

No. 05-94112-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In The Matter of The Marriage Of:

MARILYN GAY WEBSTER, PETITIONER-APPELLANT,

and

BILLIE JOE WEBSTER, RESPONDENT-APPELLEE

**BRIEF OF APPELLEE
BILLIE JOE WEBSTER**

**APPEAL FROM THE DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE DAVID J. KAUFMAN, JUDGE
DISTRICT COURT CASE NO. 03-DM-5533**

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STATEMENT OF THE CASE

Petitioner Marilyn Gay Webster appeals to the Kansas Court of Appeals from the trial court's denial of her untimely third motion to reconsider.

STATEMENT OF ISSUES

Whether Petitioner Marilyn Gay Webster can use the appeal of a ruling denying her untimely third motion for reconsideration to “back-door” an out-of-time appeal.

STATEMENT OF FACTS

On August 19, 2004, Petitioner Marilyn Gay Webster (“Petitioner”) and Respondent Billie Joe Webster (“Respondent”) appeared for trial of their divorce case before the District Court of Sedgwick County, Kansas. (R. III, 1-139.) Following the presentation of testimony and evidence by both parties, the district court granted Petitioner the divorce she sought from Respondent and made certain findings and rulings regarding resolution of various property settlement and maintenance issues. (R. III, 127-39.) As is customary, the district court asked Petitioner’s counsel to draft the journal entry. (R. III, 127.)

Instead, on August 23, 2004, and without stating specific points of error therein, Petitioner filed her first motion for reconsideration of the August 19th rulings. (R. I, 57.) On September 3, 2004, the district court denied that motion, deeming it to be a motion pursuant to K.S.A. 60-259(f) that was premature because no judgment was yet on file. (R. I, 69.)

On September 21, 2004, and again without stating specific points of error therein, Petitioner filed her second motion for reconsideration of the August 19th rulings. (R. II, 87.) On October 4, 2004, at precisely 2:50:34 p.m., while both parties and their counsel were before the court, the district court filed of record the Journal Entry of Judgment and Decree of Dissolution of Marriage prepared by Respondent's counsel that both Petitioner and her counsel refused to sign. (R. II, 94-100; R. V, 15-16.) Regarding Petitioner's second motion for reconsideration, the district court then heard arguments and took the matter under advisement. (R. V, 16-40.) By letter dated October 12, 2004, the district court advised counsel that the second motion for reconsideration was denied. (R. II, 101-02.)

On October 22, 2004, Petitioner filed her third motion for reconsideration of the August 19th rulings, and also requested a new trial, on the grounds that she believed the 2001 Ford F-150 truck set aside to her, upon which Respondent was to make payments as maintenance through December 2005, to be in jeopardy because it was cross-collateralized with another vehicle that had been repossessed and therefore could be repossessed itself at any time. (R. II, 103-07; R. IV, 5-6.) At a hearing February 3, 2005, the district court advised Petitioner that this K.S.A. 60-259(f) motion was untimely as such and, therefore, he considered it to be a motion pursuant to K.S.A. 60-260(b), specifically, K.S.A. 60-260(b)(6). (R. IV, 3, 24.) The district court denied that motion in open court and a minute sheet was filed the next day. (R. II, 111; R. IV, 25.) On February 14, 2005, Petitioner filed her Notice of Appeal from "the Court's Journal Entry and Decree of Divorce, denials of post trial motions and journalized adverse rulings." (R. II, 115.)

Interestingly, Petitioner filed a similar Notice of Appeal on November 3, 2004 (R. II, 114), and docketed the matter with the Clerk of Appellate Courts as Case No. 93,528 on November 23, 2004.¹ On December 14, 2004, the district court indicated it no longer had jurisdiction to hear Petitioner's third motion for reconsideration. (R. IV, 3-4.) On December 16, 2004, as indicated by the Kansas Appellate Courts Case Inquiry System,² Petitioner requested that the matter be remanded so that the district court would have jurisdiction to rule on her third motion. Instead, this Court dismissed Case No. 93,528 on January 10, 2005, and without objection by Petitioner, issued the Mandate on February 14, 2005. (R. II, 114-15.)

ARGUMENT

1. The issue of whether the district court abused its discretion in failing to set aside the Divorce Decree pursuant to K.S.A. 60-260(b)(6) is now moot.

A ruling on a motion for relief from a final judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the trial court and will not be reversed absent

¹Note that in the Docketing Statement filed to commence the instant matter, Petitioner failed to disclose the existence of this prior appeal as required by Kan. S.Ct. R. 2.041(b), Example 1, Item 5b.

²A court always may take judicial notice of its own files. K.S.A. 60-409(b)(4); *In Interest of A.S.*, 12 Kan.App.2d 594, 598, 752 P.2d 705, 709 (1988). Similarly, courts may take judicial notice of earlier proceedings had in a case. *Smith v. State*, 199 Kan. 293, 295, 429 P.2d 103, 106 (1967) (citing *State v. Morris*, 190 Kan. 93, 372 P.2d 282 (1962); *Ablah v. Eyman*, 188 Kan. 665, 365 P.2d 181, 90 A.L.R.2d 766 (1961); *In re Estate of Rothrock*, 173 Kan. 717, 252 P.2d 598 (1953)).

a showing of abuse of discretion. *In re Marriage of Hampshire*, 261 Kan. 854, 934 P.2d 58, 63 (1997) (citing *In re Marriage of Zodrow*, 240 Kan. 65, Syl. ¶ 2, 727 P.2d 435 (1986)).

Petitioner frames the issue as follows:

[The district court's ruling that nothing should be done because Petitioner was still in possession of the truck] was an abuse of discretion because the award is impaired but the court is of the opinion as long as Petitioner has the truck, the court should take no action without acknowledging that there is a problem since the court ordered that Petitioner pay the debt on the truck after December 2005. If it is repossessed, Petitioner is responsible for any deficiency because the debt has been made hers by court order.

Appellant's Brief at 9-10. Further, as conceded by Petitioner through her counsel at the hearing on the third motion for reconsideration, the creditor approached Petitioner about refinancing the vehicle in her name. (R. IV, 6.) Other than quoting K.S.A. 60-260(b)(6), Petitioner cites no authority for her position.

On December 5, 2005, Respondent made his final court-ordered maintenance payment on the truck. Records from Boeing Wichita Credit Union showing the payments made by Respondent, or on his behalf, are attached hereto in Appendix "A" and incorporated herein by this reference. Now both the truck and the debt it secures are Petitioner's responsibility. Respondent believes that the district court did not abuse its discretion in refusing to renovate the entire property settlement based only on speculation and conjecture, circumstances that we now know never came to fruition. In any event, the issue is now moot and dismissal of the instant appeal is appropriate; appellate courts generally do not decide moot questions or render advisory opinions unless the particular issue is one capable of

repetition and one of public importance. *See In re Marriage of Burbank*, 23 Kan.App.2d 602, 932 P.2d 466 (1997).

2. Petitioner concedes that her third Motion for Reconsideration was untimely; consequently, it did not toll the time for appeal from the Divorce Decree and this Court lacks jurisdiction to proceed further.

A motion for reconsideration is considered a motion to alter or amend a judgment. *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128, 1135 (1992). It must be filed not later than ten (10) days after entry of the judgment complained of; when timely filed, it tolls the time for appeal. K.S.A. 60-259(f); *Uhock v. Sleitweiler*, 13 Kan.App.2d 621, 625, 778 P.2d 359, 362 (1988). K.S.A. 60-206(a) applies to the computation of time for the filing of the motion under K.S.A. 60-259(f).³ *In re Marriage of Willenberg*, 271 Kan. 906, 909, 26 P.3d 684, 688 (2001). Thus, Petitioner had ten (10) *business* days from Monday, October 4th, or until Tuesday, October 19th,⁴ to file a motion pursuant to K.S.A. 60-259(f). She failed to take any action until Friday, October 22nd, and even then neither requested nor filed a motion to permit filing out of time.

Thus, the trial court correctly determined that it needed to view Petitioner's third Motion for Reconsideration as one filed pursuant to K.S.A. 60-260(b) instead. (R. IV, 3.) Petitioner does not contest this conclusion, or otherwise even attempt to argue that her third

³The three-day mailing rule of K.S.A. 60-206(f) is inapplicable where, as here, Petitioner and her counsel were informed in open court that the Divorce Decree had been filed. (R. II, 94-100; R. V, 15-16.)

⁴Monday, October 11, 2004, was Columbus Day.

Motion for Reconsideration somehow tolled the time for appeal. An appellate court will not consider an issue abandoned on appeal. *Cohee v. Cohee*, 26 Kan.App.2d 756, 759, 994 P.2d 663, 666 (1999).

Petitioner's time for appeal began to run when the district court filed the journal entry in open court on Monday, October 4, 2004. K.S.A. 60-258; K.S.A. 60-2103(a). The right to an appeal is statutory, and an appellate court has jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner provided by the applicable statutes. *State ex rel. Secretary of SRS v. Keck*, 266 Kan. 305, 308, 969 P.2d 841, 843 (1998). Petitioner's pursuit or acquiescence in the dismissal of the docketed appeal from her Notice of Appeal filed on November 3, 2004, bars this Court from proceeding further. The Kansas Appellate Courts have only such jurisdiction as is provided by law, and when the record discloses a lack of jurisdiction, the courts have the duty to dismiss the appeal. *Edwards v. Edwards*, 182 Kan. 737, 741, 324 P.2d 150, 155 (1958).

3. The trial court did not abuse its discretion in allocating the assets and liabilities of the parties.

A trial court has wide discretion in adjusting the financial obligations of the parties in a divorce action, and exercise of that discretion will not be disturbed on appeal unless clear abuse of discretion is shown. *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880, 884 (1998) (citing *In re Marriage of Monslow*, 259 Kan. 412, 414, 912 P.2d 735 (1996)). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. *Rodriguez, id.* (citing *In re Marriage of Wade*, 20 Kan.App.2d 159, 168, 884

P.2d 736 (1994), *rev. denied* 256 Kan. 995 (1995)). Petitioner has conceded these points in her Brief. Appellant’s Brief at 4, 8.

The burden of showing abuse of discretion lies with the party alleging abuse. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995). But in reviewing the rambling and disjointed Appellant’s Brief submitted herein, Respondent has found it difficult to pinpoint exactly how Petitioner believes the trial court abused its discretion to the extent necessary to obtain the reversal she seeks on appeal – getting “the short end of the ruling” (Appellant’s Brief at 8) is insufficient. She seems to reargue the evidence presented, rather than the conclusions of law drawn from that evidence. The trial court as the trier of fact is the sole judge of the credibility of witnesses and of the weight to be given the evidence presented at the trial. *Parish v. Parish*, 220 Kan. 131, 134, 551 P.2d 792, 796 (1976); *LaRue v. LaRue*, 216 Kan. 242, 246, 531 P.2d 84, 88 (1975). An appellate court will not reweigh the testimony and substitute its judgment for that of the trier of fact. *Ranney v. Ranney* 219 Kan. 428, 430, 548 P.2d 734, 737 (1976).

Remarkably, Petitioner complains on one page of her Brief that the trial court allocated about \$27,000 in debt to each party, yet on another acknowledges that she requested that each party be responsible for their own credit cards which were held separately. Appellant’s Brief at 3, 6. Petitioner’s own credit cards total approximately \$27,226. (R. II, 98.) The remaining debt secures the truck Petitioner stated that she had to have to continue her expensive hobby of barrel racing.⁵ (R. III, 8, 41-42, 54, 58-59.)

⁵Note the Court’s extensive questioning of Petitioner on this point, as well as Petitioner’s admission that “those horses eat before I do.” (R. III, 54-56.)

Petitioner's major disagreement with the trial court's allocation of marital debts and liabilities regards its failure to award her any share of the equity in the marital home. Appellant's Brief at 5. In particular, Petitioner complains that Respondent presented insufficient evidence regarding whether there was any equity in the townhouse that Petitioner transferred to her daughter. Appellant's Brief at 5-6. Dissipation of assets is a factor a trial court specifically is permitted to consider in dividing the parties' property (K.S.A. 60-1610(b)(1); *see also Rodriguez, supra*), and the trial court remarked that it was at issue in its decision. (R. III, 127.) Further, Kansas law gives a trial court discretion to consider all of the property, regardless of when acquired, to arrive at a just and reasonable division. *Rodriguez*, 266 Kan. at 353, 969 P.2d at 884. Petitioner admitted to "gift-deeding" the townhouse to her daughter in September 2002 without Respondent's knowledge at a time they were having marital problems. (R. III, 28-29.) Petitioner admitted that Respondent contributed to the payment and other expenses for the townhouse from the time it was purchased and they began living there in September 1994, through the five years they lived there, both before and after their April 1998 marriage. (R. III, 26-32.) Petitioner also admitted to taking money out of a special checking account the parties set up to make the payments on the marital residence. (R. III, 30, 39-40.)

Petitioner argues that her unemployed status merited special consideration by the trial court, regarding both the property division in general and her specific request for attorney fees. "Given the fact that she was unemployed, she received nothing that an unemployed person needs." Appellant's Brief at 8; *see also* Appellant's Brief at 7, 10. Petitioner has held

a bachelor's degree in Computer Information Systems since 1998. (R. III, 6, 25.) At the time of trial, she anticipated receiving a certificate in Network Administration in May 2005. (R. III, 6, 46.) Further, through Petitioner's own testimony, the trial court reasonably could have concluded that she deliberately was trying to remain un- or underemployed and – “those horses eat before I do” (R. III, 54) – was unwilling to adjust her expenses to compensate: since she was laid off from Boeing in January 2002, she had supported herself mostly by drawing unemployment and advances on her retirement and credit cards; she made \$7.00 per hour for a couple of months at a t-shirt shop; she was not working very hard at selling Mary Kay; she could not find a “real good” or “well paying” job like she used to have; she was “going to have to [look for a job] more aggressively”; and she asked the trial court to order Respondent to pay her utility bills that had accumulated since the commencement of the case. (R. III, 4-5, 12, 14, 18, 20-22, 25-26, 42-44, 46, 53-54, 57-58.)

The fact that Petitioner failed to receive everything she requested does not mean the trial court abused its discretion in allocating the assets and liabilities of the parties and, should this Court reach this issue, the trial court's award must be affirmed.

CONCLUSION

Appellate courts don't grant mulligans. Petitioner filed and docketed a timely Notice of Appeal from the Journal Entry of Judgment and Decree of Dissolution of Marriage, then allowed that appeal to be dismissed, gambling that her third Motion for Reconsideration would provide her with the relief she now requests. But because that third Motion for

Reconsideration was untimely, it did not toll the time for appeal from the Journal Entry; thus, her Notice of Appeal therefrom cannot be used to “back-door” an out-of-time appeal on issues she failed to raise therein. The only issues properly before the Court – those raised in that third Motion for Reconsideration – are now moot. Petitioner made a strategic decision that backfired – she doesn’t get a “do-over” – and the instant appeal must be dismissed.

Respectfully submitted,

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APPENDIX:
BOEING WICHITA
CREDIT UNION
PAYMENT
RECORDS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of January, 2006, two (2) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to:

Cheryl J. Roberts
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