NOT DESIGNATED FOR PUBLICATION

No. 111,128

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

RONALD E. KLEMENTOWSKI,
Appellee,

and

PHAEDRA L. KLEMENTOWSKI
(n/k/a FAYE KLEMENS),
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES CHARLES DROEGE and DAVID W. HAUBER, judges. Opinion filed August 1, 2014. Affirmed.

Patrick Copley and *Roger A. Nordeen*, of Overland Park, for appellant.

Gregory A. Dean, of Johnston, Ballweg & Modrcin, L.C., of Overland Park, for appellee.

Before HILL, P.J., POWELL and STEGALL, JJ.

Per Curiam: Phaedra Klementowski (n/k/a Faye Klemens) appeals aspects of the district court's property division in her divorce. She argues the district court (1) violated her procedural due process rights by accepting the parties' proposed values of their pension plans without holding an additional hearing; (2) improperly valued the Dairy Queen commercial property; (3) abused its discretion by assigning the First Option Bank account to her husband, Ronald Klementowski; and (4) erred in awarding tools and various books to her husband. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

Ronald filed for divorce from Faye on May 8, 2012, six days after the parties separated. The district court conducted a bench trial on February 12, 2013. Before the trial, each party submitted proposed findings of fact and conclusions of law, including a proposed property division.

One of the issues at trial and on appeal involves a Dairy Queen (DQ) business and associated commercial real estate in Paola, Kansas. Ronald owned and operated the DQ business from 2005 until 2009. He took an early-retirement package from Electronic Data Systems (EDS) in order to work at the DQ full-time. Faye also worked there full-time in the summer and part-time in the evenings and on weekends during the school year when she was not teaching. The real estate and building upon which the DQ is located is owned by REK, LLC, of which Ronald is the sole member and manager.

Ronald testified he used part of his inheritance from his grandmother to buy the DQ. In 2009, Ronald sold the DQ business but retained ownership of the commercial real estate and building. The parties used some of the money from the sale to pay off the mortgage on their home. At the time of the divorce, REK still owned the DQ real estate and building. The operators of the business leased the property pursuant to a triple net lease under which the lessee paid the property tax and insurance costs. The base rent of $2,200 per month was deposited into REK's First Option Bank account.

According to Ronald, in 2011 the DQ property generated about $1,000 per month in taxable income. However, in 2012 he claimed it generated only $976 in net income for the entire year because major maintenance repairs of the sewer and pipes costing about $10,000 were required. The repairs were not covered by insurance. Ronald explained that under the triple net lease, though general maintenance costs were the responsibility of the

lessee, infrastructure repairs were the responsibility of the owner. Ronald testified the property's air conditioning unit would also need to be replaced in the following year or two and that expense would be the responsibility of the owner as well.

At the end of the trial, the district court agreed to keep evidence open in order for the parties to obtain the value of Faye's KPERS and Ronald's EDS pension funds. The court made some findings of fact on the record and accepted the undisputed value of the DQ property. The court asked the parties to submit posttrial proposed findings of fact and conclusions of law.

After receiving the parties' proposed findings, the district court issued its property division ruling. Faye then filed a motion to alter or amend the district court's judgment as well as a motion for a new trial. These motions were not included in the record on appeal, but the parties did include the transcript of the hearing on the motions. Ultimately, a different district judge denied both motions, finding the trial judge made an equitable division of property based on the evidence presented at trial.

Faye timely appeals.

DID THE DISTRICT COURT VIOLATE FAYE'S PROCEDURAL DUE PROCESS RIGHTS BY FAILING TO HOLD AN ADDITIONAL HEARING TO ACCEPT THE PARTIES' PROPOSED VALUATIONS OF THEIR PENSION PLANS?

First, Faye argues the district court violated her right to procedural due process by denying the parties an opportunity to present additional evidence and make closing arguments after the trial was bifurcated and continued.

Unfortunately, neither of Faye's posttrial motions was included in the record on appeal. The motions hearing transcript was included, however, and there was no mention

of Faye raising her procedural due process claim. Issues not raised before the trial court cannot be raised on appeal. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011). "Moreover, constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review." *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007).

Supreme Court Rule 6.02(a)(5) (2013 Kan. Ct. R. Annot. 39) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. See *State v. Breeden*, 297 Kan. 567, 574, 304 P.3d 660 (2013) (declining to consider due process issue for this reason). Faye's brief fails to state when she raised this issue before the district court or argue why the issue should be considered for the first time on appeal. Therefore, we decline to consider it.

DID THE DISTRICT COURT ERR IN DENYING FAYE'S MOTION TO ALTER OR AMEND?

Second, Faye argues the district court improperly subtracted the cost of sewer and air conditioner repairs from the value of the DQ property because the lessee, not the owner, was required to pay for such repairs. However, Faye did not make this argument before the district court until she filed a motion to alter or amend the judgment.

Before trial, an appraiser estimated the value of the DQ property was $240,000 but due to needed repairs reduced the value to $225,000 by subtracting the estimated cost of the repairs. In the parties' pretrial proposed division of property, both parties estimated the value of the property to be $225,000. At trial, both parties submitted the same appraisal report into evidence. Ronald testified the sewer repairs cost around $10,000 and the air conditioner would need to be replaced within the following year or two. He testified that under the triple net lease agreement both repair expenses would be the responsibility of the owner, not the lessee. The issue of whether the value of the property

should be reduced by the cost of the repairs was never discussed or challenged by either party during the trial.

The district court made provisional findings of fact on the record at the end of the trial and adopted both parties' proposed value of the business: $225,000. In the parties' posttrial proposed findings of fact, both parties again listed the value of the DQ property at $225,000 without dispute. The district court's final order valued the DQ property at $225,000. From the motions hearing transcript, it appears that Faye argued for the first time in her motion to alter or amend that the cost of repairs should not have influenced the value of the DQ property. After hearing arguments from both sides, the district court denied the motion.

On appeal, Faye asks us to interpret the DQ property lease agreement and find the repair costs should not have been deducted from the property's value because the lessee, not the owner, was responsible for paying for the repairs. However, interpretation of the lease's terms is not required in this case. Because Faye only made this argument in her motion to alter or amend, we review the district court's denial of her motion under an abuse of discretion standard of review. See *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004).

Our Supreme Court has stated the purpose of a motion to alter or amend under K.S.A. 2013 Supp. 60-259(f) is to allow the trial judge the opportunity to correct previous errors. *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001); *Denno v. Denno*, 12 Kan. App. 2d 499, 501, 749 P.2d 46 (1988). Our court has found that on a motion to alter or amend, the trial court should limit its consideration to matters that were before the court when it entered the original judgment. *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan. App. 2d 932, 939-40, 159 P.3d 215 (2007); see also *In re Marriage of Galvin*, 32 Kan. App. 2d 410, 414, 83 P.3d 805 (2004) (a party may not invite error and then complain of that error on appeal).

There is no allegation that Faye did not have access to copies of the DQ property appraisal or lease agreement. She included both in her trial exhibits and was represented by counsel throughout the trial. The district court correctly denied Faye's claim in her motion to alter or amend because she failed to make this argument during the trial. In fact, Faye *agreed* to this value twice before: first in her pretrial proposed property division, and second in her posttrial proposed findings of fact. The district court was correct to deny this claim. Even considering this issue on the merits would not help Faye as the district court clearly did not abuse its discretion in adopting the undisputed value of the DQ property for the purposes of the property division.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY ASSIGNING ALL FUNDS FROM THE DQ PROPERTY IN THE FIRST OPTION BANK ACCOUNT TO RONALD?

Third, Faye argues the district court erred by failing to award her any of the rental income collected by REK from the DQ property during the 10 months between the parties' separation and date of divorce. She also made this argument in the hearing on her motion to alter and amend. However, a district court has broad discretion when dividing the property of a marital estate, and its decision will not be disturbed absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). "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." *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

The business entity operating on the parties' property leased the property for $2,200 per month. Ronald testified the property produced about $12,000 in taxable income in 2011. However, in 2012 sewer repairs required the parties to pay over $10,000

in repair costs. Therefore, in 2012 the property only produced about $1,000 in income for the parties.

Faye argued she was entitled to half the property's rental income multiple times before the district court, and there is no dispute that the net income generated from the DQ property was subject to division by the court. In her posttrial proposed findings of fact and conclusions of law, Faye proposed that Ronald receive a "credit" of $22,000, representing the 10 months of rental payments. However, Faye did not take into account that although she was entitled to half of the rent payments, conversely she was also responsible for half of all the repair costs.

After finding the property would only generate about $1,000 in profit for 2012 because the $5,920 annual tax bill was due and over $5,000 in sewer repairs were still needed, the district court determined there was no money left in the account to divide between the parties. The district court incorrectly considered the property's annual tax bill under the lease agreement because the lessee paid the taxes. The district court also misconstrued the evidence when it found $5,000 in sewer repairs were needed, as the evidence contained estimates for plumbing/sewer repairs and Ronald testified the work was done in 2012 and cost over $10,000. The evidence showed REK would be responsible for repairing the property's air conditioner within the next couple of years at an estimated cost of $5,000.

Based upon this record, we find the evidence supported the trial judge's finding that the funds in the First Option Bank account from the DQ property were needed to maintain the property. Moreover, even if there were sufficient funds for Faye to claim her share, we cannot conclude that the district court erred with its division of property. We are required to look at the property division as a whole, and Kansas law merely requires the division of property to be "just and reasonable," not necessarily equal in every way. K.S.A. 2012 Supp. 23-2802(c). The district court did not abuse its discretion.

DID THE DISTRICT COURT ERR BY AWARDING TOOLS, BUSINESS TEXTBOOKS, AND BOOKS ON BUILDING AND CONSTRUCTION TO RONALD?

Fourth, Faye argues the district court erred in awarding Ronald personal property from their marital residence, including tools and two categories of books. Again, a district court has broad discretion when dividing the property of a marital estate, and its decision will not be disturbed absent a clear showing of abuse. *Wherrell*, 274 Kan. at 986.

At the end of the trial, Ronald's attorney asked the court to adopt Faye's position with regard to division of the household personal property. Faye's pretrial proposed property division indicated that both parties made a list of what personal property each desired. She suggested the court grant to each party the items on which they agreed but divide any remaining property by alternating selection. On the record the district court agreed to adopt Faye's position, but in its final order it actually adopted the language proposed by Ronald in his findings of fact. The language in the divorce decree stated Ronald waived any claim to household goods and furnishings, "except the tools, his business text book [*sic*] and his books on building and construction." In civil cases, the written order controls "over and may differ from the trial court's oral pronouncement from the bench." *Valadez v. Emmis Communications*, 290 Kan. 472, 482, 229 P.3d 389 (2010); see also *In re Estate of McLeish*, 49 Kan. App. 2d 246, 257, 307 P.3d 221 (2013) (written journal entry approved by and filed with court controls), *rev. denied* 299 Kan. ___ (April 28, 2014).

Faye argues the court could not assign the tools and books to Ronald because no evidence was produced at trial showing the parties owned such tools and books or whether Ronald requested these items. The district court did not need specific evidence because Ronald requested these specific categories of property in his pretrial proposed division of property, Faye did not contest this proposal in her pretrial proposed division

of property, and the district court's written order granted Ronald these items. Considering Faye was granted all household items except the tools, business textbooks, and building and construction books, the district court acted well within its discretion to award these items to Ronald.

APPELLATE ATTORNEY FEES AND COSTS

Finally, we note that Ronald requested he be awarded appellate attorney fees in the amount of $7,299.03 in light of what he calls Faye's "frivolous" appeal. Kansas Supreme Court Rule 7.07(c) (2013 Kan. Ct. R. Annot. 67) allows the assessment of fees when "an appeal has been taken frivolously, or only for the purpose of harassment or delay." A frivolous appeal is "one in which no justiciable question has been presented and the appeal is readily recognized as devoid of merit in that there is little prospect that it can ever succeed." *Peoples Nat'l Bank of Liberal v. Molz*, 239 Kan. 255, 257, 718 P.2d 306 (1986).

While we agree with Ronald that some of the issues Faye presented on appeal had little or no merit, we cannot find they were frivolous. For the most part, the issues Faye raised on appeal were whether the district court's rulings constituted an abuse of discretion. Two prior panels of our court have suggested that sanctions for a frivolous appeal generally are not appropriate when reviewing a divorce court's decision for abuse of discretion. See, *e.g.*, *In re Marriage of Cotter*, No. 104,466, 2011 WL 2535011, at *8 (Kan. App. 2011) (unpublished opinion), *rev. denied* 294 Kan. 943 (2012); *In re Marriage of Levins*, No. 95,907, 2007 WL 1110545, at *5 (Kan. App. 2007) (unpublished opinion). Moreover, even when an appeal is frivolous, the award of sanctions is discretionary under Rule 7.07(c). We conclude that an award of fees as a sanction under that rule is not appropriate in this case.

The district court's decision is affirmed, and Ronald's motion for attorney fees and costs is denied.