NOT DESIGNATED FOR PUBLICATION

No. 109, 422

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF
WESLEY CLARK,
Appellee,

v.

VANIDA CLARK,
Appellant.

MEMORANDUM OPINION

Appeal from Jackson District Court; MICHEAL A. IRELAND, judge. Opinion filed November 15, 2013. Affirmed in part, vacated in part, and remanded with directions.

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellant.

Donald R. Hoffman and *Jason P. Hoffman*, of Hoffman & Hoffman, of Topeka, for appellee.

Before BRUNS, P.J., ARNOLD-BURGER and POWELL, JJ.

Per Curiam: Wesley Clark (Wesley) and Vanida Clark (Vanida) were granted an annulment of their marriage by the district court. On appeal, Vanida challenges the district court's division of marital property and denial of spousal maintenance. We conclude that the district court's orders fail to explain the division of marital property with enough particularity to allow for meaningful review. Furthermore, we conclude that the district court erred as a matter of law in finding that an award of spousal maintenance is not appropriate in an annulment action. Thus, we remand the issues of property division and spousal maintenance to the district court for further consideration.

FACTS

Wesley and Vanida married on June 4, 2008. At the time of the marriage, Wesley was 61 and Vanida was 45. No children were born during the marriage. On July 6, 2012, Wesley filed a petition for annulment of the marriage. In her answer, Vanida requested an equitable division of the property and debt of the parties as well as an order of spousal support and an award of attorney fees. Vanida also filed a counter-petition seeking an annulment of the marriage.

The district court held a pretrial conference on October 9, 2012. At the conclusion of the pretrial conference, the parties presented testimony in support of their mutual request for an annulment. At a second pretrial conference held on November 6, 2012, both the district court and Vanida's counsel questioned whether there was "jurisdiction" to award spousal maintenance in an annulment case.

On January 3, 2013, the district court held a bench trial on the issues of property division and attorney fees. The testimony revealed that Wesley had met Vanida when he was on a trip to Thailand about 2 years before they were married. Vanida—who evidently holds an accounting degree and a master's degree in finance—worked as an officer at a bank in Thailand. Prior to the marriage, Wesley paid Vanida's family a dowry in accordance with a custom in Thailand.

After they were married, the couple lived together in a house that Wesley had built in 1982. In the United States, Vanida did house work, worked part time as a hostess at a restaurant, and worked at a casino busing tables and serving as a dealer. Shortly after the marriage, Wesley sold his optometrist practice. He was retired or semi-retired at the time of trial, and Wesley testified that he was unemployed and living off of funds from the sale of his business and his military retirement. Vanida, at the time of trial, continued to

own a house in Thailand. Although Wesley testified that he had paid off the indebtedness on her house, Vanida disputed this testimony.

The parties also offered testimony at trial regarding their respective personal property and debts. In addition, they testified regarding various services they had rendered to each other during their 4-year marriage. And Wesley testified regarding certain expenses he had paid on behalf of Vanida and members of her family. The parties also offered testimony regarding Wesley's ownership of various investment assets, the manner in which he obtained them, and whether they had appreciated in value during the marriage.

After the parties testified, the district court asked Wesley and Vanida about various items of personal property. It ordered an exchange of the items within 2 weeks in the presence of a law enforcement officer. At the conclusion of the trial, the district court took the issue of property division and attorney fees under advisement. It did, however, enter a journal entry—which counsel for both parties signed—granting the annulment. In addition, the journal entry stated that "[n]o maintenance shall be ordered, as it is not appropriate in an annulment."

A few days later, on January 7, 2013, the district court filed a memorandum decision on the issues of property division and attorney fees. The district court found that the funds from the sale of Wesley's business and his house were premarital property. Likewise, the district court found that the funds placed in "trust" by Wesley's deceased parents were premarital property. The district court recognized that Vanida had "made a number of sacrifices in leaving her home country and a decent paying job to accompany [Wesley] to his home country." Although it was noted that Wesley had paid a dowry and had paid approximately $11,000 towards a loan on Vanida's house in Thailand, the district court concluded that there was not sufficient evidence to prove that Wesley had paid $20,000 to $30,000 for the care of Vanida's nephew and niece.

Ultimately, the district court awarded Wesley all of the accounts in his name and Vanida any accounts in her name. No mention was made of any appreciation in the value of such accounts during the marriage. Likewise, each party received the vehicles and personal property in their possession, subject to the agreements discussed at trial regarding certain items. Target and Visa debts were assigned to Wesley while a Bank of America debt was assigned to Vanida. The district court also ordered the parties to split any 2012 federal or state tax refunds. And it set aside one-half of the value of life insurance and a municipal fund to each party. Finally, the court awarded Vanida an equalization payment in the amount of $10,000 and ordered Wesley to pay $1,500 of her attorney fees.

On January 18, 2013, Wesley filed a motion for rehearing, arguing that the life insurance and municipal fund had no cash value and were premarital property that should not have been split. In an order entered on January 22, 2013, the district court denied Wesley's motion. Vanida did not file any posttrial motions. Instead, she filed a timely notice of appeal on February 4, 2013.

ANALYSIS

Granting of Annulment

Vanida appeals from the district court's journal entry entered on January 3, 2013, and its memorandum decision entered on January 7, 2013. We note that the journal entry includes a finding that there was sufficient evidence presented to the district court to support the annulment. Although each party asserted a different ground for annulment, it appears that neither is challenging the granting of the annulment in this appeal. Accordingly, we affirm the district court's decision to grant an annulment under the unique circumstances presented.

Division of Marital Property

Vanida contends that the district court abused its discretion when dividing the marital property after granting the annulment. A district court's division of property in an annulment action is governed by K.S.A. 2012 Supp. 23-2801 *et seq*. As in a divorce action, the district court has broad discretion in adjusting the property rights of the parties in an annulment action. See Neis *v. Neis*, 3 Kan. App. 2d 589, 594, 599 P.2d 305 (1979).

The party asserting that the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009). A judicial action constitutes an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

Although the ultimate division of property must be just and reasonable, it need not be equal. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 715, 229 P.3d 1187 (2010). Likewise, there is no fixed formula for dividing marital property in an annulment action. And there is no particular percentage of assets that should be awarded one spouse automatically. See *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

K.S.A. 2012 Supp. 23-2801(a) defines "marital property" as "[a]ll property owned by married persons . . . 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." Furthermore, K.S.A. 2012 Supp. 23-2801(b) provides that "[e]ach 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. 2012 Supp. 23-2802 . . . ."

Under K.S.A. 2012 Supp. 23-2802(c), a district court must consider the following factors when dividing marital property between the parties:

> "(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property."

In the present case, it is undisputed that Wesley owned certain investment assets prior to the marriage. But as Vanida points out, the district court mistakenly referred to these investment assets—which were awarded to Wesley—as "premarital property" in its memorandum decision. Vanida contends that the district court should have equitably divided any increase in the value of these assets that occurred during the marriage. Moreover, Vanida argues that by awarding all of the investment assets to Wesley—including any increase in the value during the marriage—the property division was inequitable.

Clearly, a district court is to consider the "time, source and manner of acquisition of property" in making an equitable division between the parties. But all of the property owned by the parties at the time this action was commenced—including the investment assets—was "marital property" subject to division under K.S.A. 2012 Supp. 23-2801. Thus, the district court's reference to the investment assets as premarital—instead of marital—property is an error of law that constitutes an abuse of discretion. See *Northern Natural Gas Co.*, 296 Kan. at 935.

It is not an abuse of discretion for a district court to treat assets acquired prior to a marriage differently than those acquired after the marriage. Often, the entry value of such

assets is restored to the party who brought the property into the marriage and any appreciation is equitably divided between the parties. See *In re Marriage of Hair*, 40 Kan. App. 2d at 482-83. In fact, we note that the family law committees of local bar associations in several judicial districts in Kansas recommend this approach. See 2010 Johnson County Family Law Guidelines 3.3; 2006 Shawnee County Family Law Guidelines 3.03. While such guidelines are not binding, judges and attorneys frequently look to them for guidance when considering how to equitably divide marital property.

Wesley argues on appeal that the district court fully evaluated the financial situation of the parties in light of the factors in K.S.A. 2012 Supp. 23-2802(c). Although it appears that the district court probably considered at least some of the factors, the memorandum decision fails to specifically mention any of the factors. Similarly, the memorandum decision does not explain the basis for the property division with enough particularity to allow for meaningful review. While brevity is usually a virtue, it is important that district courts adequately explain the rationale for their decisions.

We recognize that the district court is not required to make express findings on all of the factors listed in K.S.A. 2012 Supp. 23-2802(c). See *In re Marriage of Lawson*, No. 107,434, 2013 WL 1010406, at *4 (Kan. App. 2013) (unpublished opinion). We also recognize that some family law cases may require more or less explanation than others depending on the complexity of the issues and the amount of property to be divided. But due to the significant amount of marital property in the present case, we find that a more thorough explanation is warranted as to the district court's rationale for its division of property.

We do not arrive at this decision lightly, and we are reluctant to vacate a district court's division of property. Moreover, we understand that part of the confusion likely arose from the way in which this case was presented to the district court. In particular, we note that Vanida failed to object to the sufficiency of the district court's findings. Without

such an objection, we generally presume the district court found all of the facts needed to support its judgment. See *In re Marriage of Whipp*, 265 Kan. 500, 508-09, 962 P.2d 1058 (1998). However, we may still remand when the lack of factual findings prevent meaningful appellate review. *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

We find remand to be appropriate in this case because our review of the record does not support a presumption that the district court found all of the facts needed to support a just and reasonable division of the marital property. See *In re Estate of Cline*, 258 Kan. 196, 206, 898 P.2d 643 (1995). We are particularly uncomfortable presuming that the district court found all the facts necessary to support its decision because of the mistaken reference to "premarital property" in the memorandum decision. In addition, we do not believe the application of the presumption is appropriate because we cannot determine why the district court divided the property as it did when the statutory factors arguably support a greater award of property to Vanida.

We, therefore, vacate and remand the portion of the district court's judgment related to property division. On remand the district court should reconsider its decision in light of this opinion. Finally, we direct the district court to explicitly state the factual and legal reasoning for its division of the marital property.

Denial of Spousal Maintenance

Vanida also contends that the district court erred as a matter of law in finding that it could not award spousal maintenance in an annulment. In response, Wesley argues that the district court simply meant that an award of spousal maintenance was not appropriate in this particular case. Although this may have been the district court's intention, we simply cannot tell from the record as it currently exists.

In the journal entry entered on January 3, 2013, the district court expressly found that "[n]o maintenance shall be ordered, as it is not appropriate in an annulment." Unfortunately, this is a misstatement of Kansas law. Clearly, district courts have the discretionary authority to award spousal maintenance in any divorce, separate maintenance, or annulment action. See K.S.A. 2012 Supp. 23-2902(a); K.S.A. 2012 Supp. 23-2711. As we noted above, an error of law constitutes an abuse of discretion. See *Northern Natural Gas Co.*, 296 Kan. at 935.

Wesley also argues that Vanida waived her right to seek spousal maintenance. Although Vanida requested spousal support in her answer and stated in her pretrial questionnaire that maintenance was an issue, Wesley points to the following exchange that occurred between Vanida's former attorney and the district court at the pretrial conference:

"[District court]: You're not seeking maintenance?

"[Vanida's counsel]: Well, it is an annulment case so I'm not sure the Court has—

"[District court]: I don't think you can, either.

"[Vanida's counsel]: jurisdiction."

Additionally, at the bench trial, Vanida's former counsel stated, "I don't believe that under statute we can ask for spousal maintenance."

Although it is regrettable that Vanida's former attorney helped lead the court to commit this mistake of law, a panel of this court has found that spousal maintenance is not a right that is subject to waiver. See *In re Marriage of Schmidt*, No. 104,582, 2011 WL 2637456, at *2 (Kan. App. 2011) (unpublished opinion). Further, even if maintenance could be waived, we do not find that Vanida had both the "'knowledge and

intent'" necessary for a valid waiver. See *Sultani v. Bungard*, 35 Kan. App. 2d 495, 498, 131 P.3d 1264 (2006) (quoting *Flott v. Wenger Mixer Manufacturing Co.*, 189 Kan. 80, 90, 367 P.2d 44 [1961]). Generally, "[w]aiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it." *United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009).

There is no indication in the record that Vanida deliberately considered the issue of spousal maintenance or made an intentional decision to forgo maintenance in this case. Rather, it appears that Vanida relied upon the representations made by her former attorney and the district court regarding whether maintenance could be awarded in an annulment action. Thus, we also vacate and remand the portion of the district court's judgment related to spousal maintenance.

Failure to Disclose Assets

Furthermore, Vanida contends that Wesley failed to disclose all of his assets to the district court for consideration in its property division decision. Unfortunately, we do not have sufficient information in the appellate record to properly rule on this issue. Regardless, Vanida can raise this issue on remand and both parties should be given the opportunity to present arguments on this issue before the district court issues a final decision on property division and spousal maintenance. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011).

Attorney Fees and Costs on Appeal

After oral argument, Vanida timely moved this court to award her attorney fees and costs on appeal. See Supreme Court Rule 7.07(b) (2012 Kan. Ct. R. Annot. 66) (discussing appellate court's authority to award attorney fees). We may award attorney fees on appeal when "the district court had authority to award" them. Supreme Court

Rule 7.07(b) (2012 Kan. Ct. R. Annot. 66). Here, the district court had authority to award attorney fees and costs under K.S.A. 2012 Supp. 23-2715. Nevertheless, because we are vacating the district court's decisions regarding property division and spousal maintenance based on errors of law—some of which were invited or at least acquiesced to by Vanida—we find that justice and equity do not require an award of attorney fees or costs on appeal. Accordingly, Vanida's motion for costs and attorney fees is denied.

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