

NOT DESIGNATED FOR PUBLICATION

No. 103,426

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

TONYA ANJARD,
Appellee,

and

RONALD ANJARD, JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed November 4, 2011. Affirmed.

Ronald Anjard, Jr., appellant pro se.

Bruce W. Beye, of Overland Park, for appellee.

Louis A. Cohn, of Caldwell & Moll, L.C., of Overland Park, for appellee/intervenor Reece & Nichols Realtors.

Before STANDRIDGE, P.J., MCANANY and ARNOLD-BURGER, JJ.

Per Curiam: Tonya Anjard filed a petition for divorce from her husband, Ronald Anjard. Although commendably the couple did not argue over the granting of the divorce or the custody of the children, the issue of the division of property and the interlocutory orders related thereto were hotly contested. It is the final distribution of property from which Ronald appeals. In addition, Reece & Nichols Realtors, Inc. (RAN), intervenor,

seeks attorney fees on appeal for costs associated with collecting its real estate fees for the sale of one of the marital properties. Finding that the district court did not abuse its discretion in the final division of assets and debts, we affirm. Accordingly, we grant RAN's motion for attorney fees and deny Ronald's motion for attorney fees and the return of remitted funds.

FACTS

When Tonya filed for divorce, she and Ronald jointly owned several properties. Early in their divorce proceeding, Ronald filed a motion asking the district court to direct the sale of the marital residence (Lamar property). Similarly, Tonya filed a motion requesting that the court order the sale of all of the marital property. Initially, Ronald objected to the sale of the property in which he was living (Hemlock property). With the exception of the Hemlock and Lamar properties, all other properties were sold by agreement. However, during the course of the divorce, both the Hemlock and Lamar properties went into foreclosure. Both were sold after the sheriff's sale but prior to the end of the redemption period. Ronald argues the Lamar property was sold for less than it should have been. He further argues that he was wrongfully assessed the real estate fees and associated legal costs for the sale of the Hemlock property to his parents. RAN was allowed to intervene to recover its commission and legal fees from the sale of the Hemlock property.

In addition to inequities Ronald argues resulted from the sale of the Lamar and Hemlock properties, Ronald contends that Tonya purposefully withheld information he needed to complete his tax returns, resulting in unnecessary interest and penalties, which he believes should have been assessed against her in the final distribution of assets. Finally, he argues that he overpaid maintenance and child support and was not appropriately "credited" for such overpayment. More facts will be set forth as needed.

THE DIVISION OF ASSETS

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986; 58 P.3d 734 (2002). The district court's division of property does not have to be equal to be just and reasonable. *In re Marriage of Roth*, 28 Kan. App. 2d 45, 49, 11 P.3d 514 (2000).

An abuse of discretion occurs when the action is arbitrary, fanciful, or unreasonable. This means no reasonable person would have taken the action of the district court. *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009).

Ronald points to three instances in which he believes the district court abused its discretion in the division of the parties' assets and debts. We will examine each allegation separately.

The Lamar Property

The parties agreed early in the case that the Lamar property, which had been the primary marital residence, needed to be sold. However, after a year on the market, the property succumbed to a foreclosure action while the divorce was pending. Ronald and Tonya had 90 days to sell or redeem the property before it would be sold at a loss to the marital estate. The parties were actively seeking buyers in hopes of realizing some profit from the sale. A buyer was secured for a \$350,000 purchase price along with the waiver of half of the real estate fees. However, Ronald still believed the house was worth more than the offer, even though the end of the redemption period was within a few weeks and the offer was approximately \$100,000 above the redemption price. At Ronald's request, the district judge allowed Ronald 1 week to present a bona fide purchaser to the court.

Ronald met the deadline and submitted an offer from a buyer to purchase the house for \$380,000, with some contingencies attached to the offer.

Unbeknownst to Ronald or his attorney, the district judge and Tonya's attorney met to review Ronald's new offer. The district court rejected Ronald's offer and accepted the \$350,000 offer previously made. The district court ruled that the offer presented by Ronald contained unacceptable contingencies. Because of these contingencies, the district court determined that the original offer was superior to Ronald's offer and ordered the property sold pursuant to the \$350,000 contract.

Ronald claims that this ex parte communication deprived him of procedural due process. He argues that he should have been given an opportunity to advocate for the acceptance of the \$380,000 contract. He speculates that it would have been accepted and the marital assets would have been increased accordingly. The district judge admitted later in the proceedings that his actions in not including Ronald and his attorney in the hearing were inappropriate. We agree. However, that does not end our analysis. The sale of the property was an interlocutory order in the divorce. We must examine the totality of the circumstances to determine if Ronald was ultimately deprived of procedural due process with regards to the sale of the Lamar property.

Whether due process was provided in specific circumstances raises issues of law and appellate review is unlimited. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1272, 136 P.3d 457 (2006). The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. 281 Kan. at 1275. The concept is flexible in that "not all situations calling for procedural safeguards call for the same kind of procedure. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Prior to a final distribution in this case, the district court held a 2-day evidentiary hearing regarding the marital assets. A new judge provided Ronald a full opportunity to present evidence on the value of the Lamar property. At trial, Ronald presented testimony regarding the ex parte discussion and order. The district court, at the time of the final decision on the case, was able to review the factual circumstances surrounding the ex parte discussion and order. The district court was able to review Ronald's testimony and the copies of both contracts considered by the court. After considering all the evidence, the district court found that the sale of the Lamar property was properly considered and ordered under the exigent circumstances of pending foreclosure and loss of marital equity in the real estate. Therefore, we find that Ronald was given an opportunity prior to a final disposition of the case to be heard at a meaningful time and in a meaningful manner regarding the value of the Lamar property and the distribution of the proceeds from the sale. The district court's findings of fact are supported in the record and were not arbitrary, fanciful, or unreasonable. Therefore, the district court did not abuse its discretion relating to the sale of the Lamar property.

Penalties and Interest on Income Taxes

Ronald next contends that Tonya intentionally delayed the production of documents that were needed to complete his 2005 and 2006 tax returns. Ronald asserts that the marital assets were dissipated by the amount of penalties and interest he was required to pay. He also requests that Tonya's attorney be disciplined for failing to comply with the court's production orders and argues that a new trial is required.

On July 19, 2006, Ronald filed a motion requesting that the district court order Tonya to provide the tax information for the years 2001-2004. On October 19, 2006, the district court filed its journal entry ordering Tonya to make a diligent search for all tax documents related to any unfiled tax returns and required her to either provide the documents or copies of the documents to Ronald.

There are numerous e-mails and contacts between the parties regarding the production of the documents required in order for Ronald to file his 2005 and 2006 tax returns. Most of the e-mails contained the assertion that Ronald had not received the appropriate documentation.

At trial, the district court heard testimony from both Ronald and Tonya regarding the alleged intentional delay. Ronald declared that the delay was Tonya's fault, whereas Tonya testified that she turned over boxes of files. In the memorandum decision and decree of divorce, the district court held that it was "not convinced that the on-going disputes between Ronald and Tonya were the direct result or reason for the delay in timely tax filings." The court specifically declined to find that Tonya "intentionally withheld documents required by Ronald for these filings." Therefore, the court found that the taxes, penalties and interest associated with Ronald's 2005 and 2006 tax returns were "his sole responsibility."

The district court thoroughly reviewed the facts regarding Tonya's alleged intentional delay in providing the required documentation and found that it was not convinced that the delay was Tonya's fault. Although Ronald testified to the contrary, we do not reweigh conflicting evidence. The district court's findings of fact are supported in the record and are not arbitrary, fanciful, nor unreasonable. Therefore, the district court did not abuse its discretion when it assessed the taxes, penalties, and interest owed for the 2005 and 2006 taxes to Ronald.

The Valuation Date

In a divorce action, the district court is required to divide all the real and personal property of the parties, regardless of how the property was acquired. It may divide the property in kind; it may award property to one party and require the other to pay an

equivalent sum; or it may order the sale of the property and a division of the proceeds. In determining the equity of the distribution, when the parties request it, the court is required to set a "valuation date" to be used for all assets at trial. The valuation date may be the date of separation, the date of filing, or the date of trial as the circumstances dictate. K.S.A. 60-1610(b).

At first glance, it appears that Ronald takes issue with the district court's failure to set a specific valuation date and its failure to attribute a monetary figure to all of the marital property. However, he does not alert us to any portion of the record where he requested such a date, and we cannot locate in the record where he requested such a date. Based upon the clear language of the statute, such a request would be a prerequisite to any claim of error. Moreover, based on the record it is obvious that the valuation date of the property was at the time of trial when the district court heard testimony and reviewed the admitted exhibits presented by the parties.

However, Ronald continues in the body of his argument to generally assert that the division of the parties' property was inequitable.

He fails to provide any legal support for his assertions. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

Granted, the district court's division of the assets and debts was not absolutely equal; however, absolute equality is not a prerequisite to a finding that the distribution was just and reasonable. See *Roth*, 28 Kan. App. 2d at 49. Few would dispute the fact that if the parties require the court to divide their assets and debts, rather than doing so by mutual agreement, the property may not be divided in the same way they would have divided it. Moreover, in this case the basis for the inequality in the division of assets is

clearly set out in the district court's decision. Ronald does not contest the various reasons for the district court's decision. Furthermore, Ronald fails to show how the district court's division of the property was inequitable and unjust; he merely argues that the division is unequal. The party asserting the trial court abused its discretion bears the burden of showing such abuse of discretion. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Thus, we are unable to conclude that the district court abused its discretion in the division of the parties' assets and debts.

OVERPAYMENT OF SPOUSAL MAINTENANCE

A trial court is required to comply with statutes authorizing payment of support and maintenance. Failure to do so requires reversal. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 706-07, 229 P.3d 1187 (2010). Ronald argues that the district court erred when it failed to give him credit for the overpayment of spousal maintenance.

In its memorandum decision and decree of divorce, the district court noted Ronald's request for modification of his maintenance obligation due to a "perceived 'overpayment' of maintenance under the temporary support orders." The court noted that although Ronald had filed a motion with the court, he never pursued his motion. Ronald argues that this is an incorrect factual finding requiring reversal. However, the record on appeal supports the district court's finding. A motion regarding overpayment was filed on August 20 with a notice of hearing scheduled for August 27, 2008. The district court found that the length of notice was noncompliant with court rules and ordered Ronald's attorney to reschedule the matter. We cannot find in the record that it was ever rescheduled by Ronald or his attorney, as ordered, and the next mention of the issue was at the pretrial conference when the district court pointed out that no hearing had been held on the motion. Ronald's attorney argued that it was within the court's discretion to

take up the issue at the time of final disposition, even though the motion was filed months earlier.

Nonetheless, limited evidence was presented on the issue at the trial. The dispute concerned which income figure should have been used to compute the temporary support orders and an allegation that there had been a failure to properly credit payments. The district court reflected in its memorandum decision that Ronald's request for modification of the maintenance obligation due to an overpayment was "considered and denied." Based on the limited evidence presented at trial on this issue and Ronald's failure to pursue the issue in a timely manner, we cannot find the district court abused its discretion.

Therefore, Ronald's claim that the district court failed to comply with the statutes authorizing payment of support and maintenance fails.

RAN'S COMMISSION, INTEREST, AND ATTORNEY FEES RELATED TO THE SALE OF THE HEMLOCK PROPERTY

Ronald next argues that the district court erred when it assessed RAN's commission, attorney fees, and other expenses to Ronald for its work related to the Hemlock property. Therefore, we must examine the facts related to the sale of this marital asset.

In April 2008, Tonya filed a motion to sell the Hemlock property because Ronald was apparently no longer living there. The property was in foreclosure at the time and had already been sold at a sheriff's sale. The redemption period was about to expire. A hearing was conducted on May 8 with all parties present.

At the hearing, the court gave permission to Tonya to "sell the residence with or without the necessity of execution of documents by [Ronald]." In addition, each party was allowed to redeem the property if they were able. Finally, Tonya was given a green light to "set the issues in motion to sell the residence with the approval of the Court of any contract." The court gave Tonya access to the property to place it on the market "as fast as possible" and ordered her to provide copies of "any documents for listing of the property" to Ronald's attorney. Any reasonable objections to the listing were to be "listened to." The court declined to give an "equal power" to list and sell to Ronald, because that would be "inviting disaster." Ronald did not object to the sale, only to the granting of an exclusive right to list to Tonya. However, the court went on to state that Ronald was free to try to find a buyer.

Tonya signed an "Exclusive Right to Sell Contract" with RAN. Ronald was not a party to the RAN contract. The agreement provided in pertinent part:

"SELLER agrees to pay Reece & Nichols Realtors a commission consisting of a fee in the amount of \$250 . . . and 6% of the selling price. . . . The commission is due and payable if BROKER or anyone else, including SELLER, produces or finds a purchaser ready, willing and able to purchase the property at the price and terms offered now or at the price and terms acceptable to SELLER at a later date. SELLER authorizes the payment of the commission and other compensation to BROKER from SELLER's proceeds at closing.

....

"SELLER AGREES TO: . . . [r]efer any offer or inquiry regarding the Property that is received by SELLER during the term of this contract to BROKER. In the event that SELLER fails to refer any such offer or inquiry to BROKER and BROKER thereafter must collect the commission due from any purchase or sale resulting from such offer or inquiry, SELLER shall reimburse BROKER for all expenses related to such collection

efforts including reasonable attorney fees based on time expended, not the amount at issue."

During the course of the next week, offers started coming in pretty quickly. Ronald presented an offer from his parents to purchase the Hemlock property for \$150,000. Offers came in through RAN from two different buyers, one for \$175,000 and one for \$209,950. On May 15, Ronald presented a second offer from his parents to purchase the Hemlock property for \$182,500. On the same day, Tonya's attorney again met with the district judge ex parte. Neither Ronald nor his attorney were present. There is no transcript of this hearing, but all relevant parties admit it took place. The district court rejected the \$209,000 offer because of too many contingencies and instead called Ronald's parents to confirm and accept their offer. The next day, a journal entry was filed stating that the contract for purchase of the property by Ronald's parents was approved as an "as-is" contract for cash for \$182,500. The journal entry confirmed that the court had personally been in touch with Ronald's parents. Ronald does not challenge the sale price of the Hemlock property.

Subsequently, apparently in an effort to complete the sale to Ronald's parents, the district court entered an order giving Ronald the authority to execute all documents regarding the sale of the Hemlock property without Tonya's consent or document execution.

When Ronald refused to recognize RAN's claim to a commission on the sale, RAN filed a motion to intervene in the divorce action, which was granted. Ronald argued that there was no legal basis for RAN to receive a commission under a contract to which he was not a party. Based on the district court's comments, he argued, he had as much right to sell the property as Tonya did and the district court's orders giving him the right to execute all documents voided the prior order giving Tonya permission to sell the residence.

In its memorandum decision, the district court pointed out that the court "granted exclusive authority to list, market and sell the Hemlock property to Tonya when it found that Ronald was delaying the disposition of the property." The court went on to find that although Ronald was not a party to the listing agreement, he was bound by its terms when RAN produced two legitimate contract offers. As the sellers, Ronald and Tonya, were bound by the listing agreement, pursuant to *Wright v. Shepherd*, 31 Kan. App. 2d 484, 486, 66 P.3d 921 (2003). The court awarded the commission, attorney fees, and interest to RAN in the amount of \$15,058.96. After the denial of Ronald's motions to reconsider, the fee was paid and RAN filed a satisfaction of judgment.

An appellate court reviews the district court's findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). An appellate court has unlimited review of conclusions of law. *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1141, 192 P.3d 614 (2008).

Wright stands for the proposition that a real estate broker's entitlement to a commission is dependent on the express terms and conditions set forth in the listing agreement. 31 Kan. App. 2d at 486. Ronald does not appear to dispute the clear language of the contract; merely that he is bound by it. However, he does not provide any legal authority to support his assertion that RAN's exclusive listing agreement was voided by the subsequent order giving him the authority to sign papers related to the sale of the Hemlock property to his parents. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *Berriozabal*, 291 Kan. at 594.

Nonetheless, Tonya clearly had the authority to enter into a listing agreement on this marital asset. It is also clear from the terms of the listing agreement that RAN was entitled to a commission, regardless of the buyer. This conclusion is bolstered by the fact that the value of the property was increased due to RAN's presentation of a buyer in excess of Ronald's parents' original offer. Moreover, it was only after the district court approved the sale to Ronald's parents that it gave him the authority, at his request, to execute all documents regarding the sale without Tonya's consent or document execution. This was a debt associated with the sale of a marital asset, regardless of which party signed the listing agreement. Therefore, we find that the district court's findings of fact are supported by substantial competent evidence and are sufficient to support its legal conclusion that RAN was entitled to a commission from the proceeds of the sale of the Hemlock property.

FAILURE TO COMPLY WITH SUPREME COURT RULE 170

Underlying much of Ronald's argument in this case is his contention that the sales involving the Lamar and Hemlock properties were compromised by the fact that Tonya's counsel repeatedly failed to comply with Supreme Court Rule 170 (2010 Kan. Ct. R. Annot. 249) by not sending journal entries to opposing counsel. Although we find that the violations did not ultimately prejudice Ronald and were, in effect, harmless, we believe it is important to examine the rule in attempt to place compliance in perspective.

Supreme Court Rule 170 provides that when counsel has been directed to prepare the journal entry in a case, counsel shall, unless another time is specified by the judge, serve copies on opposing counsel within 14 days. Counsel is required to file a copy of the journal entry with the court as well as a notice setting forth the date it was served. Opposing counsel then has 14 days to respond with any objections he or she may have to the proposed journal entry. At the conclusion of the time limits, the authoring counsel is required to submit the original and any objections to the judge for approval.

This rule is designed to allow the court some assistance in memorializing court orders. See *Lyndon State Bank v. Price*, 33 Kan. App. 2d 629, 631-32, 106 P.3d 511 (2005). The court is always free to draft its own journal entry without any assistance from counsel. By ordering one party to prepare the journal entry and another to review it, the parties can be assured that the journal entry truly reflects the court's order. Enforcement of the rule is left to the sound discretion of the district court, since its whole purpose is to provide assistance to the court. Therefore, for an appellate court to reverse or remand a case due to failure comply with this procedural rule would be rare and we are unable to locate any such Kansas cases. It is up to the district court to impose sanctions for noncompliance when appropriate. In this case, a review of the transcripts filed with the record on appeal support the accuracy of the journal entries filed in the case. Accordingly, we can find no error that would warrant reversal as Ronald proposes.

MOTIONS FOR ATTORNEY FEES AND THE RETURN OF REMITTED FUNDS

RAN's Motion

In its motion for attorney fees on appeal, RAN requests that this court grant RAN attorney fees for services rendered to defend the judgment of the district court awarding RAN its commission, fees, and attorney fees.

Under Supreme Court Rule 7.07(b) (2010 Kan. Ct. R. Annot. 62) this court may grant an award of "attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees."

The district court had the authority to grant attorney fees to RAN based on the attorney fee agreement in the exclusive listing contract between the parties. See *Brennan v. Kurzle*, 37 Kan. App. 2d 365, 392, 154 P.3d 1094, *rev. denied* 284 Kan. 945 (2007).

RAN presents ample evidence of the attorney fees incurred. Under Rule 1.5(a) (2010 Kan. Ct. R. Annot. 458) of the Kansas Rules of Professional Conduct, the list of attorney fees set out in the motion's supporting affidavit appear to be reasonable. We, therefore, grant RAN's motion for appellate attorney fees and costs in the total amount of \$4,833.78.

Ronald's Motion

Ronald filed a motion with this court to requesting that we (1) order Tonya's counsel to return the funds remitted from the proceeds of the sale of the Lamar marital residence; (2) order RAN to return the funds remitted from the proceeds of the sale of the Hemlock property; and (3) order Tonya and her attorney to pay for Ronald's attorney fees.

Finding that the district court did not commit error and all final orders entered were proper, we deny all of Ronald's requests.

The decision of the district court is affirmed.