NOT DESIGNATED FOR PUBLICATION

No. 111,966

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KYLE RIESBERG,
Appellant,

v.

LANA BARKMAN F/K/A LANA SWENDSON,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; MERYL D. WILSON, judge. Opinion filed March 6, 2015. Affirmed.

Jacob R. Pugh, of Pugh & Pugh Attorneys at Law, P.A., of Wamego, for appellant.

V. Linnea Alt, of Altenhofen & Alt, Chartered, of Junction City, for appellee.

Before MALONE, C.J., BRUNS, J., and RICHARD B. WALKER, District Judge, assigned.

Per Curiam: Kyle Riesberg appeals from a decision of the trial court finding that he and his former girlfriend, Lana Barkman, were co-owners of Charlie, a golden retriever, and awarding possession of Charlie to Barkman. He also contends the court erred by refusing to order Charlie sold through a partition proceeding. Finding the trial court committed no error, we affirm.

FACTS

Lana Barkman moved in with her boyfriend, Kyle Riesberg, in October 2011. While they were living together, they discussed purchasing a dog. Riesberg made a $100 deposit with a kennel for a golden retriever puppy named Charlie and later paid the remaining $250 balance on October 30, 2011. Both Riesberg and Barkman paid for the expenses of keeping and caring for Charlie.

Barkman paid Riesberg $400 per month starting in October 2011. She later said that the money covered both rent and purchasing Charlie. Barkman also paid to have Charlie neutered, covered most of his veterinary bills, placed him in obedience classes, and registered him with the American Kennel Club.

Riesberg and Barkman ended their relationship in November 2012. They worked out a visitation schedule for Charlie calling for a fairly equal sharing of time with him, but sometimes Barkman had Charlie more because Riesberg traveled for work. When Charlie was with Barkman, Riesberg allowed her to put Charlie in his backyard while she was at work. After a disagreement between Riesberg and Barkman in May 2013, Barkman started taking Charlie to doggy day care while she was working.

In November 2013, after approximately a year of sharing Charlie, Riesberg told Barkman that she was no longer permitted to see Charlie and asked her to sign over control of his microchip. Riesberg had possession of Charlie until December 17, 2013, when he took Charlie to day care. Barkman had previously called the day care to explain the situation, so when Riesberg brought Charlie in that day, the day care called Barkman, and she picked up Charlie and took him home with her.

In January 2014, Riesberg filed a petition with the district court requesting that it order Barkman to return Charlie and order any other just or equitable relief. He also filed

a motion for immediate possession of Charlie. Barkman filed a counter-petition for quiet title, requesting that the court determine whether Riesberg had an interest in Charlie and order title to Barkman.

The case was tried to a magistrate judge, who found that Riesberg and Barkman co-owned Charlie. Believing the case presented a custody issue, the judge determined that it was in Charlie's best interests to be in Barkman's custody. She ordered Barkman to pay Riesberg $350, noting that Riesberg filed "a replevin case" and that she was allowing him to take back the money he paid for Charlie.

Riesberg appealed the magistrate judge's decision to the district court, arguing that he was Charlie's sole owner but if the court found that he and Barkman co-owned Charlie, the proper remedy would be for the sheriff to sell Charlie under the partition statute. After conducting a review of the record, the district judge found that Riesberg paid the full purchase price for Charlie but that Riesberg and Barkman co-owned him. The court held that partition was not an appropriate remedy because it would "result in unrealistic and extraordinary hardship or oppression." The court awarded Barkman possession of Charlie and ordered her to pay Riesberg $175 for his one-half ownership interest.

Riesberg then filed a motion for findings of law and fact, asking the court to make several findings:

> "a. What Kansas law governs the facts contained in the trial held before [the] District Magistrate Judge . . . and the subsequent appeal on the record to the District Court?
>
> "b. If the Court determines that the animal in question was co-owned, how did the Defendant gain ownership of the animal?
>
> "c. If the Court determines that the animal was co-owned, what Kansas Law should be applied to settle the dispute of each party desiring to solely own the animal?

"d. If the Court determines that partition of personal property pursuant to K.S.A. 60-1003(c)(4) is not the proper remedy, what is the proper Kansas law to apply?"

The district judge never ruled on the motion or entered further findings after his initial decision. Riesberg appealed that decision to this court. This court subsequently ruled that it would construe the motion for findings of law and fact as constructively denied in the interest of judicial economy.

ANALYSIS

In his first issue on appeal, Riesberg contends that the district court erred by finding that he and Barkman co-owned Charlie.

In the prayer of his original petition for relief filed January 9, 2014, Riesberg prays "for the return of the above listed personal property and for any other just or equitable relief the court may find." The property is described as "a. golden retriever 'Charlie' $350.00." Under K.S.A. 2014 Supp. 60-1005, "an action to recover possession of specific personal property" is a suit for replevin.

To recover Charlie under a replevin action, Riesberg had to prove: (1) that he was Charlie's owner or was lawfully entitled to possess him; (2) that Barkman wrongfully detained Charlie; and (3) Charlie's estimated value. See K.S.A. 2014 Supp. 60-1005(a); *Kansas Gas & Electric v. Eye*, 246 Kan. 419, 430, 789 P.2d 1161 (1990). Here the district court found that Riesberg and Barkman co-owned Charlie—which is personal property—so Barkman did not wrongfully detain the dog. See *Burgess v. Shampooch Pet Industries, Inc.*, 35 Kan. App. 2d 458, 463, 131 P.3d 1248 (2006) (listing cases).

Riesberg challenges the district court's finding that he and Barkman were co-owners with two arguments. He first contends that Kansas law does not provide a

mechanism by which both he and Barkman could own Charlie, arguing that a party cannot acquire ownership of personal property by cohabiting with the owner or caring for the property, and noting that the district court found that he paid the purchase price for Charlie. His second contention is that the district court impermissibly failed to state what law it relied upon in determining that he and Barkman co-owned Charlie.

This court reviews the district court's finding that Riesberg did not satisfy the elements of replevin for an abuse of discretion. See *Kansas Gas & Electric*, 246 Kan. at 430. A district court abuses its discretion if its action is guided by an erroneous legal conclusion or fails to consider proper legal standards. See *Graham v. Herring*, 297 Kan. 847, 853, 855, 305 P.3d 585 (2013).

Both of Riesberg's challenges to the district court's ruling are without merit. First, contrary to his bald assertion, Kansas law does, in fact, provide a mechanism by which Riesberg and Barkman can co-own Charlie. Kansas courts recognize that cohabiting parties are co-owners of property that was purchased during the cohabitation period and was jointly acquired or acquired with the intent that both parties would have an interest in the property. See *Frazier v. Goudschaal*, 296 Kan. 730, 741, 295 P.3d 542 (2013); *Eaton v. Johnston*, 235 Kan. 323, 328-29, 681 P.2d 606 (1984) (stating that courts are permitted to make an equitable division of a formerly cohabiting couple's personal property if the property was jointly accumulated or acquired with the intent that both parties would have an interest). A court's analysis of who has ownership rights over property acquired during cohabitation is not limited to which party actually paid for it. *Werner v. Werner*, 59 Kan. 399, 403, 53 P. 127 (1898) (stating that legal title in one party's name does not preclude the other party from claiming ownership); *Becker v. Ashworth*, No. 104,417, 2011 WL 2206635, at *4-5 (Kan. App. 2011) (unpublished opinion).

Here the district court made the following findings in its order granting Barkman possession of Charlie:

"1. [Riesberg and Barkman] resided together at the time 'Charlie' was purchased.

"2. [Riesberg] paid the purchase price of $350.00 and was given a document from the kennel, listing him as the owner.

"3. While residing together, the parties shared the expense, both in the form of household expenses (rent) and expenses related to 'Charlie.'

"4. Both parties took 'Charlie' to the vet and both parties paid the vet bills.

"5. [Barkman] paid for obedience classes and dog daycare at Howl-A-Dayz.

"6. Prior to the breakup of their relationship, both parties acted like they co-owned 'Charlie.'

"7. The parties are co-owners of 'Charlie' and the fair market value of said property is $350.00."

Taken together, the findings indicate that in this case the district court found the property was jointly acquired or acquired with the intent that both parties would have an interest in Charlie. The record supports such a finding. After the relationship ended, both parties cared for Charlie and paid for his veterinary bills. They also shared Charlie for a year. Thus, the mechanism for co-ownership stated in *Eaton* clearly applies in this case.

Riesberg's second complaint about the district court's ruling on the co-ownership issue is that the court failed to make adequate findings of law. He believes the judge should be compelled to make specific findings as to the applicable law which governed his decision. He contends that the district court's order violates K.S.A. 2014 Supp. 60-252(a)(1) and Supreme Court Rule 165(a), which require that the court provide conclusions of law on the record of the court's decision on contested matters. See *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013); Supreme Court Rule 165(a) (2014 Kan. Ct. R. Annot. 272). Riesberg cites *Mies v. Mies*, 217 Kan. 269, 274-75, 535 P.2d 432 (1975), a case where our Supreme Court ordered a new trial after the district court's general finding in favor of the plaintiff and failed to express the controlling principle of law in the case, making it impossible to resolve some issues on appeal.

In Riesberg's case, however, the district court's order is not so inadequate as to preclude meaningful appellate review. Riesberg's only real complaint about the trial court's interpretation of the law is his incorrect assertion that there is no mechanism for co-ownership of property such as Charlie. As noted above, this notion of the law is wrong, and thus the district court's failure to state a legal basis for its finding of co-ownership does not impair the job of this court. We can and have determined that there is a mechanism for co-ownership of property such as Charlie without the need for further legal analysis. As a result, this court does not need to remand this issue to the district court for additional conclusions of law.

We find that the district court did not abuse its discretion in finding that Riesberg and Barkman co-owned Charlie and in refusing to permit Riesberg to recover Charlie in a replevin action.

Riesberg's final contention is that the district court erred in refusing to order the sale of Charlie under the partition statute.

After the magistrate judge found that Riesberg and Barkman co-owned Charlie, Riesberg appealed to the district court, arguing that if he and Barkman were co-owners, the appropriate remedy for their dispute was partition. Because the property at issue is a living animal and could not be divided, Riesberg argued that it could not be partitioned in kind and that the district court should have ordered that Charlie be sold at a sheriff's sale according to the procedure set out in the partition statute:

> "(a) *Petition.* (1) When the object of the action is to effect a partition of personal . . . property . . . the petition must describe the property and the respective interests of the owners thereof, if known.
>
> . . . .

"[c](4) *Election or sale.* Where the property is not subject to partition in kind, any one or more of the parties may elect within a time so fixed by the judge to take the property or any separate tract at the appraised value, but if none of the parties elect to so take the property, or two or more elect to so take, in opposition to each other, the judge shall order the sheriff to sell it in the manner provided for sale of property on execution. No sale shall be made at less than two-thirds of the valuation placed upon the property by the commissioners." K.S.A. 60-1003(a)(1), (c)(4).

Here, the district court found that partition was not an appropriate remedy, concluding that it would result in extraordinary hardship or oppression, as provided in section (d) of the partition statute:

"*General powers of judge.* The court shall have full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests, *or may refuse partition if the same would result in extraordinary hardship or oppression.*" (Emphasis added.) K.S.A. 60-1003(d).

On appeal to this court, Riesberg still contends that partition is the appropriate remedy if he and Barkman co-own Charlie. He also argues that in order to refuse to order Charlie's sale under K.S.A. 60-1003(d), the district court needed to have made factual findings regarding extraordinary hardship or oppression.

But in his petition, Riesberg pled replevin, not partition. Riesberg referred to his initial filing as a petition for *replevin* of personal property several times in the district court. Moreover, his motion for immediate possession of Charlie—filed the same day as his petition—requested immediate possession under the replevin statute, K.S.A. 2014 Supp. 60-1005(b):

> "*Hearing, notice; bond.* Except as otherwise provided herein, after filing the affidavit or verified petition, the plaintiff shall apply to the court for an order for the delivery of the property to the plaintiffs in the manner prescribed by subsection (b) of K.S.A. 60-207, and amendments thereto, and the motion made thereunder shall be served upon the defendant pursuant to K.S.A. 60-205, and amendments thereto. After a hearing and presentation of evidence on plaintiff's motion, and if the judge is satisfied as to the probable validity of plaintiff's claim and that delivery of the property to the plaintiff is in the interest of justice and will properly protect the interests of all the parties, the judge may enter or cause to be entered an order for the delivery of the property to the plaintiff."

Replevin and partition are separate and distinct causes of action. See Article 10 of the Kansas Code of Civil Procedure (listing partition and replevin as separate "actions relating to property"); K.S.A. 60-1001 *et seq.* A successful partition action provides for the division or sale of jointly owned property:

> "Partition provides a method whereby two or more persons who own property together may put an end to the multiple ownership, so that each may own a separate portion of the property or, if a division in kind is not feasible, the property may be sold and each owner given an appropriate share of the proceeds. . . . The right of partition is said to be an incident of common ownership." *Witt v. Sheffer*, 6 Kan. App. 2d 868, 869, 636 P.2d 195 (1981).

See also K.S.A. 60-1003.

A successful replevin action, however, provides for the return of specific wrongfully detained property to its rightful owner. K.S.A. 2014 Supp. 60-1005 (defining replevin as "an action to recover possession of specific personal property").

As noted above, the prayer of Riesberg's petition was for the *return* of Charlie to him. The petition did not mention partition or suggest that Riesberg wanted the court to order that Charlie be sold. No alternative relief other than replevin was included in the

pleading. At oral argument Riesberg's counsel admitted that the remedy of partition was never sought in his pleadings.

While Riesberg now seeks partition, this court will not supply a cause of action where it is clear from the petition that the plaintiff did not mean to plead it. See *Bank of Blue Valley v. Duggan Homes*, 48 Kan. App. 2d 828, 833-35, 303 P.3d 1272 (2013) (reversing the district court's order of quiet title where the plaintiff's pleading requested foreclosure) (citing *In re Marriage of Brown*, 247 Kan. 152, 168, 795 P.2d 375 [1990]; *Meyer Land & Cattle Co. v. Lincoln County Conservation Dist.*, 29 Kan. App. 2d 746, 756, 31 P.3d 970 (2001) (denying a claim for equal protection where the pleading did not mention an equal protection action), *rev. denied* 273 Kan. 1036 (2002). Plaintiffs are required to present at least the "'bare bones'" of their cause of action in an understandable manner. *Meyer Land & Cattle Co.*, 29 Kan. App. 2d at 756. Here, the facts Riesberg alleged in the petition indicated that he was Charlie's sole owner, and he requested only that the court order Barkman to "return" Charlie to him.

Further, even under relaxed rules of notice pleading, we find the attempt of the plaintiff to dragnet in every possible legal theory by including the global plea "and for any other just or equitable relief the court may find" is too slender a reed to support a claim for partition.

In short, Riesberg has not presented even the bare bones of a partition action. It is clear that Riesberg did not mean to plead partition, so the district court should not have considered Riesberg's partition arguments and properly refused to order Charlie to be sold under the partition statute. See *Hockett v. The Trees Oil Co.*, 292 Kan. 213, 218, 251 P.3d 65 (2011) (the correct result in district court will be upheld even if the court relied on the wrong ground for its decision). Accordingly, the district court was not required to make any findings as to extraordinary hardship or oppression in order to refuse Riesberg's request under the partition statute.

We hold that Riesberg is not entitled to relief under either a replevin or a partition cause of action.

Affirmed.