NOT DESIGNATED FOR PUBLICATION

No. 124,235

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of
PEGGY LOZADA,
*Appellee*,

and

LEONARDO LOZADA,
*Appellant*.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed July 21, 2023. Affirmed.

*Joseph W. Booth*, of Lenexa, for appellant.

*Christopher T. Wilson*, of Beam-Ward, Kruse, Wilson & Fletes, LLC, of Overland Park, for appellee.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Peggy Lozada filed for divorce from her husband, Leonardo, to terminate their roughly seven-year union. The matter went to trial in 2019 but the district court failed to issue a final order. In the interim, the parties placed a purported settlement agreement on the record. Not long after, Peggy moved to set the agreement aside upon learning about new information related to the couple's assets that undercut the ability to have a true meeting of the minds in arriving at their agreement. Following a hearing, the court granted Peggy's motion and declared the agreement non-binding. Several months

later the court conducted a second trial to litigate the divorce. Leonardo moved for a new trial following the court's issuance of its final order, but his request was denied.

Leonardo now brings the matter to us to resolve whether the district court improperly set the parties' agreement aside and erred in declining to tax treat a particular retirement account. Following a thorough review of the issues raised and the underlying record, we are convinced the alleged agreement was invalid and therefore properly set aside. Not only was a condition precedent to the contract's formation not completed, but many assets were also absent from the agreement. Accordingly, it cannot be said there was a meeting of the minds regarding the settlement's material terms. We further find the court's refusal to tax treat a particular IRA was appropriate given that Leonardo withdrew several hundred thousand dollars from that account during the pendency of the divorce in violation of the district court's temporary orders. Accordingly, the court properly reduced Leonardo's assets based on marital asset dissipation under K.S.A. 2022 Supp. 23-2802(c). Finding no error, the decisions of the district court are affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND

In June 2018, Peggy Lozada petitioned seeking a divorce from her husband, Leonardo. The following day, the district court filed temporary orders that, among other things, prohibited the parties from using their assets unless the use complied with a court order or accompanied written consent from both parties and was reasonably necessary for day-to-day expenses, or the payment of attorney fees and other litigation related expenses.

The first trial spanned two days in April 2019. Peggy and Leonardo both testified and presented evidence on their own behalf. Peggy testified she was seeking sole custody of the couple's four children, as well as child support and maintenance. She also desired a fair and equitable division of the marital property including their marital home and its

two mortgages, numerous joint and individual bank accounts, three vehicles, multiple retirement accounts, various credit card debts, and an assortment of other items. According to Peggy, she and Leonardo met with a mediator before trial and reached an agreement as to how the property would be disbursed. Some of these assets, including several bank accounts, were destined to be split 50/50, while they agreed to a 68/32 division of several other assets. For example, the couple recently sold a second property for $500,000 and the proceeds were split according to the 68/32 agreement.

As far as an appropriate sum for maintenance, Peggy explained that her current monthly expenses totaled approximately $25,000 and included rent, food, childcare, fuel, medication, and an assortment of other expenditures. She informed the court she was a nurse anesthetist and an attorney licensed in Missouri but was not currently employed. While she had participated in several interviews, she had yet to locate a position that would accommodate her childcare obligations.

Leonardo testified and explained that he grew up in Caracas, Venezuela, graduated medical school, and then came to the United States to complete his residency and two fellowships. After his fellowships he eventually moved to Columbus, Ohio to work as the Chief Medical Officer for the Ohio Health Riverside Methodist Hospital. During that phase of his life, he married and divorced, and the court imposed $11,250 non-modifiable monthly maintenance payments through 2025. He met Peggy while living in Ohio and the couple eventually relocated to Kansas City when he accepted a position at St. Luke's hospital. He left that role in 2018.

Leonardo addressed Peggy's maintenance request and explained he was already obligated to pay her $6,000 per month under the court's temporary orders, on top of the considerable sum he was still required to pay his first wife. He claimed to be living in a deficit and was forced to rely on his savings and severance package payout, as well as proceeds from the sale of their second home to satisfy all his financial obligations. Thus,

he did not have the funds available for maintenance, and further, did not believe it was necessary given that Peggy was capable of earning over $100,000 per year. This assertion was drawn from Peggy's testimony that she made close to that amount annually when she first met Leonardo. Finally, Leonardo rejected Peggy's claim that they agreed to a 68/32 division of certain property and instead suggested the division hinged on an agreement regarding parenting time.

The court took the matter under advisement and ultimately issued a journal entry reinforcing the requirements from its pretrial order. Several motions and filings followed, including Leonardo's motion to consider a new tax bill that surfaced. He believed the burden of that debt should be borne by both parties equally.

The parties filed a joint spreadsheet outlining their assets and debts, which indicated the marital home was valued at around $1.9 million, until the mortgages were subtracted, which then reduced the anticipated yield upon its sale to $27,500. Peggy also moved to amend the court's journal entry on the grounds it erroneously conveyed the required maintenance was around $4,000 rather than $6,000. The court granted her motion and also stated it would address the new tax bill issue raised by Leonardo in its final order.

Peggy later filed another motion seeking enforcement of Leonardo's obligation to pay the mortgage on the marital home, child support, and maintenance. The motion also contained a request for the court to direct Leonardo to complete repairs and upkeep on the marital home, reimburse her for costs based on lapsed health insurance coverage, and include medical debt among his assets and debts calculation. Not long after, Peggy's attorney withdrew and filed a lien of around $70,000 for services rendered.

The court filed a journal entry indicating that, according to counsel, each of the issues set forth in Peggy's motion were resolved except for the health insurance matter,

which the parties were actively working through to reach a decision. The court also rejected Leonardo's contention that his Cleveland Clinic Foundation Cash Balance Plan was not marital property, as the court ruled at trial, but was actually premarital property awarded to Husband's previous wife as part of their divorce. The court explained that if the parties could not come to an agreement on the matter Leonardo could file a motion for new evidence. Finally, the court observed that the parties agreed to short sell the marital home and participate in mediation with Judge Kevin Moriarty.

At the close of 2019, Leonardo submitted a series of filings to update the court as to the sale of the marital home and his new position in Ohio where he relocated to be closer to the children's new home with Peggy in Tennessee. Those filings included updated versions of his domestic relations affidavit and distribution of assets worksheet. He opted to accompany the motions with a brief to flesh out some of the issues including asset modifications, property division, and the lack of success achieved through mediation. Peggy filed an affidavit addressing each of the points Leonardo touched on.

Three months later the court conducted a hearing to address the remaining issues and opened by stating that the parties had apparently reached a settlement with respect to the outstanding issues. Peggy's attorney outlined the details of what they characterized as a global settlement agreement which included a provision that Leonardo's Roth IRA would be set over to Peggy and his other IRA through Fidelity would first be used to pay off the shortfall from the sale of the marital residence and the remainder of the asset would be forwarded to Peggy. The parties also agreed Peggy would receive an equalization payment along with two payments of $3,895 each for maintenance and child support and that Leonardo would also pay a percentage of his bonuses going forward as child support. Finally, the settlement agreement included a provision noting that "whatever personal property is in each party's possession will remain there as well as any individual debt that was not joint marital debt presented at trial [will] be assumed by either party in an individual capacity."

Peggy and Leonardo acknowledged that counsel's recitation accurately communicated their agreed upon terms. The court then explained:

> "Based on the sworn testimony and the agreement that has been reached, I do conditionally—I will explain the condition in a second—grant the decree of divorce, find the parenting plan and child support—find the parenting plan to be in the best interests of the minor children and the child support to be in the best interests of the minor children and consistent with the Kansas Child Support Guidelines, find the agreement on maintenance and the agreement on distribution of debts and assets to be valid, just and equitable.
>
> "The reason that I have said that my ruling is conditional is because it is conditioned upon the lienholder, Ms. Gondring, signing off to show that there are no other issues. And if there are, then we will schedule a hearing to address just the lien issue. So that is why it is my conditional ruling, but we have got to wait and see what the final outcome on that condition is."

Leonardo filed a proposed journal entry and a post settlement distribution of assets and debts worksheet but soon after, Peggy hired new counsel and filed a motion to correct the journal entry as well as objections to the same. Leonardo filed a response to her motion accompanied by notice of his intent to submit an amended journal entry.

Roughly two weeks later, Peggy moved to set aside the purported oral settlement agreement on the grounds there was not a meeting of the minds on its material elements, so it was not binding. As support for her claim, Peggy highlighted the fact that several pieces of marital property totaling $669,000 were not accounted for in the agreement, a portion of the values used to set the parameters of the agreement were inaccurate, and the child support worksheet was erroneous. Leonardo responded that the agreement was necessarily binding given its entry into the record, that settlements necessarily contemplate compromises, and Peggy was simply attempting to renege on its terms. He also emphasized that not only was Peggy an attorney, but she was also represented throughout by competent counsel.

Peggy received a hearing on her motion and seized that opportunity to assert that while an oral settlement agreement is typically appropriate under Kansas law, that theory contemplates that all material elements are accounted for among its terms, which ultimately proved not to be the case in her agreement with Leonardo as it skirted over around $600,000 in assets, including a piano. She explained that Leonardo's proposed journal entry included details that were not part of their oral agreement. She also noted that the terms of the agreement did not comply with the Kansas Child Support Guidelines (KCSG) and over a two-year period the disparity would amount to a $26,000 difference. Leonardo remained loyal to his position that Peggy was fully engaged in the settlement process and that the option of a trial was available to her throughout, yet she preferred a settlement conference instead. As to child support, Leonardo argued their oral agreement simply relied on the number contained in the court's previous temporary order.

After hearing argument, the court explained that while it had a motion to set aside the oral agreement it never received a counter motion to enforce the agreement. In its analysis, the court observed several problems with the agreement. First, the judge noted that, after reviewing the child support worksheet, which he acknowledged not viewing at the time the agreement was entered, he "would not have approved the child support worksheet because I don't find it to be consistent with the Kansas Child Support Guidelines." Second, the court explained that three assets were not mentioned in the transcript: the Ohio Health 457(b) account, the St. Luke's 457(b) account, and the piano.

The court also cited *In re Marriage of Towle and Legare*, 56 Kan. App. 2d 857, 439 P.3d 327 (2019), for the proposition that a settlement agreement is not final until the court signs the journal entry, which it had not yet done in the Lozadas' case. A journal entry was filed to memorialize its ruling on the motion to set aside the agreement.

The second trial occurred on November 13th and 18th, 2020, and the parties began by stipulating to the value of several assets. Peggy informed the court that both parties

now resided in Tennessee, she was now a licensed attorney in that state, and worked brief stints as a contractor conducting legal review. She also picked up shifts at a GI clinic given her extensive nursing expertise. Peggy testified that, for maintenance purposes, her monthly expenses totaled around $15,000. She reiterated her request for sole legal custody of the children and offered an opinion about how the parties should divide their debts and assets. Leonardo also took the stand and requested joint legal custody of the children coupled with a child support amount and reiterated his belief that Peggy's request for maintenance should be denied. He also informed the court what he envisioned for their asset and debt distribution.

The court granted the decree of divorce and ordered joint legal custody of the children. Turning to maintenance, the court determined that the appropriate amount was 17.5 percent of the difference between the parties' incomes. The court also ordered child support payments of $8,611 per month moving forward, as well as back payments in various amounts. Next, the court explained the division of each asset and debt. Among other things, the court set Leonardo's Fidelity IRA to him without a corresponding tax treatment. Finally, the court ordered the parties to pay their own attorney fees, but also directed Leonardo to begin payments to Peggy's former counsel to satisfy the lien. These orders were also memorialized in a journal entry.

Leonardo pursued a motion for new trial and to alter or amend judgment and claimed several legal errors warranted such relief. The court denied Leonardo's request and the case now timely comes before us to determine whether the court reached its conclusions in error.

## LEGAL ANALYSIS

*The district court properly concluded that the purported oral agreement between the parties must be set aside given that it was significantly legally flawed.*

In his first contention of error, Leonardo argues the district court erred in declining to uphold the parties' oral settlement agreement. Peggy asserts the court properly deemed the agreement invalid because it lacked a required condition precedent, the meeting of the minds which must be present to establish a valid agreement did not exist since it failed to include all the necessary material elements, and it contained erroneous child support calculations.

*Standard of Review*

The parties disagree about the appropriate standard of review. Leonardo suggests we have unlimited review while Peggy contends we review the district court's decision for an abuse of discretion. Both parties are partially correct.

As will be set forth in greater detail below, this issue involves review of the district court's decision to reverse its previous finding that the settlement agreement orally pronounced by the parties was valid, just, and equitable. We review a district court's decision regarding property settlement agreements for an abuse of discretion. *Cook v. Cook*, 231 Kan. 391, 394, 646 P.2d 464 (1982). An abuse of discretion occurs "when: (1) no reasonable person would take the view adopted by the trial judge; (2) the ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion was made." *Wiles v. American Family Life Assurance Co.*, 302 Kan. 66, 74, 350 P.3d 1071 (2015).

Additionally, we exercise unlimited review over the interpretation of the content of settlement agreements as they are governed by the rules of contract interpretation. *In*

*re Marriage of Strieby*, 45 Kan. App. 2d 953, 961, 255 P.3d 34 (2011) ("To the extent that this issue involves interpretation of the parties' settlement agreement, it is subject to normal rules regarding contract interpretation which require de novo review.") (citing *Drummond v. Drummond*, 209 Kan. 86, 91, 495 P.2d 994 [1972]).

*Legal Framework*

Parties to a divorce may enter into a marriage separation agreement, "which can detail provisions for maintenance, division of property, custody, support and visitation of the children." 2 Elrod, Kansas Law and Practice: Kansas Law § 11.2 (2022-2023 ed.); *Feldmann v. Feldmann*, 166 Kan. 699, 705-06, 204 P.2d 742 (1949). Separation agreements are viewed as contracts and may be oral or written. See *Loscher v. Hudson*, 39 Kan. App. 2d 417, 426, 182 P.3d 25 (2008) ("Separation agreements are subject to the normal rules of contract law."); *In re Marriage of Takusagawa,* 38 Kan. App. 2d 401, 410, 166 P.3d 440 (2007) (explaining "Kansas law allows for oral separation agreements in divorce cases").

K.S.A. 2022 Supp. 23-2712(a) provides that such agreements may be incorporated into a divorce decree but only if the district court first finds that the agreement is "valid, just and equitable." That determination is made following a two-step process: (1) "the agreement must be a valid contract," and (2) "the agreement must be just and equitable." *In re Marriage of Traster*, 301 Kan. 88, 104, 339 P.3d 778 (2014).

District court judges have the duty to carefully scrutinize settlement agreements. *In re Marriage of Kirk*, 24 Kan. App. 2d 31, 32, 941 P.2d 385 (1997) ("'[S]eparation agreements have always been subject to the scrutiny of the courts to prevent fraud and oppression. This is true, of course, and in finding that an agreement is valid, just, and equitable, as required by the statute, the agreement must be carefully scrutinized.'") (quoting *Spaulding v. Spaulding*, 221 Kan. 574, 577, 561 P.2d 420 [1977]).

Like any contract, a separation agreement is not valid if it does not include "a meeting of the minds on all the essential elements." *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012); 2 Elrod, Kansas Law and Practice: Kansas Family Law § 11.8 ("Basic contract rules apply to the formation and interpretation of separation agreements. Under Kansas law, there must be a meeting of the minds as to all essential terms to form a binding contract.").

*Analysis*

Leonardo argues the district court erred in setting aside their agreement where it had earlier found the agreement to be valid, just, and equitable. He suggests Peggy was properly bound by the agreement because she agreed to its terms on the record. Leonardo is correct that Peggy approved the terms related to the parenting plan, child support amounts, maintenance amounts, and property division. See *Lorenz v. Coder*, No. 116,967, 2017 WL 3446989, at *4 (Kan. App. 2017) (unpublished opinion) ("A transcript of the attorneys' recital of the terms of the agreement is a sufficient memorandum evidencing the parties' agreement.").

But Peggy's assent cannot rectify legal deficiencies that render an agreement invalid. See *Kirk*, 24 Kan. App. 2d at 34 ("'[M]ere agreement by the parties does not vitiate the court's duty to scrutinize the settlement agreement, and if the agreement is not valid, just and equitable, the court should reject or alter it.'") (quoting *Cook v. Cook*, 7 Kan. App. 2d 179, 184, 638 P.2d 980, *rev'd on other grounds* 231 Kan. 391, 646 P.2d 464 [1982]); *MEG Properties & Investments v. Gilchrist*, No. 106,697, 2012 WL 3630274, at *8 (Kan. App. 2012) (unpublished opinion) ("a district court cannot 'by its imprimatur validate a settlement which is otherwise unenforceable'") (quoting *Cooley v. Cooley*, 90 Ohio App. 3d 706, 708, 630 N.E.2d 417 [1993]).

Leonardo also suggests that public policy militates against releasing Peggy from the agreement. But the freedom to contract does not overcome the court's obligations pursuant to K.S.A. 2022 Supp. 23-2712. See 2 Elrod, Kansas Law and Practice: Kansas Family Law § 11.2. Accordingly, this court must contemplate whether the settlement agreement was valid. If it was, then the district court abused its discretion and committed an error of law by setting the agreement aside in September 2020. As Leonardo notes, his "appeal is over the issue that the contract was binding." To that point, Peggy argues the district court did not commit an error of law because the oral agreement was invalid for three overall reasons.

*Condition Precedent*

Peggy asserts the agreement was not binding because it lacked a required condition precedent. "A condition precedent is an agreed event that must occur before the contract shall take effect." *James Colborn Revocable Trust v. Hummon Corp*., 55 Kan. App. 2d 120, 125, 408 P.3d 987 (2017). Here, the condition at issue pertained to legal fees in the form of a $70,000 lien filed by Peggy's first attorney. Peggy correctly notes that there was no evidence that the lien was satisfied between the hearing on the parties' agreement and the district court's decision to set that agreement aside. According to Peggy, the settlement agreement was not valid because "[a]ny deal was dependent upon the lienholder's approval."

Leonardo challenges Peggy's classification of the lien as a condition precedent. He correctly notes the court indicated it might hold a hearing on the lien and encourages us to interpret that intention to mean the lien issue was not tied to the court's approval of the settlement agreement. We find the record favors Peggy's position.

The court explained the condition at two separate points in the proceeding. It opened the hearing with the following description:

"All right. The other issue that I will go ahead and address at this point is that the Court is aware of a lien on this case. *So how we will handle that is the agreement will be presented and then I will wait for the decree of divorce that includes the signature of the attorney who has the lien*.

"So [Peggy and Leonardo], your attorneys will be discussing the lien issue with that attorney who has filed the lien. If the decree of divorce bears the agreement and signature of that lienholder, then the decree of divorce would be approved. If it does not, there may need to be a hearing on the lien, but we won't really know until Counsel have had an opportunity to speak with the lienholder.

"You will be placing your agreement on the record and then I will be waiting to see whether or not a decree is submitted with all the signatures from Counsel or whether or not a further hearing is necessary to address the lien." (Emphasis added.)

Toward the end of the hearing, the court further explained:

"*The reason that I have said that my ruling is conditional is because it is conditioned upon the lienholder, . . . signing off to show that there are no other issues*. And if there are, then we will schedule a hearing to address just the lien issue. So that is why it is my conditional ruling, but we have got to wait and see what the final outcome on that condition is." (Emphasis added).

The ruling that the court is referencing occurs in the immediately preceding sentence. The court found:

"Based on the sworn testimony and the agreement that has been reached, I do conditionally—I will explain the condition in a second—grant the decree of divorce, find the parenting plan and child support—find the parenting plan to be in the best interests of the minor children and the child support to be in the best interests of the minor children and consistent with the Kansas Child Support Guidelines, find the agreement on maintenance and the agreement on the distribution of debts and assets to be valid, just and equitable." (Emphasis added.)

That is, the court's granting of the divorce decree and the court's finding that the agreement was valid, just, and equitable were conditioned upon the matter involving the lien. Additionally, the lienholder was present at the motion to set aside the oral agreement and shared a dialogue with the court. The court concluded that conversation in the following fashion:

> "All right. So with that issue, and Mr. Wilson I will want you to prepare today's journal entry, so the initial comments in the journal entry can just reflect that process that the lienholder is going to go through, and then if the parties have not reached an agreement on that amount by October 1st we will have a hearing. And, [lienholder], I will make every attempt to schedule that hearing as soon as practicable, because I want to address this issue and get it resolved. If I issue a bench ruling today that might give us more clarity on where the funds are, or whether they're in trust; or how that's going to be paid. So resolving the issues today might help us on your issue as well."

This language reveals the court's awareness that its ruling on whether to set aside the oral agreement may impact the lien. The lienholder's brief clarifies that she "does not know what property will be set aside to [Peggy] which would attach to the Attorney's Lien as the final division of assets and debts has not been determined." The condition was to determine what the lienholder's rights were with respect to Peggy and the attachment of any assets transferred to her from Leonardo.

In summary, the legal debt had to be satisfied and the question was simply which asset would be used to fulfill that obligation. This determination was directly related to the terms of the agreement and how the assets were distributed. The court held open the possibility for a hearing on the question in the event the lienholder had concerns or objections. As such, her approval of how the lien would be satisfied constituted a prerequisite to the court's authorization of the parties' settlement agreement as valid, just, and equitable pursuant to K.S.A. 2022 Supp. 23-2712(a). See *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 47, 234 P.3d 833 (2010) ("Courts have recognized two types

of conditions precedent: conditions precedent to *performance under an existing contract* and conditions precedent to the *formation of a contract*."). Where the condition precedent to the settlement agreement's approval never materialized, there was no oral agreement to bind the parties. There is therefore no merit to Leonardo's claim that the district court erred in setting aside the purported agreement.

*No Meeting of the Minds*

The second justification Peggy offers for upholding the court's refusal to validate the agreement is that it lacked many essential, material matters. She properly notes that the primary rule for interpreting a contract is to ascertain the parties' intent. See *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013) ("'The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.'") (quoting *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 [2011]). Here, it is evident the parties' shared intent was to enter a comprehensive "global settlement," but as Peggy points out, the terms outlined on the record ultimately proved to not be comprehensive; therefore, that agreement fell short of their desired intent.

Peggy directs our attention to three documents Leonardo filed following the hearing on their agreement and highlights how each of those three reveals significantly more detail related to their property than what was presented during the oral recitation. Specifically, Leonardo submitted a Post Settlement Distribution of Assets and Debts Worksheet, a Notice of Service of Journal Entry and Decree of Divorce Pursuant to Rule 170, and a Notice of Intent to File a First Amended Journal Entry and Decree of Divorce Pursuant to Rule 170. Our review of Peggy's claim against the filings she references reflects that specific assets and debts were undeniably absent from the parties' oral agreement.

*Fidelity IRA*

The record contains the following remarks from the hearing on their agreement:

> "There is also an additional IRA with Fidelity that has the rest of the IRA's rolled into it. At the time that it was rolled into and part of it was used by dad to pay off a shortfall on the marital residence, there was approximately $25,000 in that account. Again, that will be set over to mother/petitioner by QDRO at whatever the value is at this time with the gains or losses since the last time the parties knew the value."

The spreadsheet and proposed journal entry Leonardo filed shortly after the hearing valued his Fidelity IRA at $439,095.07. The multiple other accounts the court referenced as rolled into that IRA included Leonardo's St. Luke's 403(b), St. Luke's 401(a), and Tenet 401(k). The record reflects that Leonardo incurred a $104,000 tax penalty when he withdrew the money which left a remaining balance of $312,000 for him and $23,109.34 for Peggy. By contrast, at the hearing on their agreement, the only figure Leonardo presented to Peggy or the court was the "approximately $25,000" remaining in the account. That is, the agreement did not reflect the overall amount in the account before withdrawal, the amount of the withdrawal, the tax penalty, or Leonardo's remaining balance of several hundred thousand dollars. Peggy employs two formulas to argue that Leonardo walked away from the withdrawal with either approximately $103,000 or $228,000. Regardless of the precise amount, Peggy is correct that Leonardo wholly failed to mention the amount in excess of $100,000 that he retained in the settlement agreement.

*Piano*

The parties also owned a Steinway piano valued at $30,000. Both parties agree they still owe money on the piano and the debt is in Leonardo's name. No mention was made of the piano or its corresponding debt during the hearing on their agreement but in

Leonardo's first court filings after the agreement he imputed possession of the instrument and its debt to Peggy. Yet it is clear from the hearing to set aside their oral agreement that Peggy already sold the piano and Leonardo was the one responsible for whittling away at its debt. Peggy asserts that this conflicts with the following provision in their purported agreement: "We will put in our settlement agreement that whatever personal property is in each party's possession will remain there as well as any individual debt that was not joint marital debt presented at trial would be assumed by either party in an individual capacity."

Since the debt was in Leonardo's name, the above provision suggests he should assume that debt. Yet another portion of their oral agreement reads as follows: "I believe *all* of the other debts have been paid and satisfied and are—nothing outstanding to be assumed without an asset attached to it." (Emphasis added.) Thus, this statement suggests that it is Peggy who should receive the debt because it is attached to the piano that is in her possession. Accordingly, not only do Leonardo's filings perhaps contradict one of the agreement's provisions, but the agreement itself contains contradictory provisions, at least in the context of the piano. In fact, both parties agree that these clauses, which will be discussed further below, mark the sole reference to the $30,000 piano at the hearing for their purported agreement.

*2019 Tax Return and Allocation of Liability*

Peggy next notes that the proposed journal entry Leonardo filed on April 2, 2020, contains the assertion that he would "be entitled to any [tax] return for 2019" yet this fact was never mentioned in their March 2020 agreement.

*St. Luke's 401(a) Account*

Peggy also highlights Leonardo's St. Luke's 401(a) account for our analysis. According to one of the filings Leonardo submitted following their first trial, this account was valued at roughly $64,000. But in a subsequent filing the account was only valued at $23,000. This account was also included among those absorbed by the Fidelity IRA. The record reflects that the agreement between the parties failed to even acknowledge the existence of the account when it existed independently and further failed to explain the significant depreciation in the account's value. Any identifying information was limited to the overgeneralized statement that Leonardo's Fidelity IRA contained funds from other unspecified accounts. As an aside we note that any reduction in value, as well as the act of rolling the account into the Fidelity IRA, likely violated the district court's clear temporary order prohibiting either party from transferring funds.

*Credit Card Debts*

As further support for her position, Peggy draws our attention to two credit card debts that escaped mention in the parties' agreement. The debt and asset spreadsheet Leonardo submitted to the court set approximately $24,000 in debt to him associated with an Ameriprise Mastercard and another roughly $14,000 in debt from an AMEX Platinum card. The Supplemental Objections Peggy made to Leonardo's Journal Entry, specifically through Exhibit J, reflect that prior to her filing the divorce petition, Leonardo made payments on these debts which exceeded the debt amounts contained in his spreadsheet.

*Cleveland Clinic Cash Balance Plan*

The next account Peggy asks us to consider is Leonardo's Cleveland Clinic Cash Balance Plan. We note that this asset in particular was a large point of contention, and confusion, during the divorce proceedings. Leonardo listed the account as an asset in his pretrial domestic relations affidavit. At the first trial, the court ruled the asset was marital

property. Following that trial, and upon the suggestion of the court in a journal entry, Leonardo filed a Motion to Consider New Evidence, and argued the district court erred in designating the asset as marital property because it was allegedly awarded to his first wife as part of their divorce settlement. While his motion included the divorce settlement, nothing suggests that court specifically set the asset to the first wife. Rather, it provides: "The parties agree that all marital pension and retirement accounts and benefits shall be transferred to Wife by Husband concurrent with the execution of this Agreement, if not already transferred." Leonardo also attached a document indicating the Ohio Qualified Domestic Relations Order (QDRO) was filed in August 2019, a date after his and Peggy's first trial. Stated another way, in 2019 Leonardo sought to enforce the 2011 settlement of his first marriage.

The March 2020 agreement makes no mention of this asset. In the wake of their purported agreement Peggy claimed that Leonardo gifted the marital property away in the Ohio QDRO. For his part, Leonardo asserted that Peggy's counsel agreed it was not marital property. During the hearing on Peggy's motion to set aside the oral agreement, the judge expressed confusion that the asset was even a topic of discussion because he understood there was a stipulation that Leonardo did not own the account. Discussion concerning this asset continued through the second trial and the court's eventual divorce decree set aside zero dollars of the account to Leonardo after finding he did not impermissibly reduce the marital estate.

Though the court ultimately did not set this asset to Leonardo, this decision occurred long after the March 2020 agreement was entered. At the time of the oral agreement the court had ruled it was marital property at the first trial and Leonardo had moved for new evidence which included information related to the 2011 settlement. Apparently, the parties' attorneys agreed that it was not marital property sometime after this filing but had not filed a journal entry to this effect. Accordingly, we decline to find

that the asset's absence from the agreement is suspect. The parties had agreed that it was not marital property and it was therefore not divisible.

*Uninsured Medical Expenses of Children/Debt Created by Lapse of Insurance/Marital Residence Debt*

These three debt areas were addressed in the district court's final divorce decree, but the parties' purported settlement agreement is silent as to each one, as is Leonardo's proposed journal entry from April 2020, his spreadsheet, and his proposed amended journal entry from May 2020. The first two—uninsured medical expenses and debts created by lapsed insurance—received some measure of attention prior to the parties' agreement, by virtue of a motion Peggy filed in June 2019 in which she asserted that Leonardo's health insurance lapsed in violation of the court's temporary orders and, as a result, she accrued medical bills for care she and the children received. Leonardo filed a brief in reply. Accordingly, the record reflects these debts were a contested issue, yet they failed to materialize within the parties' settlement agreement.

The marital residence debt is a stickier issue in that it is unclear precisely what that debt is intended to identify. At the oral pronouncement of the court's decision following the second trial, the court explained the marital residence debt as follows: "Marital residence debts. I took out the car mortgage but—and the—and the mortgage payment. I find that [Peggy] has successfully demonstrated $9,797 of marital debt." Peggy's brief to us does little to clarify what marital residence debts were intended by the court's final divorce decree, and therefore it is hard to determine whether there is any colorable claim that those debts should have been included in the parties' agreement when it is just as possible they may have accrued after that date.

*Vehicle Debts*

Peggy moves on to address the parties' vehicles and asserts that their agreement contemplated that she would retain possession of two of the three, their 2013 Range Rover and 2015 GMC Yukon, but was silent about the outstanding debt which still existed for both. But her claim is belied by the record before us. To the contrary, the parties' agreement specifically provided that Leonardo would remain responsible for the payments on both vehicles for several months, after which Peggy would "either refinance both vehicles or trade them, whatever needs to be done by sale or by trading or refinancing to remove [Leonardo's] name from that debt. She will take over any car payments on those vehicles at that time."

Beyond the omissions we have already touched on, the district court noted other critical gaps during its hearing to set aside the parties' agreement. Specifically, it noted the absence of "any discussion of the Ohio Health 457(b) or the St. Luke's 457(b) or the piano. Those things were not discussed in the transcript." We already addressed the piano so we will move forward with the 457(b) accounts.

*Ohio Health 457(b)*

In addition to this account's absence from the parties' agreement, it also was not mentioned in any of the filings Leonardo submitted after the agreement, nor was it included in the parties' joint asset spreadsheet. Peggy's motion to set aside the oral agreement explained this asset was mentioned in Leonardo's settlement agreement with his first wife, which was attached to the motion for new evidence he filed before their March 2020 agreement. Leonardo contends both parties knew about the account and simply "[chose] not to have the court make a ruling about it after trial" as it was not property they deemed necessary for division in the settlement agreement. Peggy takes a

different stance and characterizes the account as "an unaccounted for, missing asset" the value of which was unknown to her.

Leonardo asserts that like the Cleveland Clinic Cash Balance Plan, this account was properly excluded because it was not a marital asset given that it went to his first wife in their divorce settlement. But his claim is undermined by that settlement agreement which undeniably states that he "shall retain his 457(b) Deferred Compensation Plan held with Ohio Health System." Accordingly, the district court properly determined this asset, which was presumably still retained by Leonardo, was not accounted for in the agreement.

*St. Luke's 457(b)*

The record reflects that Leonardo's St. Luke's 457(b) was also not included in the parties' agreement. While it was referenced in the 2018 asset spreadsheet there was no corresponding information about its value. It was similarly referenced during the parties' first trial at which time Peggy likewise lacked a clear understanding of its value, which prompted her to assume it included no funds. Yet by the time she moved to set aside their oral agreement she was in possession of a receipt that reflected approximately $114,000 was withdrawn from the account in May 2018, roughly one month before Peggy filed for divorce. This all supports Peggy's contention that this asset was absent from their agreement and Leonardo's later accounting, even though there was every indication he removed money from the account.

Collectively, the aforementioned concerns about the various unaccounted-for assets and debts lead us to conclude that the district court did not err in setting aside the oral agreement where it bore indications that a true meeting of the minds never occurred.

Kansas courts are clear that the district court must consider the full panoply of financial information when determining whether a settlement agreement was valid, just, and equitable. See *Kirk*, 24 Kan. App. 2d at 32-36 (finding the district court lacked evidence to determine whether the settlement agreement was valid, just, and equitable when there was no testimony and no evidence of property values); *In re Marriage of Meier*, No. 121,497, 2020 WL 4249538, at *3-4 (Kan. App. 2020) (unpublished opinion) (finding the district court lacked evidence to determine whether the settlement agreement was valid, just, and equitable when there was no testimony and no evidence of income, assets, or other reasons for division of property). Here, the court had access to various documents which explored the parties' financial situation.

*In re Marriage of Lee*, No. 123,508, 2021 WL 5149827 (Kan. App. 2021) (unpublished opinion), presented a very similar issue to a panel of this court. The appellant argued the parties' separation agreement lacked a meeting of the minds because a section regarding an IRA transfer included the following requirement: "The transfer shall be made as soon as is reasonably possible after it is determined with certainty, with written verification from each creditor, that [appellee] is not liable for any of the credit card indebtedness's being assumed by [appellant]." 2021 WL 5149827, at *5. According to the appellant, the lack of clarity in the agreement with respect to which party was responsible for obtaining verifications from the credit card companies evidenced a lack of necessary meeting of the minds.

This court rejected the argument, noting the accounts were in the appellant's name. Thus, "[c]ommon sense and logic dictate that a financial institution is only going to discuss and disclose the details of an account with the account holder." 2021 WL 5149827, at *5. Here, however, common sense and logic are not enough to fill in the gaps. Peggy has successfully identified several assets that were previously discussed but failed to make their way into the parties' agreement. Additionally, both Peggy and the district court noted that at least one asset, the Ohio Health 457(b), was never mentioned

by Leonardo in any filing he submitted to the court. See *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 266-67, 223 P.3d 815 (2010) (affirming a district court sanction against a party for attempting to mislead the court about his income and assets). As such, we find that the details of how the assets and debts would be dispersed were unclear and therefore the agreement does not evidence a meeting of the minds regarding numerous essential terms.

Leonardo attempts to persuade us that a catch-all provision sufficiently accounts for the details which are lacking. He specifically directs us to the following language: "We will put in our settlement agreement that whatever personal property is in each party's possession will remain there as well as any individual debt that was not joint marital debt presented at trial would be assumed by either party in an individual capacity." He once again seizes upon Peggy's legal training and argues that expertise vested her with the knowledge and understanding that the unaccounted-for items were personal property.

Leonardo argues that *In re Marriage of Johnston*, 54 Kan. App. 2d 516, 402 P.3d 570 (2017), offers persuasive authority that supports his position. In that case, the parties had significant assets and complex military benefits but declined to seek counsel and instead used only forms to complete a separation agreement which the district court then found to be valid, just, and equitable. One of the terms stated that the appellant would pay the appellee $1,000 in monthly maintenance unless the appellee remarried. Around three years later, the appellant sought to terminate the maintenance payments because the appellee was living in a quasi-marital relationship. The district court held a hearing and found that the appellee was not remarried, but also sua sponte determined that the maintenance payments would cease after 121 months. Later, the appellee moved to find the appellant in contempt for not making the maintenance payments and to reconsider the separation agreement because it failed to divide the appellant's military retirement

benefits. The court denied the contempt request but did find that the retirement benefits must be equally divided.

On appeal, this court analyzed the terms of the settlement agreement and explained:

> "Additionally, according to the language in the divorce decree, it awarded to each party—except for personal property specifically awarded to the other party—all personal property in such person's possession. Given that Jim was the named owner of his military retirement pay, it was in his possession according to the terms of the decree. All of these facts taken together show no ambiguity as Jim was awarded sole ownership of his military retirement pay and Pamela was awarded $1,000 per month in spousal maintenance payments." 54 Kan. App. 2d at 527.

This court ultimately found the district court erred in modifying the agreement to mandate a division of the retirement benefits. 54 Kan. App. 2d at 527. Leonardo suggests *Johnston* is analogous because in both cases the settlement agreement's terms noted that personal property in possession of an individual remained with that party. *Johnston* noted that the outcome of the case was determined by the precise terms of the decree. Accordingly, we will likewise analyze the specific terms of the parties' oral agreement as they exist within the record.

"'The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.'" *Waste Connections of Kansas, Inc.*, 296 Kan. at 963 (quoting *Osterhaus*, 291 Kan. at 768). A contract interpretation "'should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners . . . . [Citation omitted.]'" 296 Kan. at 963.

But when the written language is ambiguous, we may properly look to extrinsic or parol evidence to try to construe it. 296 Kan. at 963. The question of whether a written instrument is ambiguous is a question of law subject to de novo review. 296 Kan. at 964. "A contract is ambiguous when its language is susceptible to more than one reasonable interpretation." *Johnston*, 54 Kan. App. 2d at 526.

Peggy contends that personal property, such as that addressed in the parties' agreement, was not intended to encompass non-tangible items like debts or assets. Thus, the language conveying that such items would remain with their respective party meant it would remain in a physical location. Hence, her argument concludes, the debts and assets fall outside the scope of the catch-all phrase.

Earlier language in the agreement lends credence to Peggy's interpretation. Leonardo's attorney explained: "Your Honor, the parties have divided most of their property, whether it be personal or otherwise." That "or otherwise" language suggests the agreement contemplates a distinction between tangible personal property, like the vehicles described as being in Peggy's possession, and other types of property. Therefore, construing the agreement as a whole, Peggy is correct that the limited nature of its terms compromises a definitive understanding of what the phrase "personal property" intended to communicate. Thus, the term is subject to more than one reasonable interpretation which renders it ambiguous.

Again, the existence of such ambiguity enables us to turn to parol evidence to try to resolve the matter. See *Johnston*, 54 Kan. App. 2d at 526 (noting that when a contract has ambiguous "language, the taking of parole evidence is designed to allow the court to divine the intent of the parties beyond the words of the contract itself"). Peggy directs us to several documents, but those seemingly make the proper interpretation of the catch-all phrase an even murkier undertaking.

We turn first to Leonardo's April 2020 spreadsheet and its phrase "household goods/furniture/personal property all to wife." But we find this language cuts against Peggy's interpretation because, in our view, it is broad enough to encompass a total accounting of assets. As such, it is conceivable that for Leonardo the phrase "personal property" captured the IRAs.

Second, Peggy encourages us to analyze an earlier proposed distribution of assets and debts worksheet, which used the same "household goods/furniture/personal property all to wife" language but also included a disclaimer stating, "These numbers do not include any value of the personal property that was ALL kept by wife . . . ." But this directive fails to disclose whether Leonardo classified assets and debts as personal property.

While not a resource Peggy suggested, Leonardo's proposed journal entry from April 2020 does yield evidence favoring her interpretation of the agreement's terms. A section titled "2.2.1 Wife's Assets" lists many items including "[a]ll personal property; presently in Wife's possession, including the Piano" under subsection C, and several retirement and other accounts in subsections G-J. Contrary to the terms used in the spreadsheet, this language and structure does tend to suggest Leonardo viewed personal property in Peggy's possession as something separate from the accounts. To find otherwise would render the listing of the accounts duplicative.

There is also language contained within Leonardo's proposed journal entry from May 2020 which suggests that he sought to clarify terms that may otherwise be viewed as questionable. The following section is particularly insightful:

> "The parties have divided most of their property, whether it be personal or otherwise. . . . Everything they have divided up already is fair, just and equitable. Each party shall keep whatever property he or she had already received and that is *in his or her*

*possession or individual name* unless set forth below otherwise. There is no additional property in the joint names of the parties remaining." (Emphasis added.)

While the "or otherwise" language was included in the agreement, the "individual name" language was not. Accordingly, Peggy persuasively argues the inclusion of this new language evidences a recognition that the term "personal property" is unclear and represents Leonardo's attempt to clarify the agreement's terms.

The relevant parol evidence is unclear and, at most, conveys Leonardo recognized that the catch-all phrase he relies on was unclear. Since the term "personal property" is ambiguous and therefore cannot be used to capture the assets and debts that were omitted from the agreement, it cannot be said that the parties reached a meeting of the minds regarding the essential terms of the property settlement agreement. *Mohr v. State Bank of Stanley*, 244 Kan. 555, 573, 770 P.2d 466 (1989) ("Only reasonable certainty is required in a purported contract, but where the purported contract is so vague and indefinite that the intentions of the parties cannot be ascertained, it is unenforceable."). Accordingly, we conclude the agreement was invalid.

*Child Support*

Peggy's third argument for why their agreement should be classified as invalid is the district court's determination that it ran afoul of the Kansas Child Support Guidelines. Child support in Kansas is governed by the KCSG. K.S.A. 2022 Supp. 23-3002; *In re Marriage of Thrailkill*, 57 Kan. App. 2d 244, 259, 452 P.3d 392 (2019). This court reviews "a district court's order determining the amount of child support for an abuse of discretion, while the interpretation or application of the Kansas Child Support Guidelines is a question of law subject to unlimited review." *In re Marriage of Skoczek*, 51 Kan. App. 2d 606, 607, 351 P.3d 1287 (2015). "An abuse of discretion occurs if: (1) no reasonable person would take the view adopted by the district court; (2) the decision is

based on an error of law; or (3) the decision is based on an error of fact." *State v. Ballou*, 310 Kan. 591, 615, 448 P.3d 479 (2019).

Peggy notes the district court appropriately found the child support award illegal given that it (1) contained the wrong residential state for both parties; and (2) there was a discrepancy between the agreement and the child support worksheet with respect to Leonardo's maintenance obligation.

Notably, Leonardo does not challenge the district court's ruling that their agreement failed to conform to the KCSG. Rather, he contends that, assuming the court was correct, then the appropriate remedy was to reform the agreement rather than vacate it. Thus, he has abandoned any argument related to the district court's finding of error. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (an issue not briefed is deemed waived or abandoned). At best he argued in his reply brief that he "did not concede that the worksheet is wrong," but he briefs no argument outlining how the district court abused its discretion when finding the child support was illegal. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (a point raised incidentally in a brief and not argued therein is deemed waived or abandoned).

Turning to the reformation argument, Husband notes K.S.A. 2022 Supp. 23-3005 provides that child support is modifiable. He also suggests that reformation is appropriate because setting aside the agreement is simply too drastic a remedy. Yet the record reflects no such argument was ever presented to the district court for consideration. Issues not raised before the district court cannot be raised on appeal unless, pursuant to Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36), the appellant explains why an exception to the general rule applies. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019); *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008) (outlining exceptions), *cert. denied* 555 U.S. 1178 (2009); see *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (explaining that Supreme Court Rule 6.02[a][5] is "strictly

enforce[d]"). Leonardo does not favor us with an argument for why we should apply an exception on appeal. As such, we conclude the reformation issue is not properly before us.

*Other Considerations/Finality*

Leonardo makes several other arguments related to the district court's findings. First, he contends it erroneously found Leonardo failed to seek enforcement of the oral agreement. The record before us includes Leonardo's "Suggestions in Opposition to Petitioner's Motion to Set-Aside Purported Oral Settlement Agreement" which contains a request for the court to "enter an order to enforce the Settlement agreement." We are satisfied this language is sufficient to meet the requirements articulated under K.S.A. 2022 Supp. 60-207(b), that a request for relief be stated with particularity in writing if not made during a hearing or trial.

Leonardo next suggests the district court erred in relying on *In re Marriage of Towle and Legare*, 56 Kan. App. 2d 857, as the supportive authority to set aside the parties' oral agreement. The parties in that case entered into a settlement agreement but failed to finalize the divorce decree with a properly filed journal entry. Unfortunately, one of the parties died before finalization of the decree. The surviving party sought to dismiss the case, but the district court substituted the deceased party's son for the deceased party and ordered the son to file a journal entry. After missing the deadline to file the journal entry, the court granted the son's motion to enforce the agreement.

The surviving party appealed to this court and argued the district court erred by not dismissing the case based on the other party's death. This court agreed. Citing K.S.A. 2016 Supp. 60-258, we explained that a judgment is not effective until there was a journal entry or signed judgment form. 56 Kan. App. 2d at 872. Since one of the parties

died prior to the filing of a journal entry the action abated upon the death. 56 Kan. App. 2d at 873.

The district court may have misapplied *Towle* because it was seemingly of the mindset that the settlement agreement was not final until the divorce decree was finalized. In *Towle*, this court's discussion of the settlement agreement involved determining whether the court erred by not enforcing the maintenance agreement. It surveyed the relevant law and concluded "a separate maintenance action is a personal one that abates at the time of a party's death." 56 Kan. App. 2d at 869. This court then turned its attention to the question of finality as a second issue because one question on appeal was whether a particular document was enough to be considered a final judgment/journal entry under K.S.A. 2016 Supp. 60-258. We explained that if it could properly be considered a journal entry, then the deceased party's death would not impact the property settlement agreement. The *Towle* court concluded the document was not a journal entry and, as a result, the deceased party's death ended the marriage. 56 Kan. App. 2d at 870-73. Thus, the maintenance agreement abated upon the death.

With this in mind, we find Leonardo is correct that the district court erroneously relied on *Towle* because that case does not stand for the principle that settlement agreements are not binding until the divorce decree is finalized. Here, no deaths occurred so abatement is not a consideration. Rather, K.S.A. 2022 Supp. 23-2712(b) provides that a settlement agreement may not be revisited after being incorporated into a divorce decree unless the agreement allows for it or the parties consent. In fact, the court's finding that the settlement agreement was valid, just, and equitable was a prerequisite for a decree.

Peggy's motion to set aside the agreement intervened between the court finding the agreement was valid, just, and equitable, and any finalized settlement. As Leonardo asserts, "The trial court had ongoing jurisdiction as it had in the first trial, until the

agreement was incorporated into a decree." Thus, the issue is whether the court erred when it reversed its opinion on whether the agreement met the requirements of K.S.A. 2022 Supp. 23-2712(a).

We conclude the court did not err as it certainly had the authority to change its opinion following the motion to set aside the agreement. See *Burrowwood Assocs., Inc. v. Safelite Glass Corp.*, 18 Kan. App. 2d 396, 398, 853 P.2d 1175 (1993) ("It is axiomatic that a trial judge may reverse himself or herself during the course of an action if he or she believes an incorrect ruling has been made."). Additionally, since the settlement agreement was not incorporated into a decree, the modification bar found in K.S.A. 2022 Supp. 23-2712(b) is not applicable.

While it is true the district court erred in finding there was not a motion to enforce, and erred in relying on *Towle*, we still possess the latitude to affirm the district court's decision as right for the wrong reason. *State v. Parks*, 312 Kan. 487, 489, 476 P.3d 794 (2020) (quoting *State v. Smith*, 309 Kan. 977, 986, 441 P.3d 1041 [2019]). We find the court appropriately reversed its initial ruling because the agreement was not valid and affirm that decision.

*The district court properly exercised its discretion in refusing to tax treat the husband's Fidelity IRA.*

Leonardo contends the district court erred when it attributed the Fidelity rollover IRA account to him for $439,095 as opposed to a lower amount following an appropriate tax treatment of the asset. Peggy asserts the decision was appropriate given that Leonardo unilaterally removed a large sum of money from the account in violation of the court's initial temporary orders.

*Standard of Review*

This court reviews a trial court's division of property for an abuse of discretion. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). An abuse of discretion occurs when: (1) no reasonable person would take the view adopted by the trial judge; (2) the ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion was made. *In re Marriage of Perales*, 58 Kan. App. 2d 26, 32, 463 P.3d 427 (2020).

In 2019, the parties sold the marital home in a short sale and accrued a liability of roughly $185,000 so Leonardo withdrew money from the Fidelity IRA to cover the debt and incurred a tax expense of $104,000. He testified that prior to any withdrawal, the account totaled $439,095. He withdrew $416,000 and paid $104,000 in taxes, leaving around $23,000 in the account. Of the $312,000 that Leonardo received after taxes ($416,000-$104,000), he paid $185,000 to cover the short sale and pocketed the remaining approximately $127,000.

Leonardo informed the district court that he believed he had the authority to withdraw the money from the account based on the following language in the temporary orders:

> "Husband and Wife are both restrained and prohibited from altering, removing, selling, giving away, disposing, hiding, spending, mortgaging, pledging, or encumbering any assets, including withdrawals from checking, savings or other financial accounts, unless reasonably necessary for normal day-to-day business or personal expenses, for reasonable attorneys' fees and litigation expenses, in order to comply with this court's orders, or with written consent from both Husband and Wife."

According to Leonardo, the phrase "day-to-day business or personal expenses" authorized him to withdraw the money from the IRA because the funds were destined for

a business expense or transaction. He conceded that he did not obtain Peggy's approval for the withdrawal but still suggested it was the most financially reasonable decision lest he incur extra expenses that would have diminished the marital estate. Leonardo acknowledged that the withdrawal eliminated the parties' ability to have the withdrawn amount grow tax deferred and he was also aware that he would incur a tax penalty. Following the second trial, the district court's journal entry and decree of divorce indicated that Leonardo would receive all proceeds from the IRA without tax treatment because of his unilateral decision to withdraw the funds.

*Analysis*

In a divorce action, trial courts are required to divide the marital property and have broad discretion when making these determinations so long as they are fair and equitable. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480-81, 193 P.3d 504 (2008); see also Black's Law Dictionary 679 (11th ed. 2019) (defining equitable distribution as: "The division of marital property by a court in a divorce proceeding, under statutory guidelines that provide for a fair, but not necessarily equal, allocation of the property between the spouses.").

When doing so, a court "shall consider" the following factors:

> "(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property." K.S.A. 2022 Supp. 23-2802(c).

Leonardo attacks both district court justifications for attributing to him the entire $439,095. First, the court noted "[t]he exact amount of taxes were not established in the evidence." Leonardo suggests the precise tax amount was not necessary because district courts generally reduce IRA cash values from between 28 and 33 percent. In support of this contention, he directs our attention to the Johnson County Bench Bar Guidelines. But a court does not abuse its discretion in simply declining to follow bench bar guidelines. See *In re Marriage of Jones*, No. 97,714, 2008 WL 2251177, at *5 (Kan. App. 2008) (unpublished opinion) ("The Johnson County Guidelines have not been adopted by any court and are not binding on any judge." As a result, the trial court judge did not abuse his discretion by calculating spousal maintenance differently than recommended in those guidelines.).

Leonardo further argues the court erred in finding the tax amount was unknown because there was evidence of that figure given that he specifically testified that he incurred a $104,000 tax withholding, with the actual tax amount being larger. Peggy agrees that the taxes "deprived the marital estate of well over $100,000, plus the opportunity for continued tax deferred growth."

Leonardo believes our analysis could benefit from review of *In re Marriage of Reynolds*, No. 71,954, 1995 WL 18253286 (Kan. App. 1995) (unpublished opinion). In that case, Reynolds argued the district court erred by not considering the tax consequences when valuing several assets, one of which was an IRA, that he received in a marital property division. The district court did not consider the tax consequences because the distribution dates of the assets were too far in the future and therefore would require the court to speculate about the tax liability. On appeal, a panel of this court endorsed the district court's reasoning and affirmed. 1995 WL 18253286, at *7.

But unlike Reynolds, Leonardo's tax consequences did not require the court to speculate. He is correct that K.S.A. 2022 Supp. 23-2802(c)(9) requires the court to

consider the tax consequences of a property division. The district court's assertion that there was no evidence of the *exact* tax liability, when it had testimony that the liability was roughly $100,000, tentatively supports Leonardo's contention that the court failed to adhere to K.S.A. 2022 Supp. 23-2802(c)'s mandate to consider the tax consequences.

It is well within the court's discretion to consider the tax consequences and still conclude that an asset should not be tax treated. For example, in *In re Marriage of Zillinger*, No. 123,563, 2022 WL 35658528, at *8 (Kan. App. 2022) (unpublished opinion), this court reviewed the property division of a divorce involving farm equipment and cattle and found "[t]he district court made a reasonable decision when it opted not to reduce the value of the cattle to reflect tax implications" even though one of the parties relied on livestock sales for income. We noted that the party who relied on those sales employed certain accounting practices that resulted in "minimal" tax payments. 2022 WL 35658528, at *8. The panel determined that the district court properly considered any tax implications associated with its division of property. 2022 WL 35658528, at *8.

That said, even if the district court's first justification for declining to tax treat the IRA—that there was no evidence of the exact amount—was incorrect, it nevertheless correctly declined to tax treat the asset based on its second justification, that Leonardo unilaterally withdrew funds to cover the short sale of the marital home. As noted above, the district court issued the following temporary restraining order pursuant to K.S.A. 2022 Supp. 23-2707(a)(1):

> "Husband and Wife are both restrained and prohibited from altering, removing, selling, giving away, disposing, hiding, spending, mortgaging, pledging, or encumbering any assets, including withdrawals from checking, savings or other financial accounts, *unless* reasonably necessary for normal day-to-day business or personal expenses, for reasonable attorneys' fees and litigation expenses, in order to comply with this court's orders, or with written consent from both Husband and Wife." (Emphasis added.)

See K.S.A. 2022 Supp. 23-2707(a)(1) (providing that after a divorce petition is filed, a district court may enter an order to "[j]ointly restrain the parties with regard to disposition of the property of the parties and provide for the use, occupancy, management and control of that property"). Leonardo unpersuasively suggests the provision authorized him to make the withdrawal at issue. But that order undeniably proscribed "withdrawals from checking, savings or other financial accounts" unless one of four exceptions were met.

Following an analysis of the same, we conclude none of those exceptions were triggered here. The first contemplates a withdrawal that is reasonably necessary for normal day-to-day or personal expenses. Leonardo's withdrawal of over $400,000 falls well outside the scope of what is contemplated by that exception. The second is also unavailable to Leonardo because nothing about the withdrawal was linked to the acquisition of funds necessary to cover reasonable legal fees. The third and fourth are similarly beyond his reach because the withdrawal certainly was not in accordance with a court order and was unquestionably carried out without Peggy's knowledge or blessing.

A somewhat related issue we must resolve is whether the withdrawal can be properly characterized as a dissipation of the marital assets. *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998), contains the following explanation from the Kansas Supreme Court regarding dissipation:

> "As we read the Kansas statute, we believe the legislative intent is clear in that it allows a trial judge wide latitude to divide marital property and this latitude provides the judge with discretion to consider whether marital assets were lost as a result of the wrongful conduct of one of the parties to the marriage."

The *Rodriguez* court further defined dissipation using Black's Law Dictionary:

> "To 'dissipate' has a defined and accepted meaning. Black's Law Dictionary 473 (6th ed. 1990) defines dissipate as '[t]o destroy or waste, as to expend funds foolishly.' Webster's New Collegiate Dictionary 366 (9th ed. 1991) defines the term as 'a: to expend aimlessly or foolishly b: to use up esp. foolishly or heedlessly.'" 266 Kan. at 352.

Leonardo challenges the classification of his withdrawal as "dissipation" with the argument that his liquidation "was largely used to cover the parties' $185,590 debt." But this contention ignores the funds he retained from that withdrawal after the short sale was covered and the tax penalties were assessed. He explains that surplus of roughly $127,000 was used to cover personal expenses including attorney fees, maintenance payments, and expenditures related to the children such as travel costs and gifts.

Though the district court never specified that it was not tax treating the IRA because of Leonardo's dissipation of assets, its statement that Leonardo's "decision to cash this out was unilateral" also suggests dissipation. Leonardo suggests the district court classified this as an impermissible distribution as part of a finding of fault and in so doing, sidestepped the directive articulated by the Kansas Supreme Court in *In re Marriage of Sommers*, 246 Kan. 652, 657, 792 P.2d 1005 (1990), "that, in all but extremely gross and rare situations, financial penalties are not to be imposed by a trial court on a party on the basis of fault." Yet the *Sommers* court also then defined the parameters of fault, noting that, "[f]or purposes of consideration of the financial aspects of the dissolution of a marriage, the term fault must be confined to a term of art relative to a ground for dissolution of the marriage and penalties arising therefrom." 246 Kan. at 657; see also *In re Marriage of Robinson*, No. 123,219, 2021 WL 5266569, at *5 (Kan. App. 2021) (unpublished opinion) ("In divorce cases, 'fault' is a term of art relating to one party's culpability in the disintegration of the marriage.").

We are not persuaded by Leonardo's fault-based argument. The unilateral withdrawal was not a ground for dissolution of the marriage or a penalty arising from it. A panel of this court delved into *Sommers* in *In re Marriage of Curry*, No. 90,784, 2004

WL 2848586, at *4 (Kan. App. 2004) (unpublished opinion), before rejecting Curry's contention that the divorce court's property division was impermissibly based on fault. In that case, the district court assigned the couple's credit card debt entirely to the appellant because he acquired the credit card debt by spending money on an affair without his wife's knowledge. This court explained that the divorce was based on incompatibility and not fault, and the district "court did not set this debt over to [appellant] based upon a theory of fault," but instead relied on the dissolution of assets statutory factor. 2004 WL 2848586, at *4.

We similarly find that the Lozadas' divorce court did not impermissibly rely on fault. Rather, it considered the dissipation of assets when setting over the entirety of the Fidelity IRA to Leonardo and we believe rightfully so as Leonardo's withdrawal of the funds, in violation of a court order, was wrongful, meets the definition of dissipation, and deprived the marital estate of the potential for future tax deferred growth. See *Krogen v. Collins*, 21 Kan. App. 2d 723, 726, 907 P.3d 909 (1995) (party may be held in civil contempt if, following a divorce petition, the party disburses funds in violation of a temporary order); *In re Marriage of Wood*, No. 122,211, 2020 WL 6685537, at *12 (Kan. App. 2020) (unpublished opinion) ("Despite Steven's insistence that the district court applied a 'strict construction' of the term 'dissipation,' his own testimony shows that he concealed and later used the funds from his retirement account for his personal benefit and Marlouise received substantially less than she was entitled for that marital asset.").

## CONCLUSION

We conducted a comprehensive review of the underlying record alongside the issues the parties brought to us for resolution. Our analysis did not yield evidence of error. Rather, we are satisfied the district court reached the appropriate legal conclusion when it determined that the parties' agreement was invalid and must be set aside. A meeting of the minds as to material terms was required to establish a sound agreement

but the absence of several assets from its contents indicates that condition was not met. We also find the court properly exercised its discretion when it declined to tax treat the Fidelity IRA. Leonardo unilaterally withdrew a substantial sum of money from that account in violation of the district court's temporary orders and the statutory prohibition covering the dissipation of marital assets. Finding no error, the decisions of the district court are affirmed.

Affirmed.