

NOT DESIGNATED FOR PUBLICATION

No. 111,737

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

EBUBE P. OTUONYE,
Appellee,

and

UGOCHINYERE M. OTUONYE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court, ERIC A. COMMER and STEPHEN J. TERNES, judges.
Opinion filed August 7, 2015. Affirmed.

Jerry D. Bogle, of Young, Bogle, McCausland, Wells & Blanchard, P.A., of Wichita, for
appellant.

Kyle P. Sollars, of Stinson, Lasswell, & Wilson, L.C., of Wichita, for appellee.

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

Per Curiam: After 12 years of marriage, pharmacist Ebube P. Otuonye (Ebube) filed for divorce from his wife Ugochinyere (Ugo). The major points of contention in the divorce revolved around financial matters, especially those related to Ebube's income and the value of his business, Neighborhood Pharmacy. Ugo's appeal concerns two of these financial issues: first, whether the district court should have granted a continuance for her to consider hiring someone to appraise the business, and second, whether the district

court should have imputed a higher income to Ebube. Finding no abuse of discretion on either issue in the district judges' well reasoned decisions, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Ebube and Ugo married in Nigeria in 2000 and are the parents of three minor children. Ebube holds a pharmacy degree and worked for a time as a pharmacist at both Dillons and Line Medical. However, Ebube always dreamed of opening his own pharmacy. For that reason, and with Ugo's blessing, Ebube opened Neighborhood Pharmacy in July 2009. By September 2011, Neighborhood Pharmacy was Ebube's only job. For her part, Ugo began attending college when the family lived in Texas and remained in Texas to complete her education even after Ebube accepted a job in Wichita. Ugo's mother helped care for the children and keep house while Ebube worked. When she finished her education, Ugo returned to Wichita and obtained employment as a nurse.

In October 2012, Ebube filed for divorce, citing incompatibility of the parties. Prior to trial, the district court entered a pretrial order listing the issues to be determined at trial and designating the witnesses for both parties. Ebube designated an expert witness to testify about the value of Neighborhood Pharmacy. Ugo designated no experts. However, the order specified that the parties could name any additional witnesses or exhibits up until 10 days before trial. Although the pretrial order was later amended, the list of expert witnesses remained the same.

The district court held a hearing concerning the minor children in August 2013 but considered the financial issues in a separate trial in November. The custody rulings are not at issue here. Two weeks before the scheduled trial date on the financial issues, the district court took up several motions from the parties, including Ugo's motion to continue. Ugo's motion, which related to a subpoena for pharmacy records, requested that the district court continue the trial to allow her to decide whether she wanted to hire an

appraiser to review the pharmacy's value. Ugo explained that her decision on hiring an appraiser or other expert would depend on the records received pursuant to the subpoena and that she would have acted sooner had there not been a dispute over the subpoena. However, she designated no specific appraiser as she had yet to decide whether to hire one.

Ebube opposed the motion, citing the amount of time that had passed since both the pretrial order and Ugo's counsel entering his appearance. Ebube also observed that his expert had evaluated the pharmacy a year earlier, while Ugo chose to wait until "the eve of trial."

Ultimately, the district court denied the motion for continuance, reasoning that no expert was designated in the pretrial order and that Ugo's new decision regarding an expert did not justify postponing the case further. The case proceeded to trial as scheduled, and Ugo provided no additional witness names to Ebube as allowed by the pretrial order. However, during the hearing itself, Ugo's counsel proffered that he "ha[d] spoken with experts who have certified appraisal degrees" who would have testified about the specific methods of appraising and valuating pharmacies. But counsel also elected against disclosing the names of these individuals.

At the hearing, Ebube testified about his employment and income. He explained that when employed by Dillons and Line Medical, he worked between 60 to 80 hours a week. However, Ebube ended his employment at Dillons voluntarily in 2009. At the time he left his employment at Dillons, he earned approximately \$100,000 a year at that job and between \$60,000 and \$70,000 a year at Line Medical. He opened Neighborhood Pharmacy as a limited liability company with what he termed an "80 [to] 84 percent monthly" stake in the business. However, he testified that he also continued to work at Line Medical until the company laid him off in September 2011. He decided at that point to focus on Neighborhood Pharmacy rather than returning to another retail pharmacy.

Ebube testified that he paid himself a salary of \$495 a week at Neighborhood Pharmacy. Ebube also financially supported Ugo during her schooling, although she did rely on some loans as well. Because Ugo attended school out-of-state, Ebube provided for most of the children's needs from his income alone.

Ebube admitted on cross-examination that he started Neighborhood Pharmacy with a silent partner. He estimated that both he and the partner contributed \$20,000 to open the business. Regarding his work history, Ebube testified that he had previously worked for several retail pharmacies, including CVS, Walgreens, Rite Aid, and Osco Drugs. Ebube also testified that, since losing his job at Line Medical, he received no other job offers. Upon reviewing some documents, he conceded that he made over \$100,000 at Line Medical.

Ebube's expert witness, Dr. Jeffrey Quirin, testified regarding the value of Neighborhood Pharmacy. Quirin, who worked primarily as a family law litigation consultant evaluating businesses or income for support purposes, explained his methodology for valuing the pharmacy. He explained that usually and in this case, he inspected the physical business and its finances, spoke to the owner, observed the clients and customers, and evaluated the area in which the business was located. He explained that for Neighborhood Pharmacy, he used what he called "the net asset approach," as the lack of long-term earning history suggested the business could not easily be sold. As such, the pharmacy's value depended on its actual physical assets, especially given that the business ended 2012 with a negative cash balance. Based on this approach, Quirin valued Neighborhood Pharmacy at \$22,997. Given that Ebube's capital contribution to the business constituted only 62.1% of the whole, Quirin calculated his personal stake in the business to be worth \$14,281.

Quirin acknowledged on cross-examination that he elected against using a method of valuation which analyzes the number of prescriptions filled each year because he felt it

to be inaccurate. In response to a question on income-based valuation, Quirin noted that an average pharmacist salary is between \$100,000 and \$115,000. If a pharmacist, such as Ebube, is not earning that average amount at a business, it requires abandoning the income-based approach for a net asset approach. However, Quirin also noted that a business owner's decision to pay himself a salary is a discretionary one and is not necessarily indicative of the business' overall profitability.

Ugo's sister Uchechi Awengwe (Uchechi) testified about working for Ebube at Neighborhood Pharmacy. Uchechi explained that Ebube confided in her about receiving two job offers with salaries higher than what he had earned at Line Medical. But Ebube told Uchechi that he planned on declining the offers and asked her to keep the news of the offers from Ugo. However, Uchechi could not recall what entities extended offers to Ebube. On cross-examination, Uchechi testified that Ebube told her about the job offers sometime in April 2012, although she could not remember the exact date. But Uchechi also admitted that she never saw any official paperwork about the offers and never witnessed Ebube meeting with representatives from other companies.

Ugo testified as well, first discussing her student loans and the family's motivations for living both in Wichita and Texas. Ugo testified that even after Ebube opened Neighborhood Pharmacy, they discussed leaving Kansas and that Ebube in fact received out-of-state job offers. According to Ugo, he received a July 2012 offer for a job in Florida with a yearly salary of \$150,000. Ugo also testified regarding her proposed division of assets, debts, and allocation of spousal maintenance.

On cross-examination, Ugo testified that she earned approximately \$43,000 in 2012. She acknowledged that Ebube paid for her education at several of the institutions she attended. Ugo also admitted that the reduction in Ebube's income happened over a year before he filed for divorce, although she also testified that Ebube had opportunities to earn more but declined because he "always wanted to own a pharmacy, and . . . he

didn't want to leave." Ultimately, she acknowledged that Ebube's decision to change jobs was motivated by his desire to start his own business, not to hide or intentionally reduce his income prior to divorce.

Although the district court granted the divorce at the close of the hearing, it issued its ruling on the financial issues in April 2014. In a thorough written order, the district court determined Ebube's income to be the \$25,245 per year he earned at Neighborhood Pharmacy. The district court denied Ugo's request to impute a higher income to Ebube, reasoning that Ebube was not "intentionally under-employed for the purpose of reducing his income for this case." Specifically, the district court determined:

"No credible evidence exists to suggest that [Ebube] turned down other offers of employment for purposes of escaping spousal maintenance or child support and further he worked full time at the Pharmacy for over a year before the filing of the divorce. [Ugo's] sister's testimony, stating that [Ebube] had discussed other employment offers with her, is found to be not credible."

The district court further reasoned that although Ebube "has skill with which he could possibly earn a higher income, the Court is left to speculate as to whether such jobs are available currently, and if so, whether they are available locally and what they might pay."

The district court also determined that Ugo "is without sufficient need to be supported by [Ebube], and [he] is without sufficient resources to support her. Both parties are young and fully employed. As such [Ugo's] age and earning potential militate against the need for spousal maintenance." The district court also observed that Ugo's educational costs "were born largely, if not entirely, by [Ebube]" while she focused on her education. Accordingly, the district court found that it would not be equitable to order Ebube to pay maintenance to Ugo.

The district court also divided the marital property and debts. Ugo timely appealed.

ANALYSIS

The district court did not abuse its discretion in denying Ugo's continuance request.

On appeal, Ugo first argues that the district court abused its discretion when it refused to grant her requested continuance. As a preliminary matter, Ugo essentially treats her underlying motion as one to modify the pretrial order and argues that the district court's action caused manifest injustice.

But Ugo never moved to amend the pretrial order. Instead, she simply moved for a continuance to consider whether she wanted to hire an expert. In fact, at the motions hearing, Ugo specified that she would "have to file a motion to amend the pretrial order" if she ultimately decided to hire the expert in question. Clearly, Ugo understood that her October 2013 motion served only to request more time, not to designate an expert. Therefore, the correct analysis is whether the district court abused its discretion in denying her requested continuance and not in denying an amendment Ugo never requested.

As a general principle, "[a] district court's refusal to grant a continuance is reviewed for abuse of discretion." *In re J.A.H.*, 285 Kan. 375, 384, 172 P.3d 1 (2007). A judicial action constitutes an abuse of discretion if that action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). In terms of unreasonableness, however, "[d]iscretion is abused only when no reasonable person would take the view adopted by the district court." *Vorhees v. Baltazar*, 283 Kan. 389, 393, 153 P.3d 1227 (2007).

By statute, a district court "may continue an action at any stage of the proceedings on just terms" and for good cause. K.S.A. 2014 Supp. 60-240(b). In a relatively recent case, our Supreme Court reiterated that a district court ruling on a motion for continuance "must consider all circumstances, particularly such matters as the applicant's good faith, his showing of diligence, and the timetable of the lawsuit." *J.A.H.*, 285 Kan. at 385. There, the Supreme Court determined that the party requesting the continuance both lacked good faith and demonstrated a lack of diligence by waiting to request reappointment of counsel until the morning of trial. 285 Kan. at 385. The court therefore reasoned that denying the motion did not constitute an abuse of discretion. 285 Kan. at 385.

In *Cheek v. Hird*, 9 Kan. App. 2d 248, 675 P.2d 935 (1984), the plaintiff moved for a continuance to allow endorsement of an expert shortly before trial. In determining that the district court did not abuse its discretion, this court noted that "it is incumbent upon the applicant to affirmatively show due diligence with respect to all grounds upon which the continuance is sought." 9 Kan. App. 2d at 250. The plaintiff's pleadings and deposition testimony had raised the issue that her expert would testify about early on in the proceedings, and at the time of the motion, the district court had already ruled that the parties could not endorse any additional expert witnesses. This court determined that the plaintiff showed a lack of diligence in her delay. 9 Kan. App. 2d at 250. Moreover, the court also noted that the plaintiff failed to comply with K.S.A. 60-240(c), which requires a supporting affidavit when a motion to continue is based on the absence of a material witness. 9 Kan. App. 2d at 250.

In another case, the wife in a divorce proceeding served discovery on her husband, but her husband never responded. *In re Marriage of Rice*, No. 91,620, 2005 WL 1661323 (Kan. App.) (unpublished opinion), *rev. denied* 280 Kan. 982 (2005). On the day of trial, the wife requested a continuance in part because she lacked the requested discovery. The district court denied her motion, and this court found no abuse of discretion. 2005 WL

1661323, at *3. Because the wife failed to demonstrate the steps she took to compel discovery prior to trial, this court reasoned that she failed to show the required due diligence. 2005 WL 1661323, at *3. This court also noted that the district court had already granted two continuances prior to trial. 2005 WL 1661323, at *3.

The record here, like in *Cheek* and *Rice*, fails to demonstrate due diligence on Ugo's part. The first pretrial order, entered in April 2013, clearly named the value of Neighborhood Pharmacy as one of the issues to be determined at trial. At that time, Ebube designated his expert witness regarding valuation. Quirin's expert witness report was dated March 31, 2013, and was delivered to Ugo's attorney the next day. Although Ugo later obtained new counsel, nothing in the record suggests that Ugo failed to timely receive the report.

A copy of the subpoena for the business records that are connected to the motion to continue is absent from the record, as is the motion to quash that subpoena. Therefore, it is uncertain as to exactly when Ugo requested the records she wished to review—records she believed would help inform Neighborhood Pharmacy's valuation. At the same time, the record is clear that Ugo was not certain to hire an expert based on receipt of these records. If anything, Ugo wanted the chance to review the records, speak to potential witnesses, and then determine whether she wanted an expert to testify. This situation is analogous to that in *Cheek*, when the plaintiff wanted a continuance to designate an expert for an issue known to the parties since the proceeding's inception. See 9 Kan. App. 2d at 250. Ugo had ample opportunity to discuss valuation with potential experts in the several months between receiving the pretrial order and moving for the continuance, and she failed both below and on appeal to demonstrate why these steps were not taken earlier than the month before trial. The record only demonstrates that she waited until very late in the proceeding and long after the previously scheduled trial dates to start considering whether to hire an expert.

In sum, Ugo failed to show the requisite due diligence justifying the requested continuance. Instead, she waited until a few weeks before trial to ask for more time to consider hiring an expert on an issue known to her for more than 6 months. Without such a showing, it cannot be said the district court acted unreasonably in denying her motion. For that reason, its decision on the continuance issue should be affirmed.

As a final matter, Ugo argues in her brief that the district court's action deprived her of hiring an expert and created manifest injustice. However, Ugo fails to recognize that the pretrial order authorized an exchange of additional witnesses until 10 days before trial. Acting quickly, Ugo could have still named an expert and exchanged his or her information with Ebube. Instead, Ugo elected only to proffer what her potential, still-unnamed expert might have testified to. Moreover, as Ebube observes in his brief, the district court assigned the full value of Neighborhood Pharmacy to Ebube alone; as it found no evidence that Ugo "made any contribution to the creation or establishment of the business" because "she was absent from the marital home, at school in Texas, when the business was begun." Ugo offers no argument as to how a different valuation method would have affected this finding. As such, any error in not allowing Ugo a continuance to hire an expert is likely harmless. See K.S.A. 2014 Supp. 60-261 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

The district court did not abuse its discretion in failing to impute a higher income to Ebube.

Ugo also argues on appeal that the district court should have imputed income to Ebube at a rate higher than his salary at Neighborhood Pharmacy. Ugo contends that the evidence shows both that Ebube earned significantly more when employed by traditional retail pharmacies and that he intentionally rejected offers by those pharmacies to work at Neighborhood Pharmacy. Ugo contends that this imputation should apply not only to

child support calculations, but also the district court's consideration of maintenance and property division.

A district court's determination of the amount of child support is reviewed for abuse of discretion. *In re Marriage of Scott*, 263 Kan. 638, 645, 952 P.2d 1318 (1998). This standard holds true in appeals concerning the district court's decision to impute or not impute income, as well. See *In re Marriage of Johnson*, 24 Kan. App. 2d 631, 633-34, 950 P.2d 267 (1997), *rev. denied* 264 Kan. 821 (1998).

Our Kansas Child Support guidelines authorize district courts to impute income to the nonresidential parent "in appropriate circumstances." Kansas Child Support Guidelines, § II.F. (2014 Kan. Ct. R. Annot. 130). One such circumstance occurs "[w]hen there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support." Kansas Child Support Guidelines, § II.F.1.e. (2014 Kan. Ct. R. Annot. 130). If evidence demonstrates such underemployment, "the court may evaluate the circumstances to determine whether actual or potential earnings should be used" to impute that parent's income. Kansas Child Support Guidelines, § II.F.1.e. (2014 Kan. Ct. R. Annot. 130).

However, imputation of income is not appropriate in all cases where a parent is earning a less-than-ideal salary. "If the underemployment is a lifestyle choice to further legitimate personal or career goals, not to avoid child support, then if the family were intact, all members would undergo a belt tightening. It generally is not appropriate for a court to intervene in personal career choices merely because there has been a divorce." 2 Elrod, *Kansas Law and Practice: Kansas Family Law* § 14.11, p. 597 (2014). However, "[a] parent should not be able to voluntarily reduce income to avoid paying child support," and in other jurisdictions, courts have held that parents "may not assume new responsibilities or establish a new business which takes precedence over existing responsibilities to dependents and may impute income based on earning capacity." 2

Elrod, Kansas Law and Practice: Kansas Family Law § 14.11, p. 597 (2014). A parent's good or bad faith may also factor into the imputation analysis, as well. 2 Elrod, Kansas Law and Practice: Kansas Family Law § 14.11, p. 599 (2014).

Reductions of income during the pendency of divorce or sometime thereafter often result in the imputation of income. For example, the father in *In re Marriage of McNeely*, 15 Kan. App. 2d 762, 815 P.2d 1125, *rev. denied* 249 Kan. 776 (1991), earned \$2,000 each month at the time of the postdivorce hearing but planned to enter law school in the near future, resulting in a dramatic reduction to his income. The district court assigned child support based on his earnings at the time of the hearing regardless of his future plans for schooling. In affirming the district court's decision, this court observed: "[I]t is questionable whether [the father] should be allowed to voluntarily reduce his income by attending law school so that his support obligation could be reduced. Courts have been reluctant to allow this." 15 Kan. App. 2d at 766.

In another case, a mother voluntarily left her employment as a doctor to move to Norway with her new husband. *In re Marriage of McCollum*, 30 Kan. App. 2d 651, 45 P.3d 398 (2002). The district court reduced her child support obligation, imputing only minimum wage to the mother despite her deliberate unemployment. This court reversed, determining that the mother's "voluntary relinquishment of her medical license and voluntary decision to move to Norway should not mean her child support obligation is slashed." 30 Kan. App. 2d at 654.

When the father in *In re Marriage of Waggoner*, No. 99,138, 2009 WL 1591394, at *4 (Kan. App. 2009) (unpublished opinion), left his job to start his own business 7 years after the divorce, the district court imputed income to him based on his previous income, and this court affirmed. This court considered many factors in upholding this decision, including: the father's knowledge that his expenses exceeded his earning potential at his new job; the father's unpersuasive reasons as to why he left his previous

job (including an increased quality of life and changes in company policy); the timing of his resignation, which occurred almost immediately after an increase in child support; and the "questionable credibility" of father's new income figures. 2009 WL 1591394, at *4-5.

Of course, these cases each differ from the instant case in one important way: the change in employment occurred after the parties divorced, not before. Here, it is undisputed that Ebube opened Neighborhood Pharmacy in 2009 after consultation with Ugo. Similarly, this job became Ebube's only job in September 2011, more than a year before he filed for divorce. Nothing in the record suggests that Ebube opened his own pharmacy in anticipation of avoiding his child support obligations; instead, Ugo herself admitted in testimony that Ebube always dreamed of opening his own pharmacy. Although Ebube could clearly earn more per month at a traditional pharmacy job, his decision to pursue a different career path clearly predated the divorce and appears to be without any bad faith on his part.

On appeal, Ugo essentially argues that because Ebube's pharmacy continues to struggle after 4 years, he is somehow obligated to seek out a job with a salary commiserate to what he made previously. But this contention is unsupported by Kansas law. Ebube chose to pursue his dream of opening his own pharmacy while the marriage was intact and continued that pursuit regardless of more lucrative offers. It is not the duty of this court to intervene in a career choice that predates the divorce simply because one party is not earning to his or her full potential. See 2 Elrod, *Kansas Law and Practice: Kansas Family Law* § 14.11, p. 597 (2014). Instead, the district court's intervention is only required in situations where one party is earning below his or her potential to thwart child support obligations. See *Kansas Child Support Guidelines*, § II.F.1.e. (2014 Kan. Ct. R. Annot. 130) (allowing imputation of income when parent is underemployed specifically for the purpose of avoiding child support obligations). To quote the district court: "No credible evidence exists to suggest that [Ebube] turned down other offers of

employment for purposes of escaping spousal maintenance or child support and further he worked full time at the Pharmacy for over a year before the filing of the divorce."

Clearly, then, substantial competent evidence supports the district court's conclusion regarding Ebube's employment, and the court appropriately exercised its judicial discretion in declining to impute a higher income to him. As such, this court need not consider Ugo's arguments concerning whether a higher, imputed income should have altered the district court's decisions on maintenance and the division of property.

As a final note, Ugo contends in her brief that imputation of income is proper because the record suggests Ebube concealed assets from her during the pendency of the divorce proceeding. Ugo appears to reason that the disparity between Ebube's high salaries in the past and the low value of the marital property suggests there are funds hidden somewhere beyond her reach. Not only is this argument based solely on conjecture, but a review of the record indicates that Ugo never argued this point below. An issue 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). Therefore, Ugo's speculation regarding hidden or unaccounted-for funds cannot be considered by this court.

Affirmed.