

NOT DESIGNATED FOR PUBLICATION

No. 108,886

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JASON SUTTON,  
*Appellee,*

and

COOKIE SUTTON,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Wyandotte District Court; WILLIAM P. MAHONEY, judge. Opinion filed September 6, 2013. Affirmed.

*J. Donald Lysaught, Jr.*, of Evans & Mullinix, P.A., of Shawnee, for appellant.

*Jason W. Sutton*, appellee pro se.

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

*Per Curiam:* Cookie Sutton appeals the district court's division of her and Jason Sutton's marital property, asserting that the district court abused its discretion in the division of the property because the division was not reasonable and equitable. In addition, she contends that the district court erred when it failed to take into account payments that Cookie made when considering the division of the marital property. Finally, she argues that the district court erred when it ended the case manager's role in the case. Cookie concedes that the fourth issue in her original brief is now moot. Because we find that the district court did not abuse its discretion in the division of the parties'

assets and liabilities and in the removal of the case manager, we affirm the district court's decision in this case.

#### FACTUAL AND PROCEDURAL HISTORY

Jason and Cookie were married on August 27, 1990. Five children were the product of this union, ranging from 13 years to 20 years old.

Jason is employed by the Kansas City, Kansas Police Department and Cookie is the owner of Gemini Realty.

On May 24, 2011, Jason filed a petition for divorce. Temporary orders were issued granting Jason exclusive use and possession of the marital home, while Jason and Cookie shared joint legal custody of the children. The children were to reside primarily with Jason, and Cookie was given parenting time with the children. Cookie was ordered to pay temporary child support. However, the district court later amended the orders and ordered the parties to weekly alternate living in the marital home. Both parties were required to pay equally for any household and food expenses from their joint account. The district court then altered the parties' payments for household and food expenses, requiring Cookie to pay the mortgage payments and her vehicle loan, and Jason to pay the utility bills and phone bills. Each party was made responsible for their own groceries during the weeks that they resided in the marital home. The district court stated it "will consider the amounts paid or left unpaid by the respective parties for the above listed expenses when determining the equitable division of property at trial."

The district court subsequently determined that the every-other-week custodial arrangement was not in the best interest of the children and ordered Jason to live in the marital home with the children while Cookie was given parenting time.

A case manager was appointed to the case. The case manager recommended that Jason be removed from the marital home and that Cookie become primary custodial parent. In Jason's view, the case manager's recommendation was based on false and incomplete information, and he asked the court to remove the case manager from the case.

The district court granted the parties' divorce but reserved all other rulings for a later date.

Cookie filed an exhibit establishing all of the payments she made from May 2011 to March 2012 totaling \$61,354.08 for groceries, dining, school, child support, household bills, household supplies, haircuts, the children's needs, and the children's medical bills.

The district court followed the recommendations of the case manager and ordered Cookie to be the primary custodial parent and to remain in the marital home. The district court relieved the case manager from any further duties in the case.

Regarding the marital property division, the district court awarded the following:

Cookie was awarded:

- (1) the marital home valued at \$175,000;
- (2) her own vehicle with its associated debt valued at \$10,000;
- (3) the entire contents of the IMCA account valued at \$36,000; and
- (4) the sole ownership of the realty business, Gemini Realty, Inc., including all associated debts or assets.

Jason was awarded:

- (1) the pontoon boat;
- (2) his own vehicle, with its associated debt, valued at \$12,000; and

(3) the entire contents of the KPERS retirement savings account valued at \$180,000.

Regarding the division of marital debts, the district court ordered the following:

Cookie was responsible for:

- (1) the home mortgage valued at approximately \$115,000;
- (2) the Capitol One card in her name valued at \$5,000;
- (3) the J.C. Penney card valued at \$300;
- (4) the Kohl's card valued at \$300; and
- (5) the Nebraska Furniture Mart card valued at \$600.

Jason was responsible for:

- (1) the home equity line of credit valued at \$24,000;
- (2) the Capitol One card in his name valued at \$1,500;
- (3) the Discover Card valued at \$1,300; and
- (4) the Police and Fire Credit Union debt.

The district court also ordered Jason to pay \$1,900 per month, later increased to \$1,973 per month, for child support.

Cookie asked the district court to reconsider the case manager's removal from the case. The district court denied Cookie's request to reinstate the case manager, finding that the expenses of a case manager would be "burdensome." Cookie also asked the court to reconsider the division of the retirement accounts. The district court denied this request. In addition, Cookie took issue with the district court's valuation of the marital home, arguing that it was really worth \$165,000 and not \$175,000. Cookie also informed the district court that it erred when it failed to consider the payments she made equaling

\$61,354.08 from May 2011 to March 2012 for the benefit of the minor children. The district court denied Cookie's request for reconsideration of those expenses.

Cookie filed a timely notice of appeal.

#### ANALYSIS

*The district court did not abuse its discretion in its division of the marital property.*

Cookie asserts that the district court abused its discretion when it divided the marital assets and debts because the division was not reasonable and equitable. Cookie specifically contends that the district court's valuation of the marital home was without any supporting evidence and that the district court should have divided the retirement accounts equally between Jason and Cookie.

It is not the role of this court to divide property between husband and wife. Our sole function is to review the record for the purpose of determining whether the district court's findings have a factual basis in the evidence and whether its discretion with respect to such a division has been abused. *Clugston v. Clugston*, 197 Kan. 180, 182, 415 P.2d 226 (1966). The district court has broad discretion in adjusting the property rights of parties involved 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 person seeking to establish an abuse of discretion by a district court in adjusting financial obligations in a divorce carries a heavy burden. *Almquist v. Almquist*, 214 Kan. 788, 791, 522 P.2d 383 (1974).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 292, 263

P.3d 767 (2011). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 331, 277 P.3d 1062 (2012).

Under K.S.A. 2011 Supp. 23-2802(c), the district court's division of the property is required to be "just and reasonable."

Cookie's main concern regarding the division of property is that she was awarded the marital home valued by the district court at \$175,000 and Jason was awarded his retirement account valued at \$180,000. First, Cookie asserts that there was no evidence to support the district court's conclusion that the marital home's value is \$175,000. This assertion appears to be incorrect. Cookie, in her testimony, testified that she placed the marital home on the market for \$175,000, but then later testified that the house was only worth \$165,000. Although there was conflicting testimony regarding the value of the house, there is some testimony that it was worth \$175,000 because that is what Cookie put it on the market for. Therefore, the district court did not abuse its discretion when it found that the house was worth \$175,000.

Second, Cookie addresses the disparity between the assets she received and the assets Jason received. Cookie contends that, although the house is worth—in her mind—\$165,000, the mortgages on the house take the value down to \$10,500. In essence, she only received \$10,500 in equity on the house while Jason received his retirement account valued at \$180,000. With the assets and debts combined, Cookie alleges that she received a negative award in the amount of \$71,500 and Jason received a positive award in the amount of \$135,000.

Cookie was awarded the marital home valued at \$175,000, the entire contents of the IMCA account valued at \$36,000, and the sole ownership of the realty business,

Gemini Realty, Inc., including all associated debts or assets. Jason was awarded the entire contents of the KPERs retirement savings account valued at \$180,000.

Cookie was responsible for the home mortgage valued at approximately \$115,000, and Jason was responsible for the home equity line of credit valued at \$24,000.

When looking at the division of the assets and debts as a whole, it is difficult to see where the district court may have abused its discretion. Even if the value of the house is \$165,000, Cookie received full ownership of the house and all its contents and is only responsible for a \$115,000 mortgage. In addition, Cookie received the IMCA retirement account of \$36,000, and she was allowed to keep all assets of her real estate business, which was not given any set value. Cookie had higher earnings than Jason and had a good earning potential from her real estate business. Cookie fails to show how the district court's ultimate division of the marital property was unjust and unreasonable, and, as such, she has not sufficiently carried her burden of demonstrating an abuse of discretion by the district court. The district court was obligated to make "a just and reasonable division of [the marital] property," and after a careful review of the bench trial held in this matter as well as the exhibits made part of the record on appeal, it is clear that the district court satisfied its obligation. See K.S.A. 2011 Supp. 23-2802(c).

*The district court did not abuse its discretion in the division of the marital property by failing to consider various payments made by Cookie.*

Cookie separately contends that the district court abused its discretion when it failed to take into account the payments she made for the children from May 2011 to March 2012 amounting to over \$61,000.

Again, the district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be

disturbed by an appellate court absent a clear showing of abuse. *Wherrell*, 274 Kan. at 986.

Before the divorce trial, the district court did indicate that it would "consider the amounts paid or left unpaid by the respective parties for the above listed expenses when determining the equitable division of property at trial." The "above listed expenses" included Cookie's timely payment of the mortgage and Jason's payment of the utilities and phone bills. Apparently, Cookie took this order as giving her free rein to spend any amount of money for any items or needs of the children. Her expense list includes everything from groceries, to dining out and entertainment with the children, to haircuts for the children, to satisfying a number of the children's other needs. Cookie believes that the property division should have included the consideration of these expenses. This is not what the district court ordered nor probably what it intended, particularly in light of the fact that Cookie failed to make all the mortgage payments as agreed.

Moreover, the district court *did* consider Cookie's expenses when it discussed the division of the property. The district court specifically found that it was not going to divide everything completely fifty-fifty and explained why. The district court noted Cookie's claimed expenditures on the kids, but disregarded them based on Cookie's lack of financial support on the basic household expenses—the mortgage and utilities—throughout the divorce proceedings. The district court also noted her failure to comply with court orders and her extravagant spending at Christmas time that could have been used on necessities. This decision was not arbitrary, fanciful, or unreasonable, but was well-reasoned based on the totality of the facts and circumstances of the case. Therefore, the district court did not abuse its discretion when it failed to give Cookie the credit she desired for her expenditures on behalf of the children.

*The district court did not abuse its discretion when it removed the case manager from the case.*

Cookie alleges that the district court erred when it removed the case manager from the case for financial reasons. She argues that the removal of the case manager was not in the best interests of the children; however, her standard of review appears to be incorrect.

The decision to grant or deny a motion to remove a case manager is clearly committed to the discretion of the court and ought not to be overruled absent evidence of abuse of discretion. *In re Marriage of Gordon-Hanks*, 27 Kan. App. 2d 987, 991, 10 P.3d 42, *rev. denied* 270 Kan. 898 (2000).

Jason filed a motion asking the court to reject the case manager's recommendation for child custody and also asked for the removal of the case manager. In addition, during closing arguments at trial, Jason's attorney indicated that having a case manager was financially difficult for Jason.

At trial, the district court asked Cookie if she felt that a case manager was financially feasible. Cookie indicated that the case manager's expenses were not unbearable and that the expenses could be paid with an anticipated tax refund.

While issuing its order, the district court expressed some concern that the parties' parenting and financial situation was such that the use of a case manager was not a necessity, but more of a luxury. The district court also based its decision on the fact that the children and both Jason and Cookie were attending therapy sessions. The court noted that if there were future disputes over parenting time that they could not work out with their therapists, the parties could come back before the court. The court indicated it hoped it would not see them all the time and it firmly believed they would be able to co-parent again, "but if I need to see you to sort things out, I'll be here to do that."

Cookie asked the district court to reconsider the case manager's removal from the case. In its written order, the district court denied Cookie's request to reinstate the case manager, finding that the expenses of a case manager would be "burdensome."

While Cookie did testify that the case manager's fees could be paid with a tax refund, there was also evidence that the mortgage payment on the marital home was still in arrears. Therefore, there was some evidence to support the district court's concerns that the parties were not in a position financially to afford the case manager's fees. In addition, the district court would not have removed the case manager if the parties had not already been seeing therapists. And the district court encouraged the parties to bring future disputes that might have been raised with a case manager directly to the court. Thus, the district court did not abuse its discretion when it removed the case manager from the case for financial reasons.

Affirmed.