NOT DESIGNATED FOR PUBLICATION

No. 108,098

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

GARY J. MCGINNIS,
Appellee,

and

HUAY A. MCGINNIS,
Appellant.

MEMORANDUM OPINION

Appeal from Harper District Court; LARRY T. SOLOMON, judge. Opinion filed November 8, 2013. Affirmed.

Bruce A. Swenson, of Derby, for appellant.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellee.

Before ATCHESON, P.J., ARNOLD-BURGER, J., and BUKATY, S.J.

Per Curiam: Gary J. McGinnis and Huay A. McGinnis divorced after a lengthy marriage. This case involves an appeal by Huay from the district court's orders pertaining to property division, or the lack thereof, and the amount of maintenance ordered. She also contends the court erred in not finding Gary in arrears on his maintenance obligation. Gary filed the divorce action on April 16, 2008. The orders Huay appeals from did not become final until August 14, 2012. We find the district court did not abuse its broad discretion in dividing the property and setting maintenance. We further find Huay has failed to establish on appeal that Gary was in arrears. We affirm.

Facts and Lengthy History of Judicial Proceedings

The parties married on March 31, 1975, in Udon, Thailand. Gary was serving in Thailand as a member of the United States Air Force. Both parties had been married before, and Huay had two children from a previous marriage. Over the next several decades, Gary and Huay moved frequently while Gary continued to serve in the Air Force. During this time, Gary took care of Huay's children from her previous marriage along with the child the parties conceived together. All the children were adults by the time Gary filed for divorce.

After living in various parts of the United States and overseas, the couple moved to Harper, Kansas, sometime in 2005. Gary had taken a position as an information technology manager for Elkhorn Valley Packaging.

At the same time that Gary filed his petition on April 16, 2008, the district court entered a temporary order granting each party possession of certain items of property. Under the order, Gary received possession of the following:

> "[A] portion of the household goods, furniture, appliances, linens, utensils and other property of the parties, to properly care for himself, now in his possession, now in the possession of [Huay], or now located in the family home, including not by way of limitation:
>
> All his personal effects and wearing apparel;
> 1999 Ford F 150
> 42" television and stand
> brown leather recliner
> Compaq portable computer
> HP officejet printer
> golf clubs
> all other property now in his possession."

Huay received possession of the marital home and all of her personal effects. Apparently, Huay never contested this division. Gary also voluntarily began paying maintenance to Huay a short time later in the amount of $1,500 per month.

Later, Huay filed a motion to modify the temporary order. In part, she sought $1,800 a month in temporary maintenance from Gary. On September 19, 2008, the district court issued its journal entry granting the divorce. However, the court decided, for reasons we are unaware of, not to divide the property or award maintenance but reserved "all other issues outstanding and unresolved" for further hearing.

Before the district court issued its ruling on those remaining issues, Huay filed a motion for temporary spousal maintenance, which incorporated by reference her request for $1,800 per month that she had included in her ptior motion to modify the temporary order. After hearing arguments on the motion, the district court issued an order on June 16, 2009, granting Huay $1,500 a month in temporary maintenance.

On July 26, 2011, Gary filed a "Motion to Terminate Temporary Spousal Support or in the Alternative Reduce Amount and Set Termination Date." The district court held an evidentiary hearing on the motion on November 7, 2011, and at the conclusion, asked the parties to submit proposed findings and conclusions. Later, the court issued its written findings of fact and conclusions of law ordering that Gary pay maintenance as follows:

> "Based on the above and foregoing, the Court orders that [Gary] continue to pay maintenance of $1,500 per month to [Huay] through the March 2013 payment. At that time, his obligation will reduce to $500 per month for twenty-four (24) months, commencing on April 1, 2013. [Gary's] obligation will end on April 1, 2015. At that time, he will be approximately sixty-eight (68) and [Huay] will be approximately sixty-five (65). The maintenance obligation shall terminate upon the death of either party or the re-marriage of [Huay]."

The district court's decision, however, made no reference to Gary's military pension. Because of this, and for other reasons, Huay filed a motion to alter or amend the court's order. She argued three points: (1) She should have received half of Gary's military pension; (2) she should have received "an additional amount of support based upon a percentage of [Gary's] earnings or upon a percentage of his surplus income"; and (3) her maintenance award should not have terminated in 3 years but should have been subject to modification based on Gary's decreased income upon retirement.

We will state additional relevant facts as necessary in our analysis of the issues Huay raises.

The Parties' Contentions on Appeal

For her first issue, Huay argues the district court erred when it denied her request for a fixed percentage of Gary's military pension. Specifically, she contends the court failed to properly treat Gary's military retirement pay as a marital asset and make an appropriate division thereof, except by default, which resulted in the asset being awarded 100% to Gary. Conversely, Gary maintains the court was correct in its analysis and application of K.S.A. 23-201 and K.S.A. 23-2801. In particular, he argues that Huay's argument is misplaced and the findings and statements of the court refute her argument.

In her second issue, Huay contends the district court abused its discretion in entering an inadequate maintenance award. She argues the court should have fashioned a support order that would be subject to modification if and when Gary retired from employment and began drawing Social Security and when she became eligible to draw from Social Security and how much.

In her third issue, Huay argues the district court erred in finding Gary was not in arrears on his court-ordered maintenance obligation.

Scope of Review

We first note that a statement of our scope of review in this case requires a somewhat lengthy recitation. Under Kansas law, district courts have broad discretion in adjusting the property rights of parties involved in a divorce action, and their 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 proof to show such abuse. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995). Judicial discretion is abused if the decision is: (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. See *State v. Harris*, 293 Kan. 798, 814, 269 P.3d 820 (2012). Similar to property divisions, appellate courts review maintenance awards under an abuse of discretion standard. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 706–07, 229 P.3d 1187 (2010).

Although district courts have broad discretion, that discretion is guided by legal standards and statutory limitations. When higher courts set out factors to be analyzed on an issue, district courts are to use those factors as a guide in making their discretionary determinations. A district court abuses its guided discretion when it fails to consider particular required factors in a case. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 569, 232 P.3d 856 (2010). In explaining that an appellate court does not review the merits of the district court's decision but, instead, reviews the process used in making the decision, our Supreme Court stated the following:

> "In general, when a discretionary decision is made 'within the legal standards and takes the proper factors into account in the proper way, the [district court's] decision is protected even if not wise.' [Citation omitted.] However, '[a]buse is found when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide

> the discretionary determination.' [Citations omitted.]" *Dragon v. Vanguard Industries, Inc.*, 277 Kan. 776, 779, 89 P.3d 908 (2004).

Also, relevant to our scope of review is the notion that a district court need not make express findings on all issues subject to dispute. For example, in a child-custody case, our Supreme Court observed that the district court's "failure to specifically articulate the evidence that supports its finding is not fatal." *In re Marriage of Whipp*, 265 Kan. 500, 508, 962 P.2d 1058 (1998). Indeed, in the absence of an objection to the district court, omissions in findings will not support reversal because the court is presumed to have found the facts necessary to support its judgments. 265 Kan. at 508-09. Thus, an appellate court's function is to review the record and determine if it supports a presumption that the district court found all facts necessary to support the judgment. 265 Kan. at 509. These same principles apply to situations like the present where a party challenges the district court's division-of-property order. See, *e.g.*, *In re Marriage of Ginavan*, No. 100,014, 2009 WL 1393758, at *3-4 (Kan. App. 2009) (unpublished opinion).

Applicable Statutory Provisions

Under K.S.A. 2008 Supp. 60-1610(b)(1), the district court "*shall divide* the real and personal property of the parties, *including any retirement and pension plans,* whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts. . . ." (Emphasis added.) When dividing the property, the district court is to consider the following factors:

> "the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers

necessary to make a just and reasonable division of property." K.S.A. 2008 Supp. 60-1610(b)(1).

Here, Huay asked the court to award her a fixed percentage of Gary's military pension that accrued during their 33-year marriage. She relies on K.S.A. 23-201(b) to establish that military retirement is marital property. It reads in pertinent part as follows:

"(b) All property owned by married persons, *including the present value of any vested or unvested military retirement pay*, or, for divorce or separate maintenance actions commenced on or after July 1, 1998, . . . 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. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto." (Emphasis added.) K.S.A. 23-201(b).

As to a district court's authority to award maintenance, K.S.A. 2008 Supp. 60-1610(b)(2) states: "The decree [of divorce] may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances." The purpose of spousal maintenance is "to provide for the future support of a divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other to pay." *In re Marriage of Hair*, 40 Kan. App. 2d 475, 484, 193 P.3d 504 2008, *rev. denied* 288 Kan. 831 (2009). When awarding maintenance, a district court should take the following factors into consideration:

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

Williams v. Williams, 219 Kan. 303, 306, 548 P.2d 794 [1976] [establishing the use of these eight factors]).

As is readily apparent, these factors are similar to those used to guide district courts in dividing marital property. See K.S.A. 2008 Supp. 60-1610(b)(1); *In re Marriage of Collins*, No. 105,217, 2012 WL 140219, at *2, 6 (Kan. App. 2012) (unpublished opinion).

While Huay separates her arguments about inadequate property division and maintenance into two issues, we will address them together as they are, by their nature, closely intertwined. *In re Marriage of Sedbrock*, 16 Kan. App. 2d 668, 675, 827 P.2d 1222, *rev. denied* 251 Kan. 938 (1992). "Maintenance and division of property are separate and distinct concepts, but neither can be intelligently fixed by itself without giving appropriate consideration to the other. [Citation omitted.]" 16 Kan. App. 2d at 675; See K.S.A. 2008 Supp. 60-1610(b)(1).

The District Court's Rationale

On January 25, 2012, following an evidentiary hearing on Gary's motion to terminate his support order and for other relief, the district court issued its detailed letter decision which contained the orders Huay appeals from. In it, the court mentioned several factors that weighed on its decision to set the order as it did. A review of that letter reveals that the court considered pretty much all of the factors listed in both K.S.A. 2008 Supp. 60-1610(b)(1) and K.S.A. 2008 Supp. 60-1610(b)(2) that had relevance in this case.

At the outset, the district court specifically stated it had considered K.S.A. 60-1610 (b)(2) as well as the cases the parties cited. It then specifically mentioned the following facts and factors it found significant: the expenses of the parties as best it could

determine from their testimony even though Huay's testimony about her monthly expenses differed significantly from the information she provided previously in her domestic relations affidavit; the fact Gary began making maintenance payments voluntarily soon after he filed the divorce in April 2008, even though a formal order was not entered until June 2009; that Gary had paid $1,500 per month from May 2008 through December 2008, $775 per month from January 2009 through June 2009, and thereafter $1,500 per month to the present; Huay had made no effort to gain job skills over the last 20 years to minimally hold a job or support herself; the court's concerns about Huay's inability to explain her living arrangements, job history, income, and expenses since the divorce; and the fact Gary was ordered to pay $3,000 in attorney fees to Huay's attorney.

As we noted earlier, Huay then filed a motion to alter or amend this order. The district judge denied the motion and stated in open court in part:

> "First of all, I'm aware of [K.S.A.] 23-201, and I'm aware that all property owned by the parties at the time of the divorce, regardless of the manner or source, etc., of that property, all property is marital property. And I'm certainly well aware that the military pension is part of that pot and capable of being divided. And of course I took his pension into account in analyzing this matter.
>
> "Secondly, I considered all aspects of K.S.A. 60-1610 as it relates to maintenance and all of the cases cited by counsel. . . .
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> . . . .
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> ". . . But as I state in my opinion, the biggest problem in having the information to adequately analyze [Huay's] needs, at least, and her current situation was, is she failed to give any significant testimony about her current residence, her current employment, what she had done or been doing for the past two and a half years since this divorce had been filed, her employment or her reasonable monthly expenses. And as I said in my letter opinion, it was my opinion that she was just being either evasive or non-cooperative in answering . . . . And she mainly wanted me to view her with sympathy. That's how she presented herself, but there was not any substantive information disclosed for me to have an accurate feel for what her situation was.

"Secondly, in that regard, the ages of the parties in this case were a very significant factor. There are numerous things you take into account, primarily ability to pay and need. Her need is almost undiscernible from her testimony. I mean, I know she needs some support and help but how much and for how long I don't know because of the lack of her concrete testimony.

"Age of the parties, and earning capacity in the future is another element of determining maintenance. I went over the parties' age, and [Gary] is at least three years older than her. Part of his argument was he shouldn't have to work forever to support her, or at least at a high rate. I was aware of her ability to claim social security at some point in time. . . .

"The other issue, frankly, is what initiative or effort she has made to provide for herself minimally. . . .

"My desire was to get her to age 65 with some ongoing support and . . . he will have paid $1500 a month for five years, and another 500 for two more years. That's what I thought was fair and appropriate, that's still what I think is fair and appropriate considering her absolute lack of candor with the court."

Analysis—Huay's Issues I and II

As we noted earlier, Huay argues the district court failed to treat Gary's military pension as marital property and make an equitable division of it. While it is true that the judge did not in so many words state that the asset was awarded solely to Gary, his order certainly made it clear that was his intent when it failed to allocate any portion to Huay after stating that he was aware that the pension was "part of that pot [marital property] and capable of being divided." He then added, "And of course I took his pension into account in analyzing this matter." While the judge could have perhaps more clearly delineated his disposition of the pension, he certainly did so by implication. The facts indicate the district court did treat the pension as marital property.

The question then becomes whether the district court made an equitable division of the pension. We again note the broad discretion the district court has when it comes to

dividing property in a divorce case. In *In re Marriage of Brane*, 21 Kan. App. 2d 778, 782, 908 P.2d 625 (1995), this court noted that Kansas, as an equitable division state rather than a community property state, does not require an equal split of all property acquired during the marriage. Rather, Kansas law "gives the court discretion to consider all of the property, regardless of when acquired, to arrive at a just and reasonable division." 21 Kan. App. 2d at 782. In *Gronquist v. Gronquist*, 7 Kan. App. 2d 583, 585, 644 P.2d 1365 (1982), this court stated:

> "[T]here is a significant theoretical difference between Kansas law and community property law *since in Kansas the court has discretion to award marital property entirely to one party so long as the overall division is fair.* Property acquired during the marriage may continue to be identified as that of one party although the other party to the divorce will have the right to some offsetting value accomplished either within the property division or by the award of alimony." (Emphasis added)

That brings us then to the maintenance award. As we stated, both maintenance and property division are closely intertwined and are best discussed together.

By the time Gary completes his maintenance obligation, he will have been making payments for approximately 7 years provided none of the conditions for termination of the obligation occur. During that time, Huay will have received over $100,000 from a marriage in which the parties had very little property other than the pension. Some of these payments Gary paid voluntarily without a court order. Apparently, there was no evidence in the record as to the present value of Gary's pension so it is difficult to determine what percentage these payments represent compared to the present value of the pension. Regardless, the district judge stated several detailed reasons why he awarded the amount he did. Chief among them was Huay's failure, either because she was evasive or uncooperative, in providing testimony about her work history, living arrangements, expenses, and general financial circumstances since the divorce.

Since the district judge clearly knew which statutory provisions must govern his decision and he explicitly stated he had considered them in making that decision, we are unable to find that his decision was based on an error of law. The court did not venture outside the legal standards set by statute or caselaw. Nor can we say the decision was based on an error of fact. Most of the essential facts in the case were undisputed. As to Huay's financial circumstances since the divorce, her testimony was, indeed, vague and unsupportive of any maintenance award significantly greater than what she received.

Our review of the record supports the presumption that the district court found all facts necessary to support its division of property and award of maintenance. See *Marriage of Whipp* 265 Kan. at 509. And when we consider the award of the pension to Gary together with the amount of maintenance Gary will likely pay, we do not find the decisions arbitrary, fanciful, or unreasonable.

Certainly, reasonable persons could disagree as to what orders should have been entered regarding the pension and maintenance in this case, some finding them appropriate and others disagreeing. We express no opinion on that point. Suffice it to say, we conclude that Huay has failed to meet her burden to show the district court abused its discretion in its decision regarding those items.

Was Gary in Arrears in Making Temporary Support Payments—Issue III

Finally, Huay argues the district court erred when it found that Gary was not in arrears under its temporary maintenance order. The entirety of her conclusory argument reads as follows:

> "The standard of review on this issue is unlimited since it involves a question of law, i.e. whether the Trial Court correctly determined when [Gary's] first temporary support payment was due and paid.

> "The order awarding [Huay] temporary support occurred at the hearing held thereon on June 16, 2009. The Court indicated that the payment should start immediately. The order from this hearing was filed on July 16, 2009, and [Gary] made his first payment on July 18, 2009. He did not however make a payment for June, 2009, and accordingly still owes $1,500 to [Huay] for temporary support."

Huay cites no authority or any part of the record that legally or factually supports the above argument that Gary was in arrears on his court-ordered maintenance. Our Supreme Court recently reiterated its position regarding a party's failure to do so:

> "A failure to support an argument with pertinent authority or to show why the argument is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. Therefore, an argument that is not supported with pertinent authority is deemed waived and abandoned. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010); see Supreme Court Rule 6.02(a)(5) (2012 Kan. Ct. R. Annot. 39) (appellant's brief must include 'the arguments and *authorities* relied on' [Emphasis added.])" *State v. Tague*, 296 Kan. 993, 1001-02, 298 P.3d 273 (2013).

Also, Supreme Court Rule 6.02(a)(4) (2012 Kan. Ct. R. Annot. 39) provides in pertinent part: "The court may presume that a factual statement made without a reference to volume and page number [in the record] has no support in the record on appeal." Huay cites us to no evidence, documentation or otherwise, that establishes when or if Gary missed any of his payments.

We are duty bound to follow our Supreme Court precedent, unless there is some indication that the court is departing from its previous position. *State v. Singleton*, 33 Kan. App. 2d 478, 488, 104 P.3d 424 (2005). Huay has failed to support her argument with pertinent authority and citation to the record, and her argument on this issue fails.

Affirmed.