

## NOT DESIGNATED FOR PUBLICATION

No. 91,620

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

In the Matter of the Marriage of

DENISE L. RICE,  
*Appellant/Cross-appellee,*

and

THOMAS E. RICE, JR.,  
*Appellee/Cross-appellant.*

## MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed July 15, 2005. Affirmed in part, dismissed in part, and reversed in part.

*Catherine A. Donnelly and Gregory W. Vleisides, of Vleisides, Donnelly & O'Leary, of Kansas City, Missouri, for appellant/cross-appellee.*

*Allan E. Coon, of Norton, Hubbard, Ruzicka & Creamer, L.C., of Olathe, for appellee/cross-appellant.*

Before GREEN, P.J., MARQUARDT, J., and BUKATY, SJ.

*Per Curiam:* Denise L. Rice appeals the trial court's denial of her motion to continue her divorce trial and the trial court's imposition of time limitations at the trial for direct and cross-examinations. Thomas E. Rice, Jr., cross-appeals the trial court's maintenance order. We affirm in part, dismiss in part, and reverse in part.

Denise and Thomas were married on September 7, 1991, after executing a prenuptial agreement. Denise filed for divorce in 1994, attacking the validity of the prenuptial agreement. On January 31, 1995, the trial court held an evidentiary hearing and ruled that the agreement was valid and enforceable. Denise voluntarily dismissed the divorce case in May 1995. On May 7, 2002, Denise again filed for divorce, alleging that she was forced to sign a prenuptial agreement. Denise asked the trial court to set aside the agreement.

On August 15, 2002, Denise filed a motion requesting a continuance of the pretrial conference set for August 21, 2002. Denise's lawyer withdrew from the case on August 20, 2002. On September 19, 2002, new counsel entered an appearance on behalf of Denise.

At a motion hearing on October 23, 2002, Denise's second attorney was granted leave to withdraw, and Karen Divita-Johnson entered her appearance on Denise's behalf and filed

a motion to continue the trial date. The trial court granted the continuance and set the divorce hearing for December 23, 2002, with the trial on all other issues scheduled for February 3, 2003. The trial court stated:

"I am just advising everybody this will be the last trial setting we're going to have in this case.

....

"You're not going to get a continuance by hiring a different attorney the day before or the week before or the night before the trial.

"I'm not going to allow another attorney to come in and say, 'I'm sorry. I'm not prepared. I just got hired. The last attorney didn't do anything. I need to do discovery.' We're not going to do it again. Okay?"

Denise's counsel later stated: "Your honor, at this time I'm sure that is fine. If I have a conflict that week, I'll contact you immediately."

On November 7, 2002, Denise filed a motion for declaratory judgment claiming that the prenuptial agreement was invalid. On November 12, 2002, Tom moved to bifurcate the divorce from the other issues. On December 23, 2002, the trial court heard arguments on Denise's declaratory judgment motion and Tom's bifurcation motion. The trial court granted a divorce on the grounds of incompatibility. The remaining issues were set for a later determination.

On January 15, 2003, the trial court held that the prenuptial agreement was valid and binding as determined by the court in 1995, and it precluded Denise from relitigating the issue. Denise filed a notice of appeal from the January 2003 bifurcation order and divorce decree.

On January 22, 2003, Denise filed a motion to continue the hearing on the remaining issues. The trial court rescheduled the trial for February 13, 2003. At trial, Denise moved to compel discovery, continue the trial, and dismiss Tom's motion to strike her list of expert witnesses.

Before proceeding with the trial, the trial court heard argument on the motions. Denise's counsel stated: "We don't have adequate discovery, I can't advise effectively for settlement. I don't know what the true numbers are for Mr. Rice. I don't know what his true incomes are. I don't know what his assets are." The trial court denied Denise's motions to compel discovery and continue the trial, and Tom's motion to strike Denise's expert witness list. Denise acknowledged that she did not have her witnesses in court that day because she did not know if the court would grant the pending motions. The trial court allowed Denise a brief recess to contact her expert witnesses.

Before the trial court adjourned for a lunch break, Denise's counsel was asked how

much time she needed to conclude her direct examination of Denise. Counsel stated that she needed 1 hour, and the trial court replied that it would limit her remaining examination to that amount of time. Denise did not object to the time limitation.

On the morning of February 18, 2003, the trial court determined that both parties would have time limitations for direct and cross-examinations of witnesses. No objection was raised.

During Denise's cross-examination of Tom's first witness, Tom objected to the length of the examination. The judge overruled the objection but stated that he would hold both parties to their aggregate allotted cross-examination time. No further objection was raised regarding the time limitations.

Tom testified that Denise had not engaged in good faith settlement negotiations and she had obtained funds from Tom's individual account by forging his signature on checks, altering checks he wrote to her, stealing his PIN number, and charging \$8,000 worth of furniture to his firm's credit card. Tom provided checks demonstrating the alleged forgeries. Denise did not deny these allegations.

On February 19, 2003, the trial court reaffirmed that the prenuptial agreement was

valid and binding. However, the trial court found that Denise was not guilty of marital misconduct because Tom failed to prove misconduct by clear and convincing evidence and he did not have "clean hands" with respect to his own financial conduct during the marriage. Although the trial court found that Denise's counsel failed to enter into good faith negotiations with Tom concerning maintenance, it ruled that it "will not attribute Petitioner's attorney's failure to negotiate to the Petitioner."

The journal entry and decree of divorce was filed on August 18, 2003. Tom filed a motion to alter or amend on September 2, 2003. Denise filed a similar motion on September 5, 2003. On October 7, 2003, the trial court heard arguments on the motions; a journal entry was entered on November 4, 2003, denying both motions and addressing other issues.

Denise timely appeals and Tom timely cross-appeals.

*Continuance Request on February 13, 2003*

Denise contends that the trial court abused its discretion in denying her motion for a continuance because discovery was incomplete at the time of trial and she could not adequately present her case or properly prepare her expert witnesses.

Absent an abuse of discretion, a trial court's order denying a motion for continuance will not be disturbed on appeal. *Cheek v. Hird*, 9 Kan. App. 2d 248, 250, 675 P.2d 935 (1984). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002). A high degree of appellate deference is allowed a trial judge's exercise of discretion in assessing the texture and feel of the trial. This presumptive validity of the trial judge's orders applies to orders granting or denying adjournments and/or continuances. *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1993).

When the trial court granted Denise's continuance and set a trial date for all issues other than the divorce, Denise had approximately 4 months to complete discovery.

K.S.A. 60-240 governs continuances. The statute states in pertinent part: "The court may for good cause shown continue an action at any stage of the proceedings upon such terms as may be just." K.S.A. 60-240(b). While the trial court may grant a continuance for good cause, "[t]he court need not entertain any motion for a continuance based on the absence of a material witness unless supported by an affidavit which shall state the name of the witness, and, if known, the witness's residence, a statement of the witness's expected testimony and the basis of such expectation, a statement that the affiant believes it to be true,

and the efforts which have been made to procure the witness's attendance or deposition." K.S.A. 60-240(c).

A month after Divita-Johnson entered her appearance, she served Tom with a request for production of documents and interrogatories. Denise filed no motion to compel before the trial. Denise was under an obligation to show due diligence in attempting to obtain the information. See *Cheek*, 9 Kan. App. 2d at 250. Without an affirmative showing that Denise took steps to compel discovery before trial, Denise cannot show due diligence.

Denise also claims that she did not bring expert witnesses to trial on February 13, 2002, because "she did not know what would happen that day." It was her decision not to bring expert witnesses on that date. The trial court, however, had previously told the parties that it would grant no more continuances. Thus, regardless of whether she followed the statute and presented an affidavit under K.S.A. 60-240(c) for each missing witness, any alleged error must be attributed to Denise.

Denise overlooks the fact that the trial court granted continuances on two occasions prior to February 13, 2003. Based on the date the continuance at issue was requested, coupled with the trial court's previous directive concerning future continuances, the trial court did not abuse its discretion in denying Denise's motion.



*Limiting Time for Witness Examination*

Denise asserts that the trial court erred in limiting the time in which to conduct witness examinations at trial. The scope of both direct and cross-examination of a witness is subject to reasonable control by the trial court. The exercise of such control will not constitute reversible error absent a showing of abuse of discretion resulting in prejudice. *Butler v. HCA Health Svcs. of Kansas, Inc.*, 27 Kan. App. 2d 403, 433, 6 P.3d 871, rev. denied 268 Kan. 885 (1999).

When Denise was asked how much time she needed for witness examination, she was told that she would have "an hour and 15 minutes." The second day of trial, the time limitations for cross-examination were discussed:

"THE COURT: What about cross-examination? We really didn't talk about [that].

"MS. DIVITA-JOHNSON: I would imagine—I would appreciate having time for cross-examination. I had not calculated that into the hour that we discussed for the hearing last week.

"THE COURT: I'll give you an additional 50 percent to use to cross-examine the other sides' witnesses. Okay. Are you ready?

"MS. DIVITA-JOHNSON: Yes. Thank you, Your Honor."

Tom argues that the issue is not properly before us on appeal because Denise failed to object to the time limitation at trial. As a general rule, issues not raised before the trial court cannot be raised on appeal. *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003). A party cannot raise an issue on appeal where no contemporaneous objection was made and where the trial court did not have an opportunity to rule. *Continental Western Ins. Co. v. KFS, Inc.*, 30 Kan. App. 2d 1262, 1266, 59 P.3d 1 (2002), *rev. denied* 275 Kan. 963 (2003). This issue is dismissed.

### *Maintenance*

On cross-appeal, Tom contends that the trial court erred in finding Denise did not waive her right to maintenance under the terms of the prenuptial agreement.

Paragraph 5.03 of the prenuptial agreement governs the waiver of maintenance. The section states in relevant part:

"Denise relinquishes, releases and waives any and all rights to receive alimony or separate maintenance payments if a court finds marital misconduct on her part, including without limitation adultery by her or alcoholism or drug abuse . . . . Thomas' obligation to make such payments, if any, shall be

contingent upon Thomas and Denise using their best efforts in good faith to enter into a written agreement providing for such separate maintenance or alimony payments, as the case may be . . . ."

In its ruling, the trial court stated:

"The Court finds that the respondent has not established by clear and convincing evidence and that's what this Court feels would be required as clear and convincing evidence that the petitioner is guilty of marital misconduct, specifically financial irresponsibility and physical violence."

Tom argues that the trial court erred in requiring clear and convincing evidence on the issue of marital misconduct. Tom argues that the standard of proof in Kansas civil actions is generally a preponderance of the evidence. See *Ortega v. IBP, Inc.*, 255 Kan. 513, 518, 874 P.2d 1188 (1994). "Preponderance of evidence" is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. 255 Kan. at 527-28.

Civil cases generally require a preponderance of the evidence. Clear and convincing evidence is required in cases such as fraud, guardianship proceedings, attorney discipline proceedings, commitment proceedings, proceedings to void adoption consents, and claims for punitive damages. *Ortega*, 255 Kan. at 519.

Preponderance of evidence is the correct standard for a factual finding such as marital misconduct. The trial court erred in applying a clear and convincing standard of evidence.

The trial court made specific findings with respect to the misconduct claim:

"Physical violence. What we really have was a he-said-she-said testimony. The testimony each claiming that they were abused in some manner by the other party and each denying that they had abused the other party in that fashion.

"In regard to the forgery and deception. There was some evidence--as Mr. Rice's testimony that his name was forged, then PIN numbers were inappropriately obtained and used to make transfers, that checks were altered.

"The Court certainly isn't a forgery expert. It may have been forged. Inappropriate transfers may have been made. The Court does feel that one check was changed from 200 to 500. However, the Court feels that the evidence is not so clear and convincing as to cause the Court to find that there was marital misconduct."

The trial court did not need a forgery expert; Denise never denied any of these allegations. There was a preponderance of evidence to support this misconduct. The question then is: Do these actions articulated by Tom fit the definition of marital misconduct?

The grounds listed as misconduct in the prenuptial agreement include "without limitation adultery by her or alcoholism or drug abuse by her."

Misconduct is defined as "[a] dereliction of duty; unlawful or improper behavior." Black's Law Dictionary 1013 (7th ed. 1999). We believe that a plain language interpretation of marital misconduct is synonymous with this State's previous fault grounds for divorce, which included adultery, extreme cruelty, habitual drunkenness, gross neglect of duty, and conviction of a felony that results in imprisonment subsequent to the marriage. See *In re Marriage of Sommers*, 246 Kan. 652, 655, 792 P.2d 1005 (1990). This interpretation is appropriate since adultery and alcoholism/drug abuse were listed as grounds for misconduct.

The trial court termed Denise's actions as financial irresponsibility. We question using the term "financial irresponsibility" for conduct which encompasses forgery and theft; however, Denise was not convicted for these crimes. Under these circumstances, we do not define Denise's financial misconduct as marital misconduct under the waiver provision of the prenuptial agreement.

Tom argues that the trial court erred in applying the doctrine of "unclean hands" to the alleged financial misconduct. The trial court found that both parties were "financially irresponsible" and that a party claiming financial irresponsibility as marital misconduct must have "clean hands."

The trial court excused Denise's financial misconduct by using the equitable doctrine of "clean hands," even though the prenuptial agreement did not specify any prohibited conduct as it applied to Tom. Where contract terms are plain and unambiguous, the intention of the parties and the meaning of the contract are determined from the contract itself. *Zukel v. Great West Managers, LLC*, 31 Kan. App. 2d 1098, 1101, 78 P.3d 480 (2003), *rev. denied* 277 Kan. 928 (2004).

The contract provision concerning misconduct is unambiguous. We agree with Tom's argument that the prenuptial agreement does not include a balancing test to determine waiver based on the propriety of marital misconduct. Rather, the provision is unilateral with respect to Denise's conduct.

Tom argues that the equitable defense does not apply to interpretation of a written contract. In support, Tom cites *T.S.I. Holdings, Inc. v. Jenkins*, 260 Kan. 703, 924 P.2d 1239 (1996). As *T.S.I Holdings, Inc.* provides, the doctrine of clean hands should not affect the

interpretation of a written agreement in the absence of a claim for an equitable remedy. See 260 Kan. at 721. Tom does not seek an equitable remedy; thus, the trial court erred in construing the prenuptial agreement to include a balancing test and we reverse that holding.

### *Failure to Negotiate in Good Faith*

Tom argues that Denise waived her right to maintenance because she failed to enter into good faith settlement negotiations. In spite of the fact that the trial court found the failure to enter into meaningful good faith negotiation, it refused to attribute Denise's attorney's actions to Denise.

Specifically, Tom argues that the trial court erred by not attributing Denise's counsel's actions to her. An appellate court's review of conclusions of law is unlimited. *Wear v. Mizell*, 263 Kan. 175, 177, 946 P.2d 1363 (1997).

Generally, the relationship between a client and his or her attorney is one of agency. *Pearcy v. First National Bank*, 167 Kan. 696, 698, 208 P.2d 217 (1949). A client is bound by the appearance, admissions, and actions of counsel acting on his or her behalf. *Reimer v. Davis*, 224 Kan. 225, 229, 580 P.2d 81 (1978). Denise does not deny that her counsel was

acting on her behalf. Thus, under Kansas law, her counsel's actions are attributable to her.

Tom testified at trial that Denise would not participate in settlement negotiations; she told him, "I want to put what I think about you on the public record and I want to make what I think known to everybody." It should also be noted that the trial court did not find Tom failed to participate in good faith settlement negotiations.

The trial court erred in finding that the actions of Denise's counsel were not attributable to her. Denise's failure to negotiate constitutes a waiver of maintenance under the prenuptial agreement. The maintenance order is reversed.

We affirm the trial court's denial of Denise's motion to continue the trial. We dismiss Denise's issue regarding the trial court's time limitations for witness examination. We reverse the trial court's ruling that Denise did not waive maintenance because she failed to negotiate a settlement in good faith.

Affirmed in part, dismissed in part, and reversed in part.