

## NOT DESIGNATED FOR PUBLICATION

No. 112,406

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of ROSWITHA POST,  
*Appellant,*

and

YOUSSEF RAHMOUNI,  
*Appellee.*

## MEMORANDUM OPINION

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed July 31, 2015.  
Affirmed.

*Richard W. Benson*, of The Law Office of Richard W. Benson, of Topeka, for appellant.

*James E. Benfer, III*, of McCullough Wareheim & LaBunker, P.A., of Topeka, for appellee.

Before LEBEN, P.J., SCHROEDER and GARDNER, JJ.

*Per Curiam*: Roswitha Post appeals the district court's denial of her amended petition for annulment and the granting of Youssef Rahmouni's counter-petition for divorce. The district court found Post failed to prove by clear and convincing evidence her petition for annulment and that Rahmouni provided substantial competent evidence the parties were married in Morocco, the parties are now incompatible, and he should be granted a divorce. We affirm.

## FACTS

Post was born in Germany and immigrated to the United States. She became a United States citizen in 1985. Post worked as an administrative assistant for multiple United States companies around the world until she retired in 2006. In April 2008, following a divorce, Post decided to move to Morocco for retirement. The facts surrounding the parties' relationship and resulting marriage are in dispute, therefore, we will set them out in some detail.

Post met Rahmouni in 2008. Rahmouni testified he first met Post at a restaurant in April in Marrakech, Morocco. They exchanged contact information and began chatting online. Post testified she first met Rahmouni in June 2008 on an online dating website and, within 3 weeks of chatting, Rahmouni was proposing marriage. Post was 30 years older than Rahmouni.

Post testified she hired Rahmouni to help with her move to Morocco. Rahmouni testified he helped with Post's move because they were in a relationship. In October 2008, Post and Rahmouni met in Tangier, Morocco. Rahmouni helped her set up her newly purchased condo in Agadir, Morocco, with furniture, food, and utilities. Post testified that she returned to Germany in January 2009, at which time Rahmouni and his girlfriend were serving as caretakers of her condo. Post also gave Rahmouni power of attorney for her car "for the fun of it." In March, Post returned for her car and testified that she bought a train ticket for Rahmouni to go home to Arabou, Morocco, before she returned to Germany.

Post and Rahmouni stayed in contact over the Internet and in September 2009 Post returned to Morocco to marry Rahmouni. The marriage ceremony was held in October 2009 at Rahmouni's parents' home in Arabou. Post testified that in retrospect there were indicators Rahmouni did not intend to establish a life with her. She noted the fact that Rahmouni only invited his immediate family and the necessary clergymen to the wedding, the wedding bore

none of the indicia of a traditional Moroccan wedding, the wedding was held in a language she did not understand, and finally, when she objected to the lack of ceremony, Rahmouni became physically violent. In contrast, Rahmouni testified the wedding showed his commitment to the marriage. His family prepared food and traditional Moroccan clothes for Post; Post and Rahmouni went before a judge to receive permission to marry; and the only reason the wedding was so small was because Post did not want him to invite additional guests.

Following the wedding in October 2009, they lived with Rahmouni's parents until December when they moved to Post's condo in Agadir. In early 2010, Rahmouni applied for a visa to Spain but his application was denied. In December 2010, Rahmouni applied for a visa to the United States. Post filed paperwork with the Department of Homeland Security agreeing to be his sponsoring spouse. Rahmouni's visa was approved in February 2011. Post testified she sponsored the visa application because Rahmouni began physically threatening her. Rahmouni testified that initially he did not want to go the United States but felt pressured after Post made him turn down a job opportunity in England. Throughout 2010, the couple lived together in the same condo in Agadir, shared a bedroom, and was sexually active.

In June 2011, the couple moved to Boston, then Virginia, and eventually settled in Topeka in September. Rahmouni had begun working at Labor Pro in August 2011. Both parties testified the marriage quickly went downhill. Rahmouni called the police three times alleging Post had assaulted him but no arrests were made. Post testified Rahmouni was emotionally and physically abusive. During this time, Rahmouni opened separate checking and savings accounts Post did not have access to.

Post testified that once the couple moved out of temporary housing and into her house in Topeka, they were not sexually active because Rahmouni refused all physical contact. In contrast, Rahmouni testified Post was a "sex addict" who "loved doing it every

day." The couple eventually separated for 3 months during which Post went to Germany. While Post was gone, Rahmouni contacted an immigration lawyer who referred him to the YWCA Center for Safety and Empowerment. Rahmouni began seeing a domestic violence counselor who, at the request of Rahmouni's attorney, provided immigration with a letter stating Post was emotionally abusive towards Rahmouni. The domestic violence counselor did not meet with Post before or after writing the letter. Following Post's return from Germany, Rahmouni moved out of the house. Post testified Rahmouni decided to move out; Rahmouni testified Post kicked him out.

On April 5, 2013, Post filed for divorce in Shawnee County District Court. On July 31, 2013, an amended petition for annulment was filed. On August 30, 2013, Rahmouni filed a counter-petition for divorce.

At the bench trial, Post called John Sampson, an immigration and marriage fraud expert, to testify. Sampson testified his specialization is in Violence against Women Act (VAWA) fraud. Under current immigration law, if a marriage is less than 2 years at the time the alien is admitted to the United States, the alien is admitted as a conditional resident. Prior to the expiration of the 2-year period after the alien is admitted, both parties must file a joint petition to remove the conditions of residency; however, the alien can get a waiver to this requirement if the alien is a victim of domestic violence and can submit any credible evidence of the abuse and that a good-faith marriage was entered into with the purpose and intent to establish a life together. Sampson testified this statute is commonly used in long-term cons. An alien marries a United States citizen with no real intent to establish a life together but as a way to obtain a temporary visa to the United States. Once in the United States, the alien begins to allege domestic abuse in order to obtain a waiver of the requirement to file a joint petition at the end of the 2 years.

Sampson testified that indicators of VAWA fraud by Rahmouni included:

- (1) The discrepancy of age between Post (71) and Rahmouni (41);
- (2) Little or no public notice of the wedding in Morocco among Rahmouni's neighbors, friends, co-workers, etc.;
- (3) Bank records of the parties showing separate accounts including a savings account in only Rahmouni's name that Post claimed not to know about;
- (4) The short time window between when the marriage was entered and when Rahmouni began applying for visas out of Morocco;
- (5) The couple met on an online dating website and Rahmouni initially worked as Post's driver and translator;
- (6) The extensive periods without sexual activity;
- (7) The lack of evidence demonstrating Rahmouni financially contributed to the marital relationship;
- (8) The bank withdraw of \$200 cash corresponding to the amount needed for Rahmouni's apartment deposit prior to when he alleged he was kicked out by Post;
- (9) The signing of Rahmouni's new lease on the same day he alleged he had been kicked out of the house by Post;
- (10) The fact that Rahmouni met with an immigration lawyer and domestic violence counselor when Post was in Germany yet continued to remain in the marital home; and
- (11) Rahmouni sent repeated emails professing his love while at the same time was submitting a VAWA petition.

Sampson explained that because Post signed a sponsoring spouse affidavit, unless the district court granted an annulment, Post would potentially be responsible financially for Rahmouni for up to 10 years. He also explained that without a VAWA waiver, it was highly unlikely Rahmouni would have met the requirements for permanent residency because the couple had not commingled their funds, had not filed joint tax returns, and had lived apart for extended periods of time.

At trial, Rahmouni's domestic violence counselor also testified that when she first met with Rahmouni she was skeptical of his abuse claims simply because he was male; however, she eventually concluded he was in an emotionally abusive relationship. The counselor testified the abuse signs included reports by Rahmouni that: (1) he was isolated from his family and discouraged from making friends; (2) Post regularly humiliated him and provided false indoctrination of what life was like in the United States; (3) Post would use his immigration status against him by threatening to have him deported; (4) Post had contacted Rahmouni's employer and told him disparaging things; and finally, (5) Post had taken semi-clothed photos of him and he was worried the photos would be leaked on the Internet.

The district court denied Post's request for an annulment and granted Rahmouni's request for a divorce. The journal entry denying the annulment and granting the divorce was filed April 4, 2014. On May 2, 2014, Post filed a motion for reconsideration with the district court requesting a new trial under K.S.A. 2014 Supp. 60-259. The district court denied Post's motion to reconsider pursuant to K.S.A. 2014 Supp. 60-259 on June 9, 2014. On July 9, 2014, Post filed a notice of appeal.

#### ANALYSIS

*Post has not shown error in the district court's denial of an annulment.*

Post argues the district court erred when it found that annulment of the marriage based on fraud was subject to the traditional essentials of the marriage test and that lying about intent to establish a life together can amount to fraud within the meaning of K.S.A. 2014 Supp. 23-2702(a)(2).

K.S.A. 2014 Supp. 23-2702(a) provides the following grounds for which the court must grant an annulment:

"(a) The district court shall grant a decree of annulment of any marriage for either of the following grounds: (1) The marriage is void for any reason; or (2) the contract of marriage is voidable because it was induced by fraud."

In addition, K.S.A. 2014 Supp. 23-2702(b) provides that the district court may grant an annulment where the marriage "was induced by mistake of fact, lack of knowledge of a material fact or any other reason justifying rescission of a contract of marriage."

The district court held that in order for it to find fraud sufficient to annul the marriage, the fraud had to relate to the essentials of the marriage, the statement was untrue, and the Petitioner relied on that statement. The district court did not attempt to define what the essentials of the marriage meant; however, it found based on the evidence given at trial it was unable to find by clear and convincing evidence the marriage was induced by fraud.

Post's primary argument is that a marriage may be annulled when one party marries solely to commit immigration fraud, rather than for some legitimate interest in marriage. K.S.A. 2014 Supp. 23-2702 provides a sufficient basis for us to agree with Post on that point—an annulment *could* be granted if the proof supported that claim. See generally 1 Elrod, *Kansas Law & Practice: Family Law* § 9:49 (2014-2015); Nelson, *Divorce, Separate Maintenance & Annulment*, in *Practitioner's Guide to Kansas Family Law* § 2.4.3 (Mann, 2d ed. 2010).

Here, however, the district court simply found there was insufficient evidence to show Rahmouni induced Post into the marriage under false pretenses—that he did not intend to establish a life together.

"I do think that maybe the standard by which maybe I have to make the judgment may be different than the standard that ICE might use in making that judgment. Because I do think the law is clear that this has to be by clear and convincing evidence, that there is fraud in the inducement of the marriage.

"And in doing that, one of the things that Mr. Sampson mentioned was the age discrepancy or the age difference between the parties, and I think typically that would be the kind of things that we would expect—at least this Court would expect that the older individual was somehow swept off of his or her feet, and that—that as a result of some kind of courtship or exchange between the parties, became so enamored with the other individual that marriage was the end result, and immigration status in the United States was the ultimate result.

"But here, this is a situation where the Petitioner in this case is admittedly a 71-year-old woman, but when you look at her employment history, it's clear that she had respective—respectful jobs in many firms all across the World; in Korea, in Germany, and in other places. So we are not dealing with someone who I guess the vernacular would be easily bamboozled.

"So I'm going to find—I can't find from the evidence that there was fraud in the inducement in this marriage."

The district court properly noted that fraud must be proved by clear and convincing evidence, and it concluded that Post's evidence did not meet that test. See *Nelson v. Nelson*, 288 Kan. 570, 588, 205 P.3d 715 (2009). What Post is asking this court to do is to reweigh the evidence and come to a different conclusion—a request we cannot honor. The court's conclusion that Post did not meet her burden of proof is a negative finding that we generally may not reverse in the absence of the disregard of undisputed evidence or a showing of bias, passion, or prejudice. *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008); *In re Estate of Culver*, No. 110,265, 2014 WL 5347287, at \*5 (Kan. App. 2014) (unpublished opinion). Here, there was evidence supporting each party's position. When a decision is challenged for insufficiency of evidence or as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the decision, it will not be disturbed on appeal. *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

While Post did present a great deal of circumstantial evidence concerning whether Rahmouni lied about intending to establish a life together, when the evidence is considered in the light most favorable to Rahmouni, we cannot reverse the district court's decision. Post and Rahmouni first met in June 2008; Post gave Rahmouni power of attorney over her vehicle in January 2009; they stayed in contact and were married in Morocco in October 2009; Rahmouni did not apply for a visa to the United States until December 2010; and the couple was sexually active. Furthermore, the district court found that despite the 30-year age difference, Post had held respectful jobs in firms across the world prior to retirement and was unlikely to be swept off her feet. It is not the job of this court to reweigh the evidence, and we decline to do so.

With respect to the possibility of granting an annulment under K.S.A. 2014 Supp. 23-2702(b), the granting of an annulment is not mandatory and thus is a discretionary call for the district court. See *National City Mortgage Co. v. Ross*, 34 Kan. App. 2d 282, 287, 117 P.3d 880 (noting that the application of an equitable doctrine rests within the trial court's discretion), *rev. denied* 280 Kan. 984 (2005). The district court abuses its discretion only where no reasonable person would agree with its decision or the decision is based on an error of fact or law. *Wiles v. American Family Life Assurance Co.*, 302 Kan. \_\_\_, 350 P.3d 1071, 1077 (2015). We find no abuse of discretion in denying an annulment here on equitable grounds. The evidence was conflicting, and it was the district court's role to make an equitable ruling based on that conflicting evidence.

*Was the cross-petition for divorce properly granted?*

Next, Post argues that even if the district court did not err in denying her annulment, the district court erred in granting Rahmouni's cross-petition for divorce alleging the parties were incompatible because he failed to show by a preponderance of the evidence there was a legal marriage. Post argues that in order to be granted a divorce, Rahmouni had to prove by a preponderance of the evidence that there was a legal marriage, and that it had a valid

inception. Again Post is challenging the sufficiency of the evidence and is asking this court to reweigh the evidence. "Substantial evidence is such legal and relevant evidence a reasonable person might accept as sufficient to support a conclusion.' [Citation omitted.] In determining whether substantial competent evidence supports the district court findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence." *Gannon*, 298 Kan. at 1175-76. Thus, we review the record to see if there was substantial competent evidence to support the district court's finding a valid marriage occurred in Morocco.

Here, the facts reflect Post and Rahmouni went before a judge in Morocco to receive permission to marry. They were married before a clergyman along with Rahmouni's family present. Post was dressed in traditional Moroccan wedding attire and Rahmouni's family prepared food for the wedding. After the wedding, Post and Rahmouni lived with his parents for a little over a month before they returned to Post's condo in Agadir. Thus, the facts, when viewed in a light most favorable to Rahmouni, reflect substantial competent evidence to support Post and Rahmouni were married to each other in Morocco on October 30, 2009, and were incompatible at the time of this trial.

#### CONCLUSION

Post failed to support her amended petition for annulment with clear and convincing evidence the marriage was induced by fraud. The record also reflects substantial competent evidence to support the district court's determination there was a valid marriage in Morocco between Post and Rahmouni and that they are now incompatible. The district court did not err in granting Rahmouni's cross-petition for divorce.

Affirmed.