

NOT DESIGNATED FOR PUBLICATION

No. 109,470

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of  
WANDA M. MIKEL,  
*Appellee,*

and

ROBERT A. MIKEL,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Labette District Court; JEFFRY L. JACK, judge. Opinion filed February 28, 2014.

Affirmed.

*Edward W. Dosh*, of Parsons, for appellant.

*Larry A. Frauser*, of Armstrong and Frauser, of Columbus, for appellee.

Before GREEN, P.J., SCHROEDER, J., and JAMES L. BURGESS, District Judge Retired,  
assigned.

*Per Curiam:* Robert A. Mikel appeals the district court's division of assets and maintenance order. The divorce case was presented to the district court with most of the property issues resolved. The district court was left to divide the "Hart Farm," Robert's retirement accounts, and Wanda Mikel's request for maintenance. Robert had ample opportunity to try his case before the district court. Robert carries the burden to show the district court abused its discretion and has failed to show the decision of the district court was arbitrary, fanciful, or unreasonable. We affirm.

## FACTS

On May 29, 2012, the district court granted the petition for divorce and approved the Mikels' partial property settlement agreement. At the conclusion of evidence, the district court took the remaining property issues involving the Hart Farm, division of retirement assets, and maintenance under advisement. The district court issued a memorandum ruling assigning those assets.

Specifically, the district court made the following findings of fact:

"The parties were married on January 14, 1989, and separated in September, 2011. The petitioner [Wanda] is sixty-five years old, and the respondent [Robert] is seventy-six years old. There are no minor children of the marriage.

"Petitioner is employed by the United States Veterans Administration (the VA). . . . Petitioner also has interest and farm income.

" . . . [Petitioner has] an average taxable income of \$39,707.33.

" . . . Petitioner plans to retire in December, 2012, for which she will be eligible for Civil Service retirement benefits (CSRS) and Social Security benefits. It is estimated that her CSRS benefits . . . and her Social Security benefits will be about . . . \$1,195 per month.

"Respondent is retired. . . . For his employment with [the Kansas Department of Social and Rehabilitative Services] SRS, Respondent receives monthly retirement benefits from KPERS, and for his service in the Army, he receives military retirement benefits. Respondent also receives Social Security benefits.

"Respondent's KPERS benefits are . . . about \$1,409.50 per month. Respondent's military retirement benefits are . . . about \$1,367.54 per month. Respondent's Social Security benefits are . . . about \$1,277 per month. Respondent also has some interest income.

....

"At the time of the parties' marriage, [Robert] owned a residence at 1304 Thornton, Parsons, Kansas that he had purchased in 1985 for \$46,750. This was the

parties' marital residence until they decided to buy the Hart Farm in 1995. Respondent sold the Thornton property for a net amount of \$45,972.74.

"The parties paid a total of \$129,000 for the Hart Farm, which they purchased in two parts: 129 acres for \$59,000, and a house and 12 acres for \$70,000.

"There are no records that conclusively show the origin of the money for the purchase of the Hart Farm. [Wanda] claims the entire purchase price came from her savings and proceeds from the sale of the house on [a piece of pre-marital property]; [Robert] claims that he turned the proceeds of the sale of the Thornton property over to [Wanda] to apply to the purchase price. These cannot both be true. The court finds that it is more likely that the parties used the proceeds from the sale of the Thornton property for the purchase, since that property was the marital residence and was specifically sold so the parties could move to the Hart Farm."

The district court then recited the statutory considerations for making a property division determination under K.S.A. 2011 Supp. 23-2802(c). Acknowledging that it had considered those factors and applied them to the facts, the district court made the following division of property:

"2. [Wanda] shall receive the Hart Farm; however, [Robert] shall receive a judgment in the amount of \$45,000 for his equity in this property, which shall act as a lien on the real estate until paid by [Wanda].

"3. [Wanda] is entitled to a portion of Robert's military and KPERS retirement not as maintenance, but as a division of property that was acquired during the marriage. By the court's calculations, the parties were married for 6 1/2 years of [Robert]'s 31 year military career, or 21%, so she is entitled to 21% of his military retirement pay, and for 4 years of [Robert]'s 28 year state employment, or 14%, so she is entitled to 14% of his KPERS. These amounts shall be enforced through QDROs to be prepared by [Wanda]'s attorney.

"4. Because of the division of [Robert]'s retirement pay, which will increase [Wanda]'s retirement income to approximately \$1,679 and reduce [Robert]'s retirement income to approximately \$3,569, the court shall enter an award of maintenance from [Robert] to [Wanda] in the amount of \$500 per month, for a period of five years beginning January 1,

2013. The court has considered not only the parties' incomes, but also their ages, length of marriage, health conditions and overall financial condition in making this award in this amount."

Robert moved the district court for a new trial or, in the alternative, to reconsider, alter, or amend the judgment pursuant to K.S.A. 2011 Supp. 60-259(a) and (f). Robert argued:

- His due process rights to present a proper defense were affected by deficiencies of both parties during discovery;
- The lack of a proper valuation for the Hart Farm prevented the district court from making an "equitable" division of property;
- The district court awarded Wanda the full value of his retirement benefits earned during their marriage instead of only half; and
- The district court improperly calculated his military retirement benefits accrued during the marriage and requested the opportunity to present additional evidence not presented at the trial.

The district court denied the request for new trial and granted the motion to alter or amend in part, reducing the KPERS and military retirement award in half. The district court noted if counsel was not prepared, it could have requested a continuance. The district court also declined to allow Robert's new evidence on how his military retirement should have been calculated as it could have been presented at trial. The district court also found the division of the Hart Farm was to Robert's advantage regarding the source of funds used to purchase it and denied his request to change how he assigned the Hart Farm to Wanda with a lien for Robert's benefit. The district court also noted Robert's complaint that a current valuation of the farm was not used and if he wanted that to be considered he should have presented it at the trial.

Robert now timely appeals.

#### ANALYSIS

##### *Did the District Court Abuse Its Discretion in Dividing the Hart Farm?*

Here, the parties executed a property settlement agreement ratified by the district court that settled many of the property issues but left open the amount of equity in the Hart Farm Robert would receive. Presented with conflicting testimony about whose premarital funds were used to acquire the Hart Farm, the district court resolved the competing claims in favor of Robert with a lien for \$45,000 based on the proceeds received from the sale of his Thornton house. In conjunction with all the other factors, this can hardly be said to be unreasonable, arbitrary, or fanciful. The valuation Robert included in his appellate brief was not provided to the district court and cannot be considered on appeal. This court will not consider the values Robert now argues the property is worth as the district court was never given an opportunity to consider it.

##### *Standard of Review*

The party asserting the district court abused its discretion bears the burden of showing such abuse on appeal. *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, *cert. denied* 134 S. Ct. 162 (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). Under K.S.A. 2011 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 the 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."

### *Evidence*

Robert complains he contributed about \$46,000 towards the purchase of the Hart Farm and additionally contributed by "performing all of the work and supplying all of the money necessary to maintain the residence and 141 acres." Additionally, Robert states he "arguably contributed approximately half of the parcel's fair market value as of the date of the parties' divorce." Robert contends the district court abused its discretion when awarding him "an equity interest within \$1,000 of his cash contribution to the purchase price from his premarital assets" without establishing a current fair market value for the property. If Robert wanted a fair market value division of the Hart Farm, it was his duty to provide the value. Here, the only evidence was the original purchase price, coupled with a dispute over how the purchase was funded. Wanda claimed all the money to purchase the Hart Farm came from her premarital assets, and Robert claims \$46,000 came from the sale of his premarital house. Additionally, Wanda argues Robert did not meet his burden of demonstrating the trial court abused its discretion by dividing the Hart Farm as it did.

Here, the property before the district court was not subject to a current appraisal and, thus, the district court did not know its condition or current value. The district court

was provided with an issue over to what each party contributed when it was purchased. Although Robert said he wanted half of the Hart Farm, the evidence was presented on the basis each party would take out of this marriage what they brought into it. Robert said he made no claim on her inherited property (Myers Farm).

It was not the district court's responsibility to obtain current values on the property. The parties have the right to present their evidence and ask for the relief they choose. Again, this limited trial asked the district court to divide the Hart Farm based on contribution, not current value. The district court did what the parties asked and that was not an abuse of discretion.

By arguing the district court should have awarded him half the value of the Hart Farm, had its value been known, Robert fails to consider how he presented his evidence to the district court. Here, he does not argue the district court improperly considered the statutory factors required for property division when awarding him a vested interest in the property that was almost equal to his contribution. In fact, he argues that "[o]ne does not need to cite legal precedent, nor have an advanced degree, to understand that property cannot be 'equitably' divided when the current value of that property is unknown." His argument is without merit as he failed to present to the district court the necessary evidence on the Hart Farm's current value. We cannot say the division, as assigned by the district court, was an abuse of discretion in consideration of how the case was presented to the district court.

*Did the District Court Abuse Its Discretion in Awarding Maintenance?*

Robert next argues that without an appraisal of the Hart Farm the maintenance award was flawed because "the two issues are inseparable and reciprocal." He also argues the maintenance award was an abuse of discretion because it did not take into account his recent purchase of a separate residence, which was encumbered by a mortgage and

constituted a "sizeable monthly housing payment obligation," whereas Wanda did not have a house payment. Wanda responds the maintenance award was based on the evidence submitted by both parties and Robert failed to present the district court with evidence of his inability to pay maintenance.

### *Standard of Review*

An award of maintenance must be "fair, just and equitable under all of the circumstances." K.S.A. 2011 Supp. 23-2902(a). An appellate court generally reviews a district court's maintenance award for abuse of discretion. *In re Marriage of Vandenberg*, 43 Kan. App. 2d at 706-07. Judicial discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. "If reasonable persons could differ as to the propriety of the action taken by the [district] court, then it cannot be said that the [district] court abused its discretion." *In re Marriage of Bradley*, 282 Kan. 1, 7, 137 P.3d 1030 (2006). The party asserting the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995).

### *Maintenance Considerations*

Robert cites two cases for the argument that "although [property division and the determination of maintenance] are separate and distinct concepts, neither can be intelligently fixed by itself without giving appropriate consideration to the other." See *In re Marriage of Wade*, 20 Kan. App. 2d 159, 167, 884 P.2d 736 (1994), *rev. denied* 256 Kan. 995 (1995); accord *Almquist v. Almquist*, 214 Kan. 788, 793, 522 P.2d 383 (1974). However, in *In re Marriage of Wade* that quote was included as support for the district court's award of both property *and* maintenance. *Almquist* required the district court give "appropriate weight" to all of the factors involved in "balancing the parties' overall financial position." See 214 Kan. at 793-94. The district court's property division and maintenance award was made at the same time, and there is no evidence the district court



failed to balance the parties' overall financial position in dividing the property and setting maintenance. Robert does not argue that maintenance is inequitable because he was not properly compensated for his contributions to the marital residence. Robert argues the court failed to properly consider his requirement to buy another house, coupled with all the other assets Wanda was assigned to justify her need for maintenance.

Robert purchased his separate home during the pendency of this action, and his monthly mortgage obligation was included in his testimony at trial. Robert's pretrial questionnaire argued against awarding maintenance due to Wanda's earning capacity, savings, investments, and her lack of debt. Those factors, as well as Robert's income (retirement income), savings, and debt, were provided to the district court during the trial. The district court made specific findings of fact regarding "not only the parties' [retirement] incomes, but also their ages, length of marriage, health conditions and overall financial condition" to determine after dividing the property (including Robert's retirement accounts) that Wanda would have a retirement income of \$1,679 per month while Robert would have a retirement income of \$3,569 per month. The district court then entered an award of maintenance in the amount of \$500 per month for five years, which would be equivalent of Wanda having a \$2,179 per month retirement income and Robert having a \$3,069 per month retirement income.

Robert's argument is, essentially, that this process of attempting "to lessen the disparity of retirement pay" was a per se abuse of discretion because it "did not take into consideration the fact [that] the Hart Farm was awarded [to Wanda] was unencumbered and free from any monthly installment payments, whereas [Robert's] residence . . . was only recently purchased . . . resulting in a monthly installment payment of \$600.00." However, the district court's written order states that it considered the "overall financial condition" of both parties when entering its award, and Robert testified he would pay off the house debt once it was assigned to him with his other cash assets to avoid paying interest. Additionally, Robert fails to recognize the \$45,000 lien Wanda must pay to him

before the Hart Farm will be debt free. Robert would then have the \$45,000 to pay on the mortgage on his new house. Robert bears the burden here and has failed to show the district court's maintenance award was not based on the evidence before it. Wanda's evidence presented a need for maintenance when she retired, and Robert's evidence failed to show his inability to pay maintenance.

From the record, it does not appear the adjusted or "net" retirement incomes of the parties, even with Robert's additional mortgage payment, are not "fair, just and equitable under all of the circumstances." See K.S.A. 2011 Supp. 23-2902(a). The district court found Robert's retirement income was greater than Wanda's expected retirement income and, therefore, started maintenance to begin on the month she anticipated retiring.

Robert has failed to show the district court abused its discretion in awarding maintenance to Wanda in the amount of \$500 per month for 60 months.

*Did the District Court Abuse Its Discretion in Denying Robert's Motion for New Trial?*

Robert argues the district court erred when it denied in part his motion for reconsideration of the division of his military retirement benefits based on an "accumulating points scale" because "evidence of points was not presented at trial." He argues he had no notice his military benefits were subject to division, therefore he had no reason to provide evidence of the "accumulating points scale." Thus, Robert claims the court's denial of his request for reconsideration was an abuse of discretion. Wanda argues the district court did not err in denying Robert's motion for new trial.

*Standard of Review*

A motion to reconsider is generally treated as a motion to alter or amend judgment under K.S.A. 2011 Supp. 60-259(f). *Exploration Place, Inc. v. Midwest Drywall Co.*, 277

Kan. 898, 900, 89 P.3d 536 (2004). K.S.A. 2011 Supp. 60-259(f) gives the district court "authority to reconsider its prior findings of fact and conclusions of law and make . . . appropriate amendments and alterations thereto." *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001). Appellate courts have "recognized that motions to alter and amend may properly be denied where the moving party could have, with reasonable diligence, presented the argument prior to the verdict." *Wenrich v. Employers Mut. Ins. Co.*, 35 Kan. App. 2d 582, 590, 132 P.3d 970 (2006). Appellate courts review a district court's decision on a motion to alter or amend for abuse of discretion. *Exploration Place*, 277 Kan. at 900. A district court abuses its discretion if it acts in an arbitrary, fanciful, or unreasonable manner or if it makes an error based on errors of fact or errors of law. *Northern Natural Gas Co.*, 296 Kan. at 935.

#### *Reconsideration of Military Benefits*

A panel of this court recently observed a motion for reconsideration would be proper for alerting the district court to an error in facts or in the law that it used in arriving at its judgment but not for arguing that the district court lacked jurisdiction to enter the order addressing "the arguments already before it." *In re Marriage of Mullokandova & Kikrov*, No. 108,601, 2013 WL 5422358, at \*7 (Kan. App. 2013) (unpublished opinion) ("reckless indifference" to a court's jurisdiction to resolve the issues pending in a case did not constitute "excusable neglect" warranting reconsideration).

Here, the district court had evidence regarding Robert's military pension, including its balance and the number of years Robert was employed in the military and married to Wanda. Thus, it cannot be said that the district court abused its discretion in awarding a small percentage of Robert's military pension to Wanda based on the time the parties were married.

The district court did not abuse its discretion when it denied Robert's motion for reconsideration about how the military pension benefits were accrued on an accumulating points scale. A motion for reconsideration is a proper vehicle for presenting additional arguments to the district court where a party could not have with reasonable diligence presented the argument to the district court. Here, Robert had knowledge of his military retirement benefit and could have presented whatever he wanted during the trial about its current value and the reasonable division, if any, of the retirement account with Wanda.

With reasonable diligence, Robert could have argued his military pension should only have been awarded based on the accumulating points scale and presented evidence regarding that mechanism. Here, Robert impliedly argues the district court used the wrong standard for deciding not to accept his new facts about the accumulating points scale. K.S.A. 2011 Supp. 60-259(a)(1)(E) and K.S.A. 2011 Supp. 60-260(b)(2) only allow for the introduction of additional facts when they are "newly discovered." It does not appear from the record or from Robert's arguments on appeal that the accumulating points scale constitutes newly discovered evidence that should have been accepted for reconsideration. The district court did not abuse its discretion when it declined to accept additional facts that were not newly discovered and could have been presented at trial with reasonable diligence and preparation. The district court's decision was reasonably based on the evidence presented for its consideration, especially given the district court's decision from the motion to reconsider to recognize its factual error on the percentage accumulation during the marriage and cut it in half.

#### CONCLUSION

Robert has failed to meet his burden to demonstrate the district court abused its discretion by being arbitrary, fanciful, or unreasonable.

Affirmed.