

NOT DESIGNATED FOR PUBLICATION

No. 109,430

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JAN HENRIETTA COLGAN,
Appellee,

and

MARK KENDRICK COLGAN,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed August 15, 2014.
Affirmed.

Mark K. Colgan, appellant pro se.

Bethany Roberts and Lowell C. Paul, of Kansas Legal Services, of Topeka, for appellee.

Before ARNOLD-BURGER, P.J., BUSER and SCHROEDER, JJ.

Per Curiam: Mark Kendrick Colgan claims the district court violated his due process rights and abused its discretion in ordering him to pay permanent maintenance for 108 months, in setting the valuation date for the assets of the marriage, and in the division of the parties' retirement accounts based on that valuation date. We affirm, finding the district court did not violate Mark's due process rights and did not abuse its discretion.

FACTS

Jan Henrietta Colgan and Mark Kendrick Colgan were married on November 26, 1977. On October 25, 2010, Jan filed her petition for divorce and requested an ex parte temporary maintenance order. The district court granted Jan's request for an ex parte temporary maintenance order in the amount of \$1,500 per month. On April 15, 2011, upon Mark's motions to modify the temporary maintenance, the district court reduced the amount to \$900 per month, retroactive to December 1, 2010, since Mark never paid any temporary maintenance to Jan. At the April 15, 2011, hearing, the district court established January 1, 2007, as the valuation date for the property of the marriage based on conflicting testimony about multiple reconciliation attempts after their initial separation in 2004. The district court granted the divorce on October 20, 2011, and took the issue of permanent maintenance under advisement to allow Mark additional time to submit his tax return for 2010.

On February 13, 2012, the district court filed a supplemental journal entry reflecting that Mark's average yearly income (excluding the highest and lowest years in a six-year period) was \$113,255. The district court determined Jan's average yearly income (excluding the highest and lowest years in a six-year period) was \$33,708. The district court awarded Jan permanent maintenance in the amount \$900 per month commencing December 1, 2010, for 108 months.

Mark filed a motion to reconsider. On September 11, 2012, Mark filed a brief in support of his motion to reconsider. The district court denied Mark's motion on January 31, 2013. Mark appeals and now raises multiple issues in his pro se brief. For the sake of clarity, many of Mark's issues have been combined for analysis.

ANALYSIS

Did the District Court Deny Mark Due Process by Not Allowing Him to Argue a Pro Se Motion to Modify the Temporary Maintenance?

Mark argues the district court denied him due process by not allowing him to argue his pro se motion filed on February 8, 2011. However, there is no motion in the record filed on February 8, 2011. There were two pro se motions filed on February 7, 2011: a motion to vacate or modify the ex parte temporary maintenance order and a motion to stay issuance of an income withholding order related to arrearages. Because this motion was addressed at the hearing on April 15, 2011, it is probable they are the subject of Mark's argument on appeal, but he has failed to provide us with a clear record on appeal to verify.

Mark was not present at the hearing on April 15, 2011. The record reflects he retained counsel after he filed his pro se motion on February 7, 2011, and counsel appeared on April 15, 2011, to argue the motions. That being said, Mark's retained counsel successfully argued his position on April 15, 2011, by obtaining a reduction in the monthly amount of the temporary maintenance order. Mark fails to explain why he was not present or how his due process rights were violated. Clearly, Mark's attorney protected Mark's due process rights by appearing on his behalf at the hearing. A procedural due process claim requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 331, 291 P.3d 1056 (2013). Mark fails to establish how his right to be heard at a meaningful time and in a meaningful matter was denied. We find no merit in Mark's argument.

Did the District Court Abuse Its Discretion by Failing to Consider the Parties Were No Longer Cohabiting in Granting the Orders for Temporary Maintenance and Permanent Maintenance?

Mark argues Jan abandoned the marriage by not returning to the marital residence within 1 year of the parties' original separation. There was no obligation for Jan to return to the marital residence to establish a need for temporary maintenance. The district court considered her motion and Mark's motion to modify to arrive at a well-reasoned amount of temporary maintenance based upon Jan's circumstances.

Mark's argument is without merit and would lead to an absurd result wherein separated spouses are treated differently under the law based on the length of time they have been attempting reconciliation. Clearly, Mark and Jan were still husband and wife until the decree of divorce was granted pursuant to K.S.A. 2013 Supp. 23-2711. K.S.A. 2013 Supp. 23-2707(a)(3) and K.S.A. 2013 Supp. 23-2902 provides the district court with jurisdiction and authority to set temporary support or permanent maintenance as it finds to be fair, just, and equitable under all the circumstances. We find no error by the district court.

Did the District Court Err in Ordering Permanent Maintenance?

Mark raises four issues related to the permanent maintenance order: First, Mark argues the district court erred by including per diem compensation in the maintenance calculation; second, Mark argues the district court should have modified the order of maintenance following the loss of his job; third, Mark argues the maintenance award improperly included past-due temporary maintenance in the final order; and fourth, Mark argues the district court considered evidence outside the record.

Standard of Review

A maintenance order is controlled by K.S.A. 2013 Supp. 23-2902. Interpretation of a statute is a question of law over which appellate courts exercise unlimited review. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013). When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something that is not readily found in it. *In re Tax Appeal of Burch*, 296 Kan. 713, 722, 294 P.3d 1155 (2013). The courts must construe statutes to avoid unreasonable or absurd results and presume the legislature does not intend to enact meaningless legislation. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013).

An award of maintenance must be "fair, just and equitable under all of the circumstances." K.S.A. 2013 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 697, Syl. ¶ 4, 229 P.3d 1187 (2010). 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).

Should the District Court Have Omitted Long-Term Taxable Per Diem?

For the first time on appeal, Mark argues long-term taxable per diem pay should not have been included in his income for the purpose of calculating maintenance. He provides this court with a recalculation of his average income and relies on the Douglas County Family Law Guidelines to argue his maintenance should be reduced by \$174.17

per month. This court is not a factfinder and will not reconsider the amount of maintenance ordered based on facts submitted to this court and not previously presented to the district court. An issue not raised before the district court cannot be raised on appeal. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011).

There is no statutory requirement for the district court to use a party's gross income, adjusted gross income, taxable income, or any other benchmark for the calculation of maintenance. Instead, "the calculation of income is highly fact specific." *In re Marriage of Brand*, 273 Kan. 346, 356, 44 P.3d 321 (2002).

Regardless, the award of maintenance was based on Jan's significant financial need and circumstances. The district court found Jan was living near poverty and had outstanding debts she was unable to pay. Mark does not challenge that finding of fact on appeal. Nor does Mark preserve the argument he was unable to pay the maintenance award due to losing his job. Maintenance is subject to modification pursuant to statute. See K.S.A. 2013 Supp. 23-2903.

Under the facts of this case, it was not arbitrary, unreasonable, or fanciful to award Jan maintenance as it was fair, just, and equitable under the circumstances.

Did the District Court Fail to Consider Mark's Motion to Modify Maintenance?

Mark argues the district court was bound to modify the maintenance award after he lost his job. A district court's ruling on a motion to modify maintenance is reviewed for an abuse of discretion. Any factual findings relied upon by the district court must be supported by substantial competent evidence. See *In re Marriage of Evans*, 37 Kan. App. 2d 803, 804, 157 P.3d 666 (2007).

Here, there is no ruling to review. The following exchange occurred between Mark's counsel and the district court judge at the hearing on the motion to reconsider the decree of divorce, with regard to Mark's separately filed motion to reconsider the maintenance award:

"[MARK'S COUNSEL]: . . . I think it needs to be set for an evidentiary hearing, and it's the Court's discretion to determine whether or not it is appropriate for relief or not. I don't have the evidence that he would present at court to speak to that today. If I were to do that and we don't have a basis to bring this before the Court, I am not going to bring it anyway.

"[THE COURT]: Well, my recommendation then is . . . you review that with him; and if you think it warrants an evidentiary hearing, given the correspondence with [Jan's counsel], give [the clerk] a call and we can set it [for hearing]."

The record on appeal reflects Mark never set for hearing a motion to modify the permanent maintenance award based on the loss of his job. He cannot now complain the district court abused its discretion when he failed to ask the district court to address the issue in the first instance. Issues not raised before the district court cannot be raised on appeal. *Duckworth*, 293 Kan. at 403. Mark's claim fails.

Did the District Court Err in Awarding Permanent Maintenance Beginning in December 2010?

Mark argues the district court improperly made his unpaid temporary maintenance a "final judgment" by selecting a retroactive starting date for the permanent maintenance order. Mark fails to show how the effective date of the maintenance order was improper. In its discretion, the district court was free to set the start date for the permanent maintenance at any time after the petition for divorce was filed. Here, the district court chose the start date of December 1, 2010, more than 30 days after the petition for divorce was filed. The district court had the discretion to leave the temporary maintenance order

in place with its accumulating judgment or incorporate it into Mark's obligation to pay permanent maintenance. By its decision, the district court merged the temporary maintenance obligation into the permanent maintenance for a total of 108 months. We cannot say the action by the district court was arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact. We find no abuse of discretion.

Did the District Court Consider Evidence Outside the Record?

Mark argues the district court erred by considering evidence outside the record when it asked Mark to submit his 2010 tax forms after the conclusion of the contested divorce hearing. Mark offers no authority for his assertion the district court cannot take an issue under advisement or request additional evidence from parties in a divorce proceeding for its consideration to resolve the issues. Whether the tax return was admitted in open court or later submitted to the court for its consideration would not affect its relevance or how the court considered it. Mark did not object to this request before the district court. Moreover, a claim of erroneous admission of evidence not properly raised before the district court cannot be considered on appeal. K.S.A. 60-404; *State v. Johnson*, 293 Kan. 959, 964, 270 P.3d 1135 (2012).

Did the District Court Err in Setting the Valuation Date and in the Division of Marital Property?

Mark argues the district court erred in dividing the marital property by selecting an arbitrary valuation date and in awarding Mark one-half of Jan's 401(k) account after it had been liquidated.

Did the District Court Err in Selecting a Valuation Date?

An appellate court reviews the determination of a valuation date for an abuse of discretion. See *In re Marriage of Cray*, 254 Kan. 376, 387, 867 P.2d 291 (1994) (describing the selection of a valuation date as discretionary). The valuation date is controlled by K.S.A. 2013 Supp. 23-2802(b), where it states: "[T]he trial court shall set a valuation date to be used for all assets at trial, which may be the date of separation, filing or trial as the facts and circumstances of the case may dictate."

Here, at the end of the April 15, 2011, hearing, the district court reconciled conflicting testimony about the parties' attempts at reconciliation. The district court selected a valuation date based on conflicting proffers of when the parties separated and attempted to reconcile between 2004 and 2009, and determined January 1, 2007, was a reasonable date to use. We cannot accept Mark's argument for a different valuation date as it would require this court to reweigh the evidence, an act precluded on appeal. See *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). The district court's date of January 1, 2007, was reasonable given the facts of this case and was not an abuse of discretion.

Did the District Court Err in Awarding Mark Half of Jan's 401(k) Account?

"[T]he district court is vested with broad discretion in adjusting the property rights of parties involved in divorce actions and . . . the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse." *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002) (citing *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 [1992]). A district court abuses its discretion when its ruling is unreasonable or based on a factual or legal error. See *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 292, 263 P.3d 767 (2011).

The division of marital property is governed by K.S.A. 2013 Supp. 23-2802(a):

"(a) A decree under K.S.A. 23-2711, and amendments thereto, 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, by: (1) A division of the property in kind; (2) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (3) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale."

Here, the district court awarded to Mark and Jan one-half of the other's retirement plan as of the valuation date, January 1, 2007. At a hearing on Mark's motion to reconsider the decree of divorce, Mark's counsel proffered that Jan had liquidated her 401(k) plan. The district court judge responded to Mark's motion for reconsideration by indicating no evidence of the value of the account had been presented and the onus was on the parties to have presented that information at trial. The district court denied Mark's motion to reconsider, concluding: "I made the best ruling I had with what [evidence] I had and the ruling will stand."

The district court divided the retirement assets of the marriage based on the valuation date. Any asset accumulated after the valuation date was not subject to division among Mark and Jan. Mark presented no evidence, only a proffer at his motion to reconsider. At most, the district court said each received one-half of the other's retirement accounts as they existed on January 1, 2007. There was no evidence presented that Jan liquidated her 401(k) account, but there was evidence at trial Jan started her 401(k) account on February 1, 2007. We find no error as the district court was dividing whatever retirement accounts the parties had on January 1, 2007, equally. Additionally, we note the retirement accounts were the only assets the district court was called upon to divide in

this proceeding as all other personal property had been split when Jan and Mark separated.

CONCLUSION

Mark's claims on appeal fail. We recognize the need to liberally construe pro se pleadings and briefs and have done so. See *Leffel v. City of Mission Hills*, 47 Kan. App. 2d 8, 21, 270 P.3d 1 (2011) (appellate courts "must liberally construe pro se pleadings to give effect to the content rather than rely on the form or label of the pleading") (citing *State v. Kelly*, 291 Kan. 563, 565, 244 P.3d 639 [2010]). Our standard of review for all of these issues is the abuse of discretion standard. As more fully set out in the opinion, we find no abuse of discretion by the district court and affirm.

Affirmed.