds. Relevant to this appeal, James argued that Tina was not entitled to any of his benefits because he does not receive any disposable retirement pay. Instead, James contended that he actually receives disability benefits which are not divisible marital assets under *Mansell* and *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 982 P.2d 995, *rev. denied* 268 Kan. 887 (1999). In response, Tina's counsel argued that James' benefits were divisible under the settlement agreement executed by both parties and, as a result, James "negotiated" the district court's ability to exercise jurisdiction over any portion of his retirement benefits that may be classified as a disability payment.

Following a hearing, the district court denied the motion to reconsider on all grounds except to correct a mathematical error in its previous calculation of Tina's share of James' retirement benefits. With regard to the divisibility of James' benefits, the district court explained that at the show cause hearing, "the Court also looked at the parties' agreement and found, contractually, that, I believe, [Tina] was entitled to any amounts that [James] reduced it by, which would be the disability, and found that that was appropriate."

On appeal, James contends that he is receiving disability benefits rather than "disposable retired pay," and under the USFSPA, the district court could not hold him in contempt because his benefits are not divisible marital assets subject to the jurisdiction of Kansas courts. Tina contends that even if a portion of James' retirement benefits are considered disability pay, the district court had jurisdiction to enforce the terms of the settlement agreement by granting her equitable relief, as James contractually agreed to divide his retirement benefits and to abide by an indemnification provision.

Resolution of this jurisdictional question requires this court to review the district court's findings regarding whether James receives "disposable retired pay." If, under the USFSPA, the entirety of James' military pension is "disposable retired pay" the district court had jurisdiction over the contempt proceedings because "disposable retired pay" is a marital asset in Kansas. See 10 U.S.C. § 1408(a)(4); K.S.A. 23-201(b). On the other hand, if any portion of James' benefits is not "disposable retired pay," then jurisdiction is called into question and it is necessary to address whether the district court had jurisdiction to award Tina equitable relief under the settlement agreement.

Our review of the district court's findings at the hearing and in its subsequent order reveals the district court did not address the jurisdictional implications of federal law as discussed above. The court's ruling was that the "Court finds per the intent of the parties, in dividing that up, was that she was to receive her share of his benefits from military

service, including the combination of retired pay, or any other waiver, and those types of things." While this holding summarized the terms of the settlement agreement, it did not take into account federal law which limits a state court's jurisdiction to review certain categories of retirement pay. As discussed earlier, under the USFSPA, state courts only have the authority to treat "disposable retired pay" as marital property. 10 U.S.C. § 1408. In the present case, the district court made an error of law in not considering and making appropriate conclusions of law regarding the jurisdictional implications of this federal statute.

Moreover, the district court also erred in failing to make sufficient findings of fact regarding the type of retirement or disability benefits James received. The evidence presented at the hearing, primarily in the form of two documents, was ambiguous if not contradictory, regarding the nature of James' benefits. For example, the Retiree Account Statement reflected a "VA Waiver" deduction of \$1,886 involving James' Chapter 61 benefits. James' VA benefits are clearly not "disposable retired pay" under the USFSPA. See 10 U.S.C. § 1408(a)(4)(B). It is not apparent, however, that this waiver was purposely sought by James. And without factual findings, we are also unable to discern what portion, if any, of James' Chapter 61 benefits is "disposable retired pay."

Relying on *In re Marriage of Wherrell*, 274 Kan. 984, 58 P.3d 734 (2002), James contends that all of his benefits are disability payments because his Retiree Account Statement indicates that his benefits are "exempted from taxes due to [his] disability status." However, on the Department of the Army's letter informing James of his disability discharge, it states "Disability retirement: Not Applicable."

In *In re Marriage of Wherrell*, the Kansas Supreme Court explained:

"The present definition of 'disposable retired pay,' however, seems to consider Chapter 61 benefits received by those members *eligible for retirement* as potentially including both

disability and retirement benefits, while only recognizing the disability portion of the benefit to be excluded from 'disposable retired pay.' See 10 U.S.C. § 1408(a)(4)(C). Thus, it is easily inferred that all benefits received pursuant to Chapter 61 are not necessarily disability benefits and that some, if not all benefits, received pursuant to Chapter 61 are capable of being considered 'disposable retired pay.'" 274 Kan. at 995.

Our Supreme Court also noted that the taxability of a Chapter 61 distribution "may be dispositive" regarding whether the payment is disability or retirement pay. 274 Kan. at 994.

Against this backdrop of ambiguous and conflicting facts, the district court made no findings with regard to whether or not, and in what amount if any, James received "disposable retirement pay." These factual findings are essential, however, in order to reach an appropriate conclusion of law as to the issue presented on appeal.

In summary, we conclude the district court abused its discretion in its contempt finding and sanctions pertaining to James' failure to pay Tina a portion of his military disability retirement benefits. See *In re Marriage of Brotherton*, 30 Kan. App. 2d 1298, 1301, 59 P.3d 1025 (2002).

Because the district court's ruling was based on an error of law and errors of fact, *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801, cert. denied 132 S. Ct. 1594 (2012), we reverse and remand with directions to the district court to reconsider this matter after allowing the parties a reasonable period of discovery and the opportunity to present additional evidence on this issue. Finally, if the district court determines that any portion of James' benefits is not "disposable retired pay," then it shall determine whether the district court had jurisdiction to award Tina equitable relief under the indemnity clause contained in the parties' settlement agreement.

### ORDER TO PAY OUTSTANDING SURVIVORS BENEFIT PLAN PREMIUMS

James contends the district court abused its discretion when it ordered him to pay outstanding SBP premiums as an additional sanction for failing to pay Tina a share of his disability retirement benefits.

As explained above, the parties' settlement agreement provided that James would designate Tina as his beneficiary under the SBP, and Tina would reimburse James for the costs associated with this arrangement. At the show cause hearing, James testified that in March 2011, the Department of the Army notified him that Tina had not been paying the SBP premiums, and as a result, the Army began to garnish the outstanding balance of \$6,615.09 from his disability retirement pay.

At the conclusion of the hearing, James' counsel asked the district court to order Tina to reimburse James for the SBP premiums in keeping with the settlement agreement. In his response to Tina's motion for contempt, James' counsel also asked the court to permit James to remove Tina as the SBP beneficiary because she was not entitled to his disability payments; however, at the show cause hearing, James' counsel simply "request[ed] that [Tina] pay any arrearages and any future amounts if she *chooses* to remain the beneficiary." (Emphasis added.) Tina's counsel acknowledged that it was Tina's responsibility under the settlement agreement to pay the SBP premiums, and Tina did not object to the district court reducing her share of James' retirement benefits by the amount of the outstanding SBP premiums, if in fact, she is still entitled to receive the survivor benefits.

At the conclusion of the show cause hearing, the district court held that James "shall be responsible for the costs associated with the SBP coverage through July 2011 based upon his failure to pay any [military retirement] funds to [Tina,] as contemplated

by the parties' Settlement Agreement," for a 2 year period. The district court further held that Tina would be responsible for future SBP premiums commencing in August 2011.

In his subsequently filed motion to reconsider, James challenged the district court's ruling on the ground that Tina was contractually obligated to pay the SBP premiums under the settlement agreement, and he should not be penalized for failing to pay Tina a portion of his disability retirement benefits when he reasonably believed Tina was not entitled to receive these benefits. As explained above, the district judge did not modify his order with regard to the SBP premiums.

We have already ruled that the district court abused its discretion in finding James in contempt for failing to pay Tina a portion of his military disability retirement benefits. The district court premised its additional contempt finding and sanction with regard to the SBP premiums on the same incorrect basis. Accordingly, the district court's ruling is reversed and remanded with directions to reconsider this matter after it has reviewed the issue of James' military disability retirement benefits.

#### FAILURE TO PAY THE DISCOVER CARD DEBT

James contends the district court erred when it held him in contempt for failing to pay the Discover card debt because the district court modified the divorce decree when it awarded Tina a domestic support judgment. Tina counters that the district court did not modify the divorce decree because after finding James in contempt, the court had the authority to impose an appropriate sanction.

Although the parties' Discover card debt was in Tina's name, under the settlement agreement, James agreed to be "solely responsible" for the \$5,423.37 in outstanding indebtedness. The parties agreed that James' responsibility for this debt would be considered spousal support. The settlement agreement further stated that if Tina was ever

required to pay a debt or deficiency related to the Discover card, such payment would "become an interest bearing support judgment in favor of [Tina] when paid."

At the show cause hearing, James admitted that in July 2007, he stopped making payments on the Discover card because his online access to the account was terminated and he could not make any payments. Tina claimed that due to James' delinquency, the credit card company garnished her wages. Ultimately, in 2010, Tina declared bankruptcy and the Discover card debt was discharged. Tina provided James with timecards indicating that she missed work because of this debt.

During closing arguments at the show cause hearing, James' counsel argued that because of the lack of proof regarding Tina's lost wages and the discharge of the debt in bankruptcy, the district court should not "consider the Discover card issue." Tina's counsel replied that James admitted to breaching the settlement agreement by failing to pay the credit card debt and, as a result, he should be ordered to reimburse Tina for the amounts she claimed were garnished from her paycheck.

The district court found James in contempt for failing to pay the Discover card debt. Accordingly, Tina was awarded a domestic support judgment in the amount of \$1,000. The court explained: "The Discover card that [James] was ordered to pay, he obviously, didn't pay, he is in contempt for that. That \$5,500, or whatever it was, apparently, got discharged in bankruptcy. . . . But, clearly, she made payments and incurred something on that."

After the district judge made his findings from the bench, James' counsel argued that Tina's affidavit, by itself, was insufficient to support the ruling and James' testimony showed otherwise. The judge responded: "[James] was ordered to pay it. He didn't pay it. He testified that way. I have the Court's order. . . . It got discharged. He saved five grand.

Okay. That's his benefit for violating the Court order. But the Court is ordering that he pay her \$1,000 on that Discover card."

James subsequently filed a motion to reconsider. In his motion, James challenged the district court's ruling on the ground that the \$1,000 domestic support judgment should not be awarded to Tina but remitted instead to the bankruptcy trustee. The motion, as it related to the Discover card debt, was denied.

For the first time on appeal, James objects to the district court's ruling on the basis that the district court improperly modified the settlement agreement. James did not object on this basis in the district court and, as a general rule, issues not raised before the trial court may not be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). Several caselaw exceptions have been recognized that allow an appellate court to consider a new legal theory on appeal. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), cert. denied 555 U.S. 1178 (2009). However, James does not brief whether an exception applies, and an issue not briefed by the appellant is deemed waived and abandoned. *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011).

Assuming James had properly raised this issue on appeal, we note that our reading of the record convinces us that by ordering James to pay Tina \$1,000, the district court was not *modifying* the settlement agreement but *enforcing* the divorce decree by imposing a monetary sanction to help defray some of Tina's costs incurred due to James' failure to pay off the credit card debt. Upon the district court's finding of contempt in this regard, the monetary sanction was not inappropriate. See K.S.A. 20-1204a(b) ("If the court determines that a person is guilty of contempt such person shall be punished as the court shall direct.").

In his appellate brief, James cursorily mentions the argument he raised in his motion to reconsider, that the district court should have awarded the monetary judgment to the bankruptcy trustee rather than Tina. James does not provide any arguments or authority in support of this argument, however, and a point raised incidentally in a brief and not argued therein is also deemed abandoned. See *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008). Moreover, failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

Accordingly, we hold that James did not properly preserve this issue for appellate review and, as a result, we decline to address the merits of his argument.

#### FAILURE TO PAY THE OUTSTANDING INDEBTEDNESS ON THE FORD ESCAPE

James contends the district court erred when it held him in contempt for not complying with the provisions of the divorce decree relating to the indebtedness on the Ford Escape. Once again, James claims the monetary sanction imposed by the district court constitutes an improper modification of the settlement agreement. Tina responds that the district court did not modify the agreement or divorce decree; it simply restored her to the position she would have been in had James satisfied his obligations as set forth in the divorce decree.

Under the settlement agreement, the parties agreed to designate the 2005 Ford Escape as Tina's sole property, and James agreed to pay the outstanding indebtedness on the vehicle as spousal maintenance. The settlement agreement stated:

"[James] shall pay to USAA Federal Credit Union by means of military allotment, the sum of Five Hundred Nineteen Dollars (\$519.00) per month commencing on February 1,

2005 and continuing each month thereafter on the 1st of the month until paid in full, approximately four years (2009). Upon the final payment owing on [Tina's] Ford Escape, approximately, March, 2009, [James] shall execute the vehicle title over to [Tina] and [Tina] shall then obtain full ownership of said vehicle."

Additionally, the settlement agreement required that James maintain "credit life coverage" in the event he decided to "refinance this loan."

After the divorce and after James' combat injury, he refinanced the loan with Alaska USA. In early 2011, the new lender threatened to repossess the vehicle because it was not in James' possession and Tina had made a claim against the vehicle in her bankruptcy proceedings. James attempted to enlist Tina's aid in an effort to remedy this situation without success. Ultimately, James had the vehicle seized from Tina and taken to his in-law's home in Boise, Idaho, where it remained as of June 28, 2011.

At the show cause hearing, James testified that based upon the condition of the vehicle and data he obtained from automotive valuation guides, he believed it was worth about \$8,000. To remedy the dispute, counsel for James proposed that James "should retain the Escape and pay the Fair Market Value of \$8,000" to Tina.

In response, Tina's counsel argued that Tina was entitled to the full retail value of the Ford Escape, or \$11,460. Tina's counsel explained that under the settlement agreement, Tina should have received "free and clear" title to the vehicle by March 2009.

The district court found James in contempt, because "by his own testimony," he failed "to pay off the automobile as contemplated by the parties' Settlement Agreement," and although Tina was supposed to maintain possession under the agreement, the automobile was "located at [James'] in-laws' home in Idaho." Accordingly, the district court awarded Tina a domestic support judgment in the amount of \$10,000.

In his motion to reconsider, James argued that the \$10,000 domestic support judgment should not be awarded to Tina due to her bankruptcy, but should be remitted to the bankruptcy trustee. The motion, as it related to this indebtedness, was denied.

James did not object below—as he does on appeal—that the district court improperly modified the settlement agreement or divorce decree. As noted earlier, generally, issues not raised before the trial court may not be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. at 224-25. James did not brief any exception, and an issue not briefed by the appellant is deemed waived and abandoned. *McCaslin*, 291 Kan. at 709.

If James had properly preserved this issue for appellate review, however, his claim of alleged error would fail. First, as discussed earlier, the district court's judgment was not *modifying* the settlement agreement but *enforcing* the divorce decree by ordering a monetary judgment upon the finding that James was in contempt. See K.S.A. 20-1204a(b).

Second, assuming the district court did err, the error was invited because James sought a similar outcome. James' counsel argued that the proper way to resolve this issue would be to "pay [Tina] the fair-market value for the vehicle . . . and give the possession of the vehicle to [James]." "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003). Although the district court's valuation of the Ford Escape's fair market value differed from James' estimate, James may not complain on appeal that the court improperly modified the divorce decree when he requested the very modification he now contends is erroneous.

Accordingly, we hold that James did not properly preserve this issue for appellate review and it is without merit.

### FAILURE TO PAY THE CHILDREN'S DENTAL EXPENSES

James contends the district court erred when it held him in contempt for failing to pay an outstanding dental bill for his children. James argues that he was not notified of the debt in accordance with the divorce decree, and the settlement agreement required the parties' obligations with respect to medical expenses to be reevaluated in the event he left the military, and "[t]he bill, if taken as true, is de minimus."

Tina counters that the district court did not err because James had knowledge of the debt, he acknowledged at the hearing that he owed 65.5% of any medical expenses not covered by insurance, and he had "the ability to purge his contempt" prior to the show cause hearing but chose not to do so.

Under the settlement agreement, James agreed to provide his children with medical and dental benefits as specified by his military service or retirement. Regarding medical expenses not covered by insurance, James agreed to pay a 65.5% share and Tina agreed to pay a 34.5% share. In the event James left the military, the parties agreed to revisit "the issue of medical insurance and payment of uninsured medical expenses . . . based upon the circumstances then existing."

At the hearing, Tina claimed that James breached the settlement agreement by failing to reimburse her for his portion of the cost of the children's uninsured dental services. James testified about problems with mark outs on the copies of the billings forwarded by Tina. He also complained that Tina did not provide him with a complete billing statement until approximately "a week and a half to two weeks" prior to the show cause hearing. James testified, however, that he was willing to pay 65.5% of the \$780 Tina actually paid for the dental services, or \$511, and he would pay 65.5% of the remaining \$672.21 balance "[o]nce Tina makes the payment."

The district court ruled:

"[James] is responsible for 65.5% of the amount incurred for the parties' child[ren]. [Tina] paid \$780.00 directly to the dentist office and [James] shall reimburse [Tina] \$510.90. The parties owe an additional amount of \$672.21 to the dentist office and [James] shall be responsible for the payment of \$440.30 with [Tina] being responsible for the remaining \$231.91."

On appeal, James candidly concedes that at the hearing "[h]e agreed that he owe[d] the bills." As a result, we can find no abuse of discretion. Absent a new agreement modifying James' obligations set forth in the original settlement agreement, it is clear that James owed the outstanding sum (as he admitted) which the district court simply ordered him to pay. No other sanction was imposed by the district court. Under these circumstances, James has not shown that the district court's ruling was "arbitrary, fanciful, or unreasonable." See *Ward*, 292 Kan. 541, Syl. ¶ 3.

#### RIGHT TO CONFRONT WITNESS

James contends the district court deprived him of his right to confrontation under the 6th Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights by failing to require Tina to testify and be subject to cross-examination at the show cause hearing. James also complains "[i]t is believed that the Court erred in allowing the testimony of [Tina] at the contempt hearing by affidavit."

Tina counters that the district court properly complied with the statutory procedure for indirect contempt proceedings, and after the district court found her affidavit sufficient to establish contempt, it was James' burden to present evidence to the contrary. Additionally, Tina points out that she was present and available in the courtroom to be called by James as a witness at the show cause hearing.

Preliminarily, this issue is not properly before our court for appellate review. First, our review of the record does not reveal any instance in the district court where James raised a constitutional objection to Tina's failure to testify or to the district court's consideration of her affidavit. "[C]onstitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review." *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007). Although caselaw exceptions to this rule have been recognized, *In re Estate of Broderick*, 286 Kan. at 1082, James does not assert an exception or brief one. In fact, in his brief, James cites only one criminal case in support of his constitutional claim in this civil contempt case. Under these circumstances, we conclude the constitutional issue was both not preserved and is waived and abandoned on appeal for failure of briefing. See *McCaslin*, 291 Kan. at 709.

Next, we address James' complaint on appeal regarding the use of Tina's affidavit during the show cause hearing. After the close of evidence and argument, the district court orally ruled on the contempt motion. Only after the district court's ruling did James' counsel state:

"I'm having a hard time understanding these rulings when all — the only testimony given to rebut what my client testified to is—is on a piece of paper. She—she sent—submitted an affidavit. . . . she's claiming that there's—that money was taken out of her paycheck, . . . when we don't have those documents. And the weight that—that the Court has given this affidavit, compared to my client's testimony is—is I think unwarranted."

Once again, this particular issue was not preserved for appeal. James did not state a contemporaneous objection to the district court's consideration of the affidavit during the proceedings. Only after closing arguments and the court's adverse ruling did James complain about Tina's affidavit—not in the context of its inadmissibility, or a shifting of the burden of proof—but that its evidential weight compared to James' live testimony was insufficient proof of contempt.

That is not the issue James presents on appeal. On appeal, James essentially contends the contents of the affidavit were inadmissible as evidence. Yet, that issue was never raised contemporaneously with the district court, and a party must make a contemporaneous and specific objection to the admission of evidence in order to preserve the issue for appeal. *State v. Martinez*, 288 Kan. 443, 450, 204 P.3d 601 (2009). James does not brief whether an exception to this rule applies, and an issue not briefed by the appellant is deemed waived and abandoned. *State v. McCaslin*, 291 Kan. at 709.

Moreover, Tina was present at the hearing and available for testimony. At the start of the hearing, the district court informed James that the hearing was "your opportunity to present any evidence you wish." James testified on his own behalf, presented documentary evidence, and rested. The district court never precluded James from calling Tina as a witness. James simply never called Tina to the witness stand to testify.

Finally, the district judge advised James' counsel that his ruling on contempt was not based on the contents of Tina's affidavit: "I'm basically looking at what the Court's order was, and then your client's testimony, which confirmed he was in contempt on the Ford Escape, on the Discover card, on the military retirement, on the dental bills, all of those things."

K.S.A. 20-1201 *et seq.* regulates the district court's power to impose sanctions for contempt of court. Under K.S.A. 20-1204a(a), a party may seek the enforcement of a court order by filing an indirect contempt motion that is accompanied by an affidavit "specifically setting forth the facts constituting the alleged violation." Upon receipt of such a motion, the district court may order the alleged contemnor "to appear and show cause why such person should not be held in contempt." K.S.A. 20-1204a(a). The district court must hear the matter as specified in the order, and if the district court finds the alleged contemnor is guilty, the contemnor "shall be punished as the court shall direct."

K.S.A. 20-1204a(b). In the present case, the district court did not err in following the procedure set forth in K.S.A. 20-1204a.

We hold that James has failed to preserve this issue for appellate review. Additionally, the issue he does raise has been waived or abandoned on appeal, and if we were to consider the issue we are not persuaded that James has shown an abuse of discretion given the circumstances of this case.

#### AWARD OF ATTORNEY FEES

For his final issue, James contends the district court abused its discretion by ordering him to pay Tina's attorney fees incurred as a result of these proceedings. James argues that the contempt ruling was incorrect and, as a result, any award of attorney fees was in error. Tina, on the other hand, asserts the award was proper because but for James' contempt, she would not have had to hire an attorney, take time off from work, and travel to Kansas for the show cause hearing.

At the hearing, Tina's counsel requested that James be ordered to pay Tina's attorney fees. In response, James' counsel objected, noting that his client had attempted to comply with the divorce decree notwithstanding his combat injuries and subsequent medical retirement. Additionally, James' counsel asserted that he attempted to resolve the dispute without court intervention but Tina failed to cooperate.

The district court awarded Tina a domestic support judgment for attorney fees in the amount of \$2,500. The district court explained that its decision was "based upon [James] clearly being in contempt, that the citation to show cause was appropriate; that he has in numerous respects failed to abide by the Court order, and [Tina] should [be] made whole on all that." In his subsequently filed motion to reconsider, James' counsel

requested review of the award of attorney fees if the district court determined that James' disability pay was not subject to division. The court declined to reconsider its order.

In an indirect civil contempt proceeding, "[i]f the court determines that a person is guilty of contempt such person shall be punished as the court shall direct." K.S.A. 20-1204a(b). District courts are authorized to award reasonable attorney fees when the fees are designed to compensate a party for the loss occasioned by the inappropriate behavior of the party in contempt. See *In re Marriage of Brotherton*, 30 Kan. App. 2d 1298, 1303, 59 P.3d 1025 (2002).

James does not contest the district court's authority to award attorney fees or challenge the amount of the fee award. He simply argues that the award of attorney fees was inappropriate because he was erroneously found in contempt. As noted earlier, we conclude the district court did not abuse its discretion in sanctioning James for contempt due to his failure to pay off the Discover card and the indebtedness owed on the Ford Escape, and his failure to pay the children's dental bills. The district court found that the award of attorney fees was to compensate Tina for the financial loss associated with James' contemptuous behavior. Under these circumstances, we conclude the district court did not err when it awarded Tina \$2,500 in attorney fees.

Affirmed in part, reversed in part, and remanded with directions.

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LEBEN, J., concurring: I wish to add a brief comment on our court's holding regarding the procedures used by the district court at the hearing to determine whether James Martin was in contempt of court. I agree with the majority that, before the district court's ruling, James did not raise an issue regarding whether Tina Martin's affidavit could be admitted as evidence at the contempt hearing or whether the district court had improperly shifted the burden of proof to him. But I think we should note that the procedure followed here by the district court is not typical for contempt proceedings.

It's true that the district court may issue a contempt citation—requiring a party to appear to show cause why he or she should not be found in contempt—based upon an affidavit submitted by the other party. See K.S.A. 20-1204a. But most courts around the country applying similar statutes have agreed that the burden to prove contempt at the hearing remains on the party asserting that proposition. See *U.S. S.E.C. v. Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010); 17 C.J.S., Contempt § 139; 17 Am. Jur. 2d, Contempt § 183; 7A Fed. Proc. § 17:36 (2012); see also *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926-27, 128 P.3d 364 (2006) (noting that the statutory procedures for handling indirect contempt proceedings are to be strictly construed against the moving party). Accordingly, in my experience, the party seeking the contempt citation has the initial burden to present evidence at the contempt hearing even though an affidavit sufficient to support the contempt charge has already been presented in advance of that hearing. It is only when sufficient evidence has been presented at the hearing to make out a prima facie case that the other party has violated a court order—and, thus, is in contempt—that the burden shifts to the opposing party to prove any legitimate excuse he or she may have for noncompliance with the order. See *Brayfield v. Brayfield*, 175 Kan. 337, Syl. ¶ 3, 264 P.2d 1064 (1953).