

NOT DESIGNATED FOR PUBLICATION

No. 109,415

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of
GUNTER M. VOGT,
Appellant,

and

DIERDRE L. VOGT,
Appellee.

MEMORANDUM OPINION

Appeal from Geary District Court; DAVID R. PLATT, Judge. Opinion filed May 2, 2014. Affirmed in part and dismissed in part.

Bentson Oleen and Blake Johnson, of Oleen Law Firm, of Manhattan, for appellant.

Bruce C. Barry, of Bruce C. Barry, P.A., of Manhattan, for appellee.

Before ARNOLD-BURGER, P.J., MCANANY, J., and ERNEST L. JOHNSON, District Judge Retired, assigned.

Per Curiam: After a trial, the district court granted Gunter M. Vogt and Dierdre L. Vogt a divorce and, among other things, ordered Gunter to pay Dierdre maintenance and child support. Nine months later, Gunter filed a motion to modify maintenance and child support orders. The district court denied the motion, finding that Gunter was voluntarily underemployed and, also, that he had the ability to pay the ordered amounts. Gunter appeals and we affirm that denial. Gunter also raises issues in his brief that concern Dierdre's income increase now that she is receiving her portion of Gunter's military pension. We lack jurisdiction over those issues and dismiss them.

FACTUAL AND PROCEDURAL BACKGROUND

For context we include a brief summary of the divorce trial testimony and the district court's divorce orders, and then a brief summary of the testimony and orders from the hearing on the posttrial motion at issue.

Gunter and Dierdre were married on April 21, 1989, in St. Petersburg, Florida. Two children were born of the marriage. On December 16, 2010, after almost 22 years of marriage and several prior years of cohabitation, Gunter filed a petition for divorce in the Geary County District Court based upon incompatibility. The district court held the divorce trial on August 11, 2011.

Gunter testified that he was an active duty service member with the United States Army based at Fort Riley. He earned between \$4,200 to \$4,500 per month, and received a base housing allowance of approximately \$1,448. He had accumulated 26 years, 2 months, and 12 days of total active service credit for retirement. He had already processed his paperwork for a retirement that would be effective January 31, 2012. He disclosed the existence of several financial accounts and assets he had accumulated during the marriage. He also expected to receive an inheritance when the probate action concerning his parents' estates finally concluded. On direct examination, he claimed that in the 3 months leading up to the divorce filing, he "got involved" in some gambling. He said he lost marital assets "in excess of \$50,000." During an interesting cross-examination, where Dierdre's counsel confronted him with documents from his Quest account, Gunter admitted that he had actually withdrawn over \$100,000 from that marital account. In spite of a thorough cross-examination, Gunter denied that he had secretly bought property, opened separate accounts, or stashed cash at home or in a safety deposit box. He steadfastly maintained that he lost nearly all that money gambling.

Gunter acknowledged his responsibility to pay Dierdre child support for their daughter, B.V., born in late 1995, who remained a minor. However, he did not believe that Dierdre was entitled to any maintenance. He said that the roughly \$1,296 per month she would soon receive as part of the property division from his military pension plus the child support should be enough to meet her needs.

Dierdre testified that she worked in the commissary at Fort Riley stocking shelves and cashiering. Her net salary was approximately \$2,094 per month. Dierdre and the parties' two children resided on the military base at Fort Riley in the home they had previously shared with Gunter. Following the divorce, though, she would need to obtain her own housing. She then planned to relocate to Florida to be closer to her family. Although she did not have a job yet in Florida, she said she would work somewhere, even if it was minimum-wage employment at a retail chain or fast food restaurant. Dierdre requested maintenance based, at least in part, on her loss of access to the monthly military housing allowance (\$1,448).

At the conclusion of evidence and arguments, the district court announced its decision. It ordered that Gunter pay a monthly child support obligation of \$772. It divided the accounts and assets. It awarded Dierdre a 41.98% share of Gunter's disposable retirement pay. Finally, the district court ordered Gunter to pay Dierdre spousal maintenance in the amount of \$1,000 per month, commencing on September 1, 2011, and continuing for 10 years. Neither party appealed those decisions.

Nine months later, on May 7, 2012, Gunter filed a motion to modify child support and maintenance based on the reduction in his income occasioned by his retirement and Dierdre's receipt of her share of Gunter's retirement.

On November 13, 2012, the same district judge who had heard the divorce trial held a hearing on Gunter's motions. Both parties were present with counsel. By

agreement, each party's attorney proffered the testimony his client would have given and offered documents, all in order to reduce the length of the proceeding.

Gunter submitted that following his retirement January 31, 2012, he was unable to find employment in Kansas. He relocated to Georgia and accepted a part-time (approximately 32 hours per week at \$8.47 per hour) position at the Ft. Steward Post Exchange. Gunter insisted that he had applied for other, better paying jobs. However, he contended that his experience as a turret mechanic with the United States Army was not "in high demand in the civilian world." Combining wages and retirement pay he had a gross monthly income of \$3,200. According to Gunter, he and Dierdre had "almost, virtually, identical incomes," which eliminated her need for spousal support and justified a recalculation of his child support obligation.

Dierdre submitted that she had relocated, as she anticipated at the divorce trial, to Florida, B.V. and the parties' adult son both lived with Dierdre. Dierdre proffered evidence that supported and explained the income and expenses she listed in her amended domestic relations affidavit. She insisted that she needed the maintenance and child support she had been awarded. Dierdre's domestic relations affidavit indicated that she had a total gross monthly income of approximately \$3,154, and a net of \$2,753. The income included wages and her share of the military retirement but did not include maintenance. She had monthly expenses of around \$4,213, so, with no maintenance, she would have a net monthly shortfall of roughly \$1,547. According to Dierdre, Gunter was intentionally underemployed in order to avoid his court-ordered obligations. She proffered evidence that Gunter had opportunities to use his turret mechanic skills as a civilian contractor on military posts. Gunter was also a licensed electrician and could earn substantially more than he was making.

Dierdre also contended that Gunter had sufficient assets, despite his deliberate underemployment, from which to pay his court-ordered obligations. He had funds in a

savings plan which had an account balance of \$19,074.59 on May 23, 2012, and he had inherited \$66,472.79 from his parents' estate on December 6, 2011. She pointed out that Gunter had remarried and the expenses he detailed on his domestic relations affidavit would be shared with his new wife. She reminded the district court of Gunter's withdrawal of over \$100,000 in marital assets, allegedly lost through gambling, in the few months before he filed for divorce.

Gunter challenged some of Dierdre's expenses as being too high. Gunter argued that he was entitled to retire after serving his country and should not be required to pay Dierdre any more than her share of his retirement. His counsel also argued that his nonmarital assets were not legally relevant to the maintenance issue, stating, "And I don't think that's what spousal support's for. Spousal support is for if she has a need and he has the ability to pay, with his income, not with assets that are nonmarital; that weren't considered when the initial spousal support was entered." Gunter's counsel also argued, "I don't know if the Court has the ability to say—to use assets to pay for support."

At the close of evidence and argument, the district court announced its decision. The court noted that it recalled the divorce trial and that it had taken into account Gunter's dissipation of over \$100,000 when it made its divorce orders. The court also noted how incomplete Gunter's motion presentation was regarding financial information on assets and accounts. Then the district court denied Gunter's motions, stating:

"The Court would find that [Gunter] is voluntarily underemployed, whether he wishes to take a job that would pay that or not is his choice. But the Court, obviously, has to look at his ability to earn that. And he, obviously, does [have] the ability to earn substantially more than he is receiving.

"It's his choice, he can do whatever he wants, but the Court can consider any asset he has in collecting judgments, both past and future. And he makes that choice, what income he gets and how it is paid.

"I give very little weight to his testimony, both based on the Court's past contact with him at the final hearing and his testimony there, and also the sworn domestic-relations affidavit that the Court doesn't believe is accurate either.

"So, based upon that, and all of the admitted exhibits, the Court would find he's voluntarily underemployed. He has the ability to pay, and would deny any motion to modify either the child support or the maintenance." (Emphasis added.)

Gunter subsequently filed this timely appeal.

ANALYSIS

Gunter contends that the district court erred when it denied his motion to modify his spousal maintenance and child support obligations. He argues that its finding of voluntary underemployment is not supported by substantial competent evidence. He also includes issues in his brief that concern Dierdre's receipt of a portion of Gunter's military pension.

Before addressing the merits of Gunter's arguments, however, we must first determine whether this court is procedurally barred from considering his appeal on the voluntary underemployment issue. The district court announced two alternative grounds for its decision: (1) Gunter's voluntary underemployment and (2) his ability to pay as indicated by his savings plan funds and inheritance. Gunter only challenges the district court's finding of intentional underemployment. Gunter essentially concedes that the court offered two bases for its judgment. Specifically, Gunter states, "The Trial Court denied the Petitioner's Motion to Modify Child Support and Maintenance based on a finding that the Petitioner was intentionally underemployed and that he had funds available through a recent inheritance." Yet, despite this acknowledgement, Gunter's brief does not contain any facts or argument that the latter, alternative basis for denying the motions was in error.

Generally, issues not briefed by an appellant are deemed waived and abandoned. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 281, 225 P.3d 707 (2010). Moreover, an appellant's failure to address all of the alternative grounds for the district court's judgment renders the issues on appeal academic and unassailable. See *Greenwood v. Blackjack Cattle Co.*, 204 Kan. 625, 628, 464 P.2d 281 (1970) (when district court's decision is based upon alternative grounds, appellant's failure to challenge both grounds on appeal "renders unnecessary" a decision on the issue raised); *Parker v. Mid-Century Ins. Co.*, 25 Kan. App. 2d 329, 332, 962 P.2d 1114 (1998) (appellant did not challenge one of the district court's conclusions of law; therefore, the ruling was deemed conclusive). Thus, if we apply these principles here, it would be unnecessary for us to address the argument Gunter raises regarding underemployment because the district court's finding regarding his ability to pay is unchallenged.

However, even though it seems unlikely, we can also see the possibility that the denial of Gunter's motions was based on the two findings in combination rather than on two freestanding grounds. We will consider this part of Gunter's appeal.

Standards of Review and Applicable Legal Principles

On appellate review of a district court's ruling on a motion to modify maintenance the court examines the record to determine if there is substantial competent evidence to support the district court's ruling and whether the trial court abused its discretion. Discretion is abused if no reasonable person would take the view adopted by the trial court. *In re Marriage of Evans*, 37 Kan. App. 2d 803, 804, 157 P.3d 666 (2007). On review of a district court's ruling on a motion to modify child support, this court again applies an abuse of discretion standard. *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000). The party asserting that the trial court abused its discretion bears the burden of showing such abuse of discretion. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009). When determining whether there is substantial competent evidence, this

court does not weigh conflicting evidence or assess the credibility of the witnesses. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 836-37, 127 P.3d 292 (2006). Moreover, an appellate court accepts as true all inferences to be drawn from the evidence that support or tend to support the findings of the district court. 280 Kan. at 837.

Gunter, as the party asserting that the district court abused its discretion, bears the burden of showing such abuse. Neither party contends that the district court did not have the discretion to modify, or refuse to modify, either the maintenance or the child support.

Intentional Underemployment

First, Gunter contends that the district court abused its discretion because it premised its decision upon an error of fact. He claims that the finding that he is voluntarily underemployed for the purpose of avoiding his support obligations is not supported by substantial competent evidence. In fact, according to Gunter, the "only evidence" offered to suggest he could maintain his prior income level following his retirement was Dierdre's "unsupported assertion that there were civilian contractors in need of turret mechanics." Gunter says that claim should have been "regarded with skepticism" due to Dierdre's failure to definitively prove that such positions exist. Gunter further asserts that even if such jobs do exist, the reduction in his income is due to his voluntary decision to "take a less demanding, dangerous job for a man in his 60's." He claims Dierdre's position is essentially a "demand" that he "engage in a physically demanding, potentially life-threatening form of employment to support his ex-wife." We note that Dierdre did not actually make such a demand.

Substantial competent evidence is that which possesses both relevance and substance and furnishes a substantial basis of fact from which the issues can be reasonably resolved. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009). In this case, the evidence regarding whether Gunter was

voluntarily underemployed consisted of each party's proffered testimony. Specifically, Gunter asserted that he had applied "at numerous places," but his experience as a turret mechanic was not "in high demand in the civilian world." He also contended that his age and lack of a college education were factors that deterred potential employers from hiring him. Dierdre, on the other hand, asserted that Gunter could have found a higher paying position because he is a licensed electrician and because "there are an awful lot of civilian-contractor positions available on military posts" for turret mechanics. Despite Gunter's assertion to the contrary, Dierdre's proffered testimony regarding his ability to obtain employment as either a civilian contractor or a licensed electrician does constitute substantial competent evidence.

Furthermore, Gunter fails to appreciate the fact that the district court, at least in part, based its decision to adopt Dierdre's contentions on the court's explicit finding that Gunter lacked credibility. The district court clearly regarded with skepticism Gunter's job-seeking testimony and believed Dierdre's employability evidence. Gunter also did not help his credibility by coming into court nearly \$14,500 in arrears on undelivered property division, 4 months' unpaid retirement pay (because Gunter refused to voluntarily execute a form for the military), child support, and maintenance. The district court was fully entitled to weigh the testimony of each party and determine which party was more trustworthy and believable. It did that. When reviewing factual findings, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility. "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).

Gunter could have supported his job search contentions with documentation regarding jobs he applied for but did not obtain, but he did not. Rather, his attorney

stated, "I would argue that after 26 years of service to the—to the United States Army, the fact that he's working 32 hours a week is somewhat commendable, at the age of 59. . . . But after a full career with the United States Army, in which [Dierdre]'s receiving 42 percent of that effort and—and she raised the children and—and deserves the amount that she received. But she's receiving the benefit of that and so is he." Bluntly, this does not describe a dedicated job-seeker; this describes someone who believes he is entitled to be retired and free from paying maintenance. Gunter filed his motion just over 6 months after retiring, which is not a substantial amount of time, especially in a new location, to seek employment. As the district judge said, Gunter is entitled to make his choices. However, his choices do not necessarily require that the district court accommodate them by reducing his court-ordered obligations.

Dierdre's testimony regarding Gunter's employability, Gunter's own acknowledgement that he voluntarily decided to retire from his army position, his apparently nearly contemporaneous decision to withdraw and dissipate \$100,000 in marital assets, and his court-declared lack of credibility regarding efforts to restore his income to its previous level all constitute substantial competent evidence supporting the conclusion that he was voluntarily underemployed. The district court implicitly determined that Gunter could be earning a wage that, combined with his retirement pay, would generate income at least comparable to his army pay. The district court imputed Gunter's former income to him and denied him relief on both child support and maintenance. We cannot say that no reasonable person would take the view adopted by the trial court. The district court did not abuse its discretion when it found that Gunter was voluntarily underemployed. Substantial competent evidence supports this finding. Because Gunter does not challenge the district court's other stated basis for its decision, *i.e.*, that Gunter had the ability to pay his obligations, we affirm the district court's denial of Gunter's motions.

Dierdre's Receipt of Gunter's Military Pension

Gunter raises two additional "issues" in his brief. These concern whether the district court, regardless of its decision on voluntary underemployment and ability to pay, should have recalculated maintenance and child support based on Dierdre's receipt of her share of Gunter's retirement benefit. We note that, at the end of the motion hearing, the district court asked the parties, "Any other findings or conclusions that counsel need?" Gunter's attorney did not then ask the district court to specifically address whether Dierdre's receipt of the retirement pay should affect maintenance or child support. Thus, the district court did not give voice to any consideration of these separate points. For the reasons below, though, we do not need to discuss invited error or issue preservation.

We chose to entertain Gunter's challenge to the underemployment determination. We do not, though, have any appellate jurisdiction over these recalculation issues. In his notice of appeal, Gunter indicates that he is appealing "the Journal Entry on Petitioner's Motion to Modify Child Support and Maintenance . . . entered against him on December 28, 2012, as finding the Petitioner is intentionally underemployed and therefore not entitled to a reduction in spousal maintenance and child support." (Emphasis added.) Similarly, in his docketing statement, Gunter described the issue he proposed to raise as follows:

"Whether a trial court abused its discretion by denying to modify child support and maintenance awards by finding that the obligor, a 58 year old man who was retired from over 20 years of military service, is voluntarily and purposely underemployed when he . . . can not find comparable [work] after his retirement from service."

Those documents do not claim that the district court erred in not recalculating Gunter's court-ordered obligations in light of Dierdre's receipt of her share of Gunter's retirement benefit. They clearly refer only to the district court's finding on the voluntary underemployment issue. While neither party challenges our jurisdiction over these issues,

we have a duty to question jurisdiction on our own initiative. According to K.S.A. 2013 Supp. 60-2103(b): "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken." Moreover, our Supreme Court has stated that it is a fundamental proposition of Kansas appellate procedure that "an appellate court only obtains jurisdiction over the *rulings identified* in the notice of appeal." [Citation omitted.]" (Emphasis added.) *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 637, 270 P.3d 1074 (2011), *cert. denied* 133 S. Ct. 158 (2012).

In *Gates v. Goodyear*, 37 Kan. App. 2d 623, 627, 629, 155 P.3d 1196, *rev. denied* 284 Kan. 945 (2007), a panel of this court pointed out that accepting jurisdiction to review findings, conclusions, or judgments that were not set out in the notice of appeal "would adjudicate out of existence the statutory mandate that a notice of appeal 'shall designate' the judgment appealed from." We will apply, rather than adjudicate out of existence, that mandate. The notice of appeal here did not identify these recalculation issues as rulings that Gunter was appealing. We do not have jurisdiction to review these separate issues. The appeal on those issues is dismissed. See *Gates*, 37 Kan. App. 2d at 626.

Affirmed in part and dismissed in part.