NOT DESIGNATED FOR PUBLICATION

No. 110,316

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CARRIE E. SINKS,
Appellee,

and

LAWRENCE W. SINKS,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed September 12, 2014. Affirmed in part, reversed in part, and remanded with directions.

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

Shaye L. Downing, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Lawrence, for appellee.

Before ATCHESON, P.J., HILL and ARNOLD-BURGER, JJ.

Per Curiam: Lawrence W. Sinks (Larry) appeals the district court's decision in his divorce action pertaining to the division of marital assets as well as the calculation of maintenance and child support. Carrie E. Sinks cross-appeals the district court's decision regarding the division of property and the calculation of maintenance and child support. After a review of the numerous issues raised, we find that the district court improperly considered the testimony of Steven York on valuation of the couples' business and their estimated cash flow. Accordingly, the case must be remanded for the district court to

consider the valuation of the properties at issue here as well as Larry's income without considering any information provided by York, either in his testimony or his written report. All other claims of error are rejected. In addition, Larry's request for costs and attorney fees in this case is denied.

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

FACTUAL AND PROCEDURAL HISTORY

Carrie and Larry were married in 1995. From the marriage, two children were born. In 2011, Carrie filed for divorce. The parties had significant marital assets. During their marriage, the parties owned several pieces of real estate and had an interest in several business ventures: Spy, LLC; JDL, LLC; Victory Sports a.k.a. Gambler Graphics; and Lonesome Doctor, LLC.

Although at the time of filing, Carrie requested temporary orders for child support and maintenance, the court did not rule on her request. Instead, the parties, with the acquiescence of the judge, entered an informal and oral agreement in which Carrie would continue to use money from the marital accounts of the parties to pay joint debts and living expenses for her and the children, with an accounting to be done at the time the divorce was granted to balance the ledger and back-date maintenance and child support to the date of filing. This agreement and the failure to have clear orders regarding child support and maintenance early in the case, account for many of the problems that subsequently arose.

As preparation for trial proceeded, the district court set August 1, 2012, as the deadline for each party to provide notice of their intent to use expert witnesses. This date was also used as the deadline for copies of the experts' reports to be provided to each

party. On November 26, 2012, almost 4 months after the deadline, Carrie gave notice that she was going to use a rebuttal expert witness, Steven York.

Initially, the district court would not allow Carrie to call York as an expert rebuttal witness because of the untimely designation. In fact, on three separate occasions, the district court denied Carrie's request to allow York to testify as an expert either in her case-in-chief or on rebuttal. However, at the end of the third day of trial and upon Carrie's fourth request, the district court reconsidered its decision to exclude York as an expert witness and determined that he could testify as a rebuttal expert witness. The court limited his testimony to the personal financial statement admitted as Carrie's exhibit 11 and the parties' cash flow. He was not allowed to discuss the 2011 tax return. (Previously, the district court disallowed the admission of the 2011 tax return because it was filed late.) Shortly before the fourth day of trial, which was approximately 1 month later, Carrie provided York's expert witness report.

In February 2013, the parties were granted a divorce. It was not until May 2013, that the district court decided all financial, property, maintenance, child support, child custody, and parenting time issues.

Larry filed a motion asking the district court to reconsider its conclusions pertaining to the marital debt and the amount and time awarded for maintenance. Larry also filed a motion to modify maintenance and child support, arguing that a material change in circumstances occurred since the filing of his 2010 tax return.

Carrie filed a motion for clarification or reconsideration by the district court. The motion lists several requests for clarification or reconsideration, but of the list, the most relevant are Carrie's request to reconsider the district court's decision to grant Larry a $160,000 premarital credit for funds he acquired prior to the marriage and used to purchase the parties' first home; the district court's calculation of temporary maintenance

and child support; and the responsibility for payment for the children's premier sports and other activities. Carrie also filed a motion requesting that the district court update the custody assessment because their daughter refused to see Larry.

The district court clarified and modified its original decision and found that child support and maintenance payments were to begin on June 1, 2013. The district court did not order that the parties be responsible for the children's premier sports. Instead, the district court ordered that the parties must agree to the children's participation in the premier sports, or the person enrolling the children in the sport shall be responsible for the cost of participation.

Both parties have appealed.

LATE DESIGNATION OF AN EXPERT WITNESS

Larry contends that the district court abused its discretion when it allowed Carrie to present her rebuttal expert witness because Carrie failed to designate her rebuttal expert witness within the allotted time frame. This resulted in an unfair surprise or "trial by ambush."

The admission of expert testimony generally lies within the trial court's sound discretion, and its decision will not be overturned in the absence of an abuse of discretion. *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 444, 228 P.3d 1048 (2010). 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).

K.S.A. 2013 Supp. 60-226(b)(6)(C) requires the parties to disclose their experts in the time and sequence as ordered by the court. If a party fails to adhere to K.S.A. 2013 Supp. 62-226(b)(6)(C), then the party cannot use an undisclosed witness to supply evidence at a trial "unless the failure was substantially justified or is harmless." K.S.A. 2013 Supp. 60-237(c)(1). In addition to or instead of this sanction, the court may impose other sanctions upon motion and after giving an opportunity to be heard. K.S.A. 2013 Supp. 60-237(c)(1)(C). No motions for alternate sanctions were ever made in this case. So the issue is whether the failure to disclose York as a witness was substantially justified or harmless.

The district court set August 1, 2012, as the deadline for each party to provide notice of their intent to use expert witnesses. This date was also used as the deadline for copies of the experts' reports to be provided to each party. There can be no dispute that the designation of York, almost 4 months after the deadline, was untimely and the judge was required to exclude his testimony unless the court was able to find that the late disclosure was substantially justified or harmless.

The court gave no reason for changing its prior position to disallow York's testimony. It made no findings that allowing the testimony was substantially justified or harmless. It merely indicated that it would allow the testimony but limit it to a cash flow analysis. Carrie was attempting to show that Larry was under-reporting his income.

But Carrie had a properly designated expert witness who was to discuss the valuation of the parties' various business ventures and cash flow, and she strategically chose not to call her expert witness during her case-in-chief. The report, from Marcus Hodge, estimated Larry's income at $178,199.32 in 2010 and $209,040.26 in 2011, based on the expenditure method. She gave no reason for not calling this witness; in fact her attorney testified that he was available, she simply chose not to call him. So she was not substantially justified in designating a different expert after the deadline had passed.

Instead, Carrie relied on York to rebut Larry's expert witnesses' testimony pertaining to the parties' cash flow and income. In addition, York discussed the county tax appraisal and the appraised value of Gambler Graphics. The York report, submitted several weeks after the third day of trial, estimated Larry's income at $250,000-$270,000 per year, with an additional $900,000 in unrecognized real estate investments.

In sum, Carrie's failure to timely designate York as an expert witness was not substantially justified. The testimony presented on rebuttal could have been presented in Carrie's case-in-chief through her properly designated expert witness. The district court even suggested such. Nor was Carrie's failure harmless. The district court took into account York's testimony when determining Larry's income, which we discuss further below.

Moreover, because the district court initially excluded York as an expert witness, he was not sequestered and was allowed to remain in the courtroom during the other expert witnesses' testimony. As such, during his testimony he was able to comment on the other experts' opinions. While it does not appear that the parties requested that the witnesses be sequestered or that the witnesses were actually sequestered during the bench trial, had Larry known York was going to testify, he may have requested the sequestration of the witnesses.

While the Kansas appellate courts have not been presented with this particular scenario, other state courts have addressed similar scenarios. In *Clark v. Hoerner*, 362 Pa. Super. 588, 525 A.2d 377 (1987), after both parties finished their cases-in-chief, the plaintiff brought in a surprise rebuttal expert witness. The defendant was given no warning of this expert witness. While Pennsylvania's discovery rules are worded differently than those in Kansas, the purpose of the rules is the same. The Pennsylvania appellate courts summed up the purpose of the rules with the following:

> "The purpose of the discovery rules is to prevent surprise and unfairness and to allow a trial on the merits. When expert testimony is involved, it is even more crucial that surprise be prevented, since the attorneys will not have the requisite knowledge of the subject on which to effectively rebut unexpected testimony. By allowing for early identity of expert witnesses and their conclusions, the opposing side can prepare to respond appropriately instead of trying to match years of experience on the spot. Thus the rule serves as more than a procedural technicality; it provides a shield to prevent the unfair advantage of having a surprise witness testify.' [Citation omitted.]" 362 Pa. Super. at 598.

In this case, York's testimony was not a last minute surprise as it was in *Clark*. Carrie had requested to present York about 2 weeks before trial. However, because the district court denied Carrie's use of York as an expert witness, it could be deemed a surprise to Larry when the district court, at the end of the third day of trial, allowed Carrie to present York as an expert rebuttal witness.

In *Banks v. Hill*, 978 So. 2d 663 (Miss. 2008), the plaintiff failed to designate expert witnesses in a timely manner. The expert witnesses designated by the plaintiff were not allowed to testify in the plaintiff's case-in-chief but were allowed to testify on rebuttal. The Mississippi Supreme Court reversed the trial court's order allowing the plaintiff's expert witnesses to testify on rebuttal, holding that because the plaintiff failed to properly disclose the experts' opinions, they may not be called to offer opinions on rebuttal to rebut anything offered by the defendants in their case-in-chief. 978 So. 2d at 666-67.

The facts presented in *Banks* are very similar to the facts of this case, and the conclusion of the Mississippi Supreme Court disallowing the testimony of untimely designated expert rebuttal testimony is persuasive.

Accordingly, we find that the district court's decision to allow York to testify as an expert rebuttal witness was an abuse of discretion for two reasons. First, it was unreasonable and arbitrary given the court's prior rulings. See *Puckett*, 290 Kan. at 444. Second, there was no evidence that the late disclosure was substantially justified, nor was it harmless. See K.S.A. 2013 Supp. 60-237(c)(1). Evidence of one or the other must be found by the court in order to allow testimony from an undisclosed witness. We reverse the district court's decision allowing York to testify as an expert rebuttal witness. We remand the case for reconsideration of Larry's income and valuation of the parties various properties without consideration of York's testimony or report.

THE INCOME OF THE PARTIES

Larry argues that the district court made the following errors when determining the incomes of the parties upon which it based the award of maintenance and child support: (1) the district court ignored Carrie's actual income; (2) the district court failed to consider additional losses sustained by Larry when determining his income; (3) the district court relied on York's rebuttal expert testimony to determine Larry's income; (4) the district court added nearly all of Gambler Graphics depreciation back into Larry's income; (5) the district court added all deducted travel expenses back in to Larry's income; and (6) the district court erroneously determined the amount and length of maintenance.

An award of spousal maintenance is governed by K.S.A. 2013 Supp. 23-2901 *et seq*. 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, 706, 229 P.3d 1187 (2010). Likewise, a district court's child support award is generally reviewed for abuse of discretion. *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 259, 223 P.3d 815 (2010). However, the interpretation or application of the Kansas Child Support Guidelines is a

question of law subject to unlimited review. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009).

Again, 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.*, 296 Kan. at 935.

Carrie's Income

The district court determined that Carrie's annual income was $25,380. This amount is in accordance with Carrie's determination of her annual income. However, on the child support worksheet, the district court used $22,884 as Carrie's annual income. Larry asserts that this discrepancy constitutes clear and reversible error. Carrie argues that after the district court's memorandum decision was handed down, both parties filed motions with concerns pertaining to the district court's child support worksheet. However, the issue of Carrie's annual income was never presented to the district court by Larry and he had no objections to the new proposed journal entry. Carrie asserts that Larry cannot now raise this issue for the first time on appeal.

Carrie is correct. The district court was not informed of the mistake and given an opportunity to correct the error. Larry filed a motion to reconsider, which listed several amounts that Larry contested. Carrie's annual income was not among those amounts contested by Larry. 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). If the district court mistakenly used the wrong figure for Carrie's income, the parties may address the point on remand. See K.S.A. 2013 Supp. 60-260(a) (corrections based on clerical mistakes may be made on motion of a party or on the court's own motion).

Larry's Income

The district court determined that Larry's income was $134,195. In summary, Larry essentially asserts that the district court abused its discretion by relying heavily on York's testimony as a rebuttal expert witness when calculating Larry's annual income.

Larry is correct. The district court heavily relied on York's inadmissible testimony. The district court gave a detailed description of York's testimony in its memorandum decision and then relied on that information to come to the determination of Larry's annual income. The district court discussed York's testimony pertaining to (1) the amount of income Larry would need in order to sustain his debt payment levels on his business enterprises, as well as regular household expenses; (2) the amount of travel expenses deducted by Larry on his tax returns; and (3) Larry's approach to depreciation on various assets. The district court then relied on York's testimony when determining Larry's annual income by adding back into Larry's suggested income the $75,000 of depreciation on the business assets and the amount deducted for travel expenses. It was an abuse of discretion for the district court to rely on York's inadmissible testimony to determine Larry's annual income. Therefore, we vacate the district court's determination of Larry's income and remand the case for redetermination without relying on York's testimony.

Maintenance

Amount

Larry disagrees with the district court's use of a 20% difference between the parties' incomes to calculate maintenance. He contends that because he asked for the Douglas County Family Law Guidelines' 17% difference, the district court was required to indicate why it deviated from the Douglas County Guidelines, and because it did not make such an indication then the 17% difference should be used and the district court

should be required to recalculate maintenance or explain why it used the 20% difference rather than the 17% difference.

Under the Douglas County Family Law Guidelines § 3.00 (October 2012), the district court uses various relevant factors to determine a fair, just, and equitable amount for maintenance. If the relevant factors do not result in a fair, just, and equitable outcome, then under § 3.01 of the Douglas County Family Guidelines, "[t]he maintenance guideline is 17% of the difference between the parties' respective gross income or earning capacities."

Larry does not assert that the district court's outcome was unfair, unjust, or inequitable. He only asserts that because the district court did not use the 17% difference, then it should have indicated why it calculated maintenance the way it did. There is no requirement within the Douglas County Family Law Guidelines that the district court provide a basis for its calculation if it fails to use the 17% difference. In fact, the 17% difference should only be used if the use of the relevant factors creates an unfair, unjust, or inequitable amount of maintenance. Larry has failed to show that the district court's method for calculating maintenance was an abuse of discretion.

However, because we are vacating the district court's order regarding Larry's income, the district court's maintenance amount must also be vacated and remanded for a recalculation of the parties' individual annual incomes as indicated above, which would in turn lead to a recalculation of the maintenance award based on the new annual income amounts. The percentage difference used between the parties' incomes for calculation of maintenance is entirely within the district court's discretion. However, on remand we order the district court to explain its rationale for any deviations from the Douglas County Family Law Guidelines.

Length of Time

The district court determined that the length of maintenance would be 62 months based on the parties' stipulation to such. Larry contends that because the district court gave Carrie credit for $155,000, plus a $9,000 withdraw for her use and that of the children during the separation but before the divorce was final, then the length of prospective maintenance should be reduced from 62 months to 38 months. Larry failed to argue that the district court's decision constituted an abuse of discretion.

The district court found that $100,000 spent by Carrie during the pendency of the divorce constituted marital debt for things such as property taxes, insurance on the property owned by the parties, medical insurance bills and premiums, utilities on all the properties where the parties were residing, the children's expenses for sports and camps, etc. Accordingly, this seems to have been properly excluded from consideration as maintenance.

The district court also subtracted $55,000 from Carrie's equitable share of the property for living expenses for her and the children. This was done to equalize the amount that Larry spent—$45,000 of the cash marital assets—during the pendency of the divorce for his living expenses.

It is true that Carrie withdrew $9,000 from escrow to meet her monthly expenses during the pendency of the divorce. However, it appears that both parties removed funds from the escrow account in order to meet their living expenses, but Carrie required more because the children were residing with her. Larry has failed to show that the district court abused its discretion when it neglected to take into account Carrie's withdrawal of $9,000 when determining the length of time maintenance would be paid.

We are, however, unclear as to why all 62 months of maintenance was applied prospectively, with no retroactive application as apparently agreed to by the parties at the beginning of the action. With the understanding that it would back-date maintenance to the date of filing, the district court did not enter any temporary orders pertaining to maintenance during the pendency of the case. Although it used the term "back-date" it appears that the intent was to somehow give Larry credit toward the length of maintenance for Carrie's financial withdrawals in lieu of maintenance. That does not appear to have been done here, and on remand in conjunction with a redetermination of the appropriate maintenance award, we order the district court to clearly explain the court's treatment of marital funds used by Carrie for her own support prior to the entry of the maintenance order and how it relates, if at all, to the court's final determination as to the length of the maintenance award.

FAILURE TO CONSIDER 2011 TAX RETURN

Larry argues that the district court abused its discretion when it used his 2010 tax return to calculate his income when determining maintenance and child support, because the 2010 tax return should not be considered current income.

Again, an award of spousal maintenance is governed by K.S.A. 2013 Supp. 23-2901 *et seq*. An appellate court generally reviews a district court's maintenance award for abuse of discretion. *Vandenberg*, 43 Kan. App. 2d at 706.

Larry's 2011 tax return was excluded from evidence at trial because he failed to supply the tax return until November 5, 2012—a month before the trial was set. However, he then complains that the district court did in fact rely, at least partially, on his 2011 tax return to determine his annual income.

In essence, at the time of trial, due to the procedural and evidentiary posture of the case, the 2010 tax return was the only tax return available to the district court for the calculation of Larry's income. As Carrie suggests, the tax return is not all that Larry was required to rely on when presenting evidence pertaining to his current income. In fact, Larry was asked at trial whether he could provide current information on his income, other than his tax returns, and he could not. Larry has failed to show that the district court abused its discretion when it relied on Larry's 2010 tax return to calculate his annual income.

VALUING GAMBLER GRAPHICS

First, Larry contends that the entire value of Gambler Graphics at $100,000 (if correct) should be fully attributed to him as premarital property and because there was no spreadsheet provided by the district court regarding distribution, then the district court's decision cannot be effectively reviewed. Larry then takes issue with the district court's valuation of Gambler Graphics because he believes the district court did not take into account various depreciation numbers and then settled on a number by relying on the competing expert opinions, including York's inadmissible opinion.

A district court's division of property in a divorce action is governed by K.S.A. 2013 Supp. 23-2801 *et seq.* Appellate review is for abuse of discretion. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

As to Larry's first argument that he should have been assigned all $100,000 of Gambler Graphics, it appears that he was assigned the full value, along with the debt. In the district court's decision, it states "[t]he business interests in Spy, LLC and JDL, LLC, and Gambler/Victory are assigned to Husband, along with accompanying debt." Thus, Larry's first argument is not persuasive.

The district court made the following conclusion pertaining to the valuation of Gambler Graphics:

> "Husband's expert valued Gambler/Victory at $23,000, which is less than the two offers Husband received for the equipment, where Husband was also offered a management position in the new company by the prospective purchaser. Wife's expert valued it at $590,508 but once again, Wife has repeatedly refused to accept the assets, even for sale. The business grossed more than $500,000 in 2011 and $700,000 in 2010. Tax returns showed a loss for 2011, but there was depreciation of $75,000, as well as in-kind income for that year. In 2009, as Wife pointed out, Husband purchased equipment for $200,000 which he put in service and has been depreciating since. For these reasons, the Court rejected each expert evaluation. Based upon the recent purchase of equipment and the depreciation schedules, and Husband's testimony that he has used some of his business equipment since 1982, long beyond its appreciated life, the Court rejected Husband's valuation of $23,000 and conservatively valued Gambler at $100,000."

The district court stated that it was rejecting both parties' experts' opinions on the valuation of Gambler Graphics. Clearly, the district court deemed the experts' opinions less than credible. It is apparent that the district court reviewed all of the evidence presented as to the valuation of Gambler Graphics, excluding the experts' opinions, and came up with a value that suited the facts of the situation. We do not find that the district court abused its discretion when it valued Gambler Graphics.

DIVISION OF PROPERTY

Larry argues that the district court abused its discretion in the division of property because it "provided no analysis, no rationale and no spreadsheet for its decision." Larry contends that the district court is required to apply various factors when dividing the property, but the district court's written decision fails to provide any guidance as to how it considered the statutory factors in dividing the property between the parties.

Again, a district court's division of property in a divorce action is governed by K.S.A. 2013 Supp. 23-2801 *et seq*. Appellate review is for abuse of discretion. *Wherrell*, 274 Kan. at 986.

Larry is correct that when a district court is dividing property, it is required to rely on the following factors:

> "(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 consequence 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." K.S.A. 2013 Supp. 23-2802(c).

However, there is no requirement that the district court provide a written detailed statement of how it relied on the statutory factors within K.S.A. 2013 Supp. 23-2802(c). The cases cited by Larry—*In re Marriage of Mamedova*, No. 107,826, 2013 WL 517956 (Kan. App.) (unpublished opinion), *rev. denied* 297 Kan. 1245 (2013), and *In re Marriage of McKenney*, No. 106,446, 2013 WL 193198 (Kan. App. 2013) (unpublished opinion)—remanded the district courts' decisions because it was unclear whether the relevant factors had even been applied and there was a lack of sufficient findings and conclusions by the district courts.

In this case, it is clear that the district court relied on the relevant factors when dividing the property. The district court set out all of the real property, premarital and marital, owned by the parties, including the various bank and investment accounts, and discussed the time, source, and manner of acquisition of the properties; the district court determined the annual incomes for both parties and Carrie's possible earning potential after she graduates; the district court determined the values for all of the business

properties, setting out the time, source, and manner of acquisition of these properties; the district court discussed the age of the parties and the length of their marriage; and the district court discussed the parties' family ties and obligations, particularly to Larry's father.

It is clear that the district court was mindful and applied the factors set forth under K.S.A. 2013 Supp. 23-2802(c). Thus, the district court did not abuse its discretion when dividing the property.

SALE OF THE MARITAL RESIDENCE

In her cross-appeal, Carrie asserts that the district court abused its discretion when it set aside $160,000 from the sale of the marital residence to Larry as a premarital asset. Carrie relies on her assertion that there was insufficient evidence to support the district court's decision.

Again, a district court's division of property in a divorce action is governed by K.S.A. 2013 Supp. 23-2801 *et seq*. Appellate review is for abuse of discretion. *Wherrell*, 274 Kan. at 986.

Larry testified that, before he and Carrie were married, he owned a residence that he purchased for $160,000. Larry sold this residence in order to purchase the parties' first marital residence. Carrie does not contest that Larry used the $160,000 from the sale of his residence to purchase the first marital home or any of the following homes purchased by the parties.

While Carrie argues that § 2.02 of the Douglas County Family Law Guidelines requires there be sufficient evidence to trace a premarital asset back to a party, this rule is not binding upon the district court. The district court, through Larry's testimony, had

sufficient evidence and did not abuse its discretion when it assigned Larry the $160,000 from the sale of his premarital residence.

CALCULATION OF TEMPORARY SUPPORT

Carrie disagrees with the district court's decision assigning her only $55,000 for living expenses for her and the children during the pendency of the divorce.

The district court indicated that it reviewed Carrie's list of expenditures during the pendency of the appeal and determined that $100,000 of her expenses constituted marital debt and $55,000 constituted living expenses.

Again, an award of spousal maintenance is governed by K.S.A. 2013 Supp. 23-2901 *et seq*. An appellate court generally reviews a district court's maintenance award for abuse of discretion. *Vandenberg*, 43 Kan. App. 2d at 706.

Essentially, Carrie argues that the district court's decision to only assign her $55,000 for living expenses during the pendency of the divorce was unreasonable because $55,000 did not completely cover the expenditures she made during that time frame. Carrie's argument is not persuasive and fails to show that the district court's decision constituted an abuse of discretion. Carrie's argument is also undercut by the fact that the district court determined that $100,000 of Carrie's expenditures for property taxes, insurance, the children's expenses, etc., constituted marital debt rather than regular living expenses.

Carrie asserts that the district court determined that she was not entitled to maintenance, child support, or reimbursement for medical expenses for the children during a 10-month period of the case. However, Carrie has failed to designate where in the record this decision is contained. The burden is on the party making a claim to

designate facts in the record to support that claim; without such a record, the claim of error fails. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644-45, 294 P.3d 287 (2013). The district court found that during the pendency of the divorce, Carrie spent $100,000 on marital debt, which included the children's expenses, and $55,000 on regular living expenses. Carrie has failed to show that the district court's decision was an abuse of discretion.

THE COSTS FOR THE CHILDREN'S EXTRACURRICULAR AND PREMIER SPORTING ACTIVITIES

Carrie contends that the district court abused its discretion when it refused to order Larry to share in the cost of the children's extracurricular and premier sporting activities.

A district court's child support award is generally reviewed for abuse of discretion. *Wilson*, 43 Kan. App. 2d at 259. However, the interpretation or application of the Kansas Child Support Guidelines is a question of law subject to unlimited review. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009).

The district court, in its modified order stated: "The Court does not Order that the parties be responsible for the children's 'premier sports.' Rather, the parties must agree to the children's participation, or the person enrolling the children in the sport shall pay for the same." In other words, if Larry and Carrie agree that the children should be in certain sporting activities, then both will share in the cost. If they do not agree, then the parent who wants the child to be in a particular premier sport will take on the responsibility of paying for that activity.

Other than the assertion that the children have been involved in certain premier sports for an extended period of time, Carrie has failed to present any other reason that

the district court abused its discretion. The district court's decision seems to be a reasonable and logical approach to determining who pays for the children's premier sporting activities.

ATTORNEY FEES

After oral argument in this case, Larry filed a request for attorney fees. Larry argues that Carrie pursued a deliberate strategy to not use her endorsed expert, Marcus Hodge, and instead rely on Steven York. As a result, Larry requests $15,352.17 in appellate attorney fees and costs in connection with this appeal. Carrie has not filed a response or an objection to the request.

This court has authority to award attorney fees for services on appeal in cases where the district court had authority to award attorney fees. Supreme Court Rule 7.07(b)(1) (2013 Kan. Ct. R. Annot. 67). Additionally, K.S.A. 2013 Supp. 23-2715 grants the trial court authority to award attorney fees to either party as justice and equity require. After considering the arguments of both parties in the case as a whole, we determine that an award of attorney fees is not required by justice or equity in this case and, accordingly, we deny said request.

Affirmed in part, reversed in part, and remanded with directions to reconsider its findings in light of the exclusion of York's testimony and report.