

No. 125,287

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

THOMAS A. MARTIN,
Appellant,

and

NANCY J. MARTIN
Appellee,

v.

MID-KANSAS WOUND SPECIALISTS, P.A., and EMERGENCY SERVICES, P.A.,
Intervenors.

SYLLABUS BY THE COURT

1.

It is well settled law in Kansas that upon the filing of a petition for divorce each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held by them.

2.

Under K.S.A. 2022 Supp. 23-2801, marital property includes all property owned by married persons or acquired by either spouse after the marriage.

3.

In Kansas, third parties asserting an interest in property of a marital estate can intervene or be joined as parties in a divorce action. In this situation, the divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, but it also includes the power to

determine the third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.

4.

Kansas courts recognize the common law rule that a debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses.

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed June 16, 2023. Affirmed in part, reversed in part, and remanded with directions.

Christopher M. Joseph and Carrie E. Parker, of Joseph, Hollander & Craft LLC, of Topeka, for appellant.

No appearance by appellee.

Todd E. Shadid, of Klenda Austerman LLC, of Wichita, for intervenors.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

MALONE, J.: Thomas A. Martin (Husband) appeals the district court's judgment granting Mid-Kansas Wound Specialists, P.A. (MKWS) and Emergency Services, P.A. (ESPA) (collectively, Intervenor) equitable liens against property in the marital estate resulting from Husband's pending divorce from Nancy J. Martin (Wife). The main issue on appeal is whether the district court erred in granting Intervenor's request for equitable liens against specific assets in the marital estate while the divorce was still pending and before the marital property had been divided between Husband and Wife.

Under the facts presented here, we find the district court had the authority and did not err in granting Intervenor's request for equitable liens against specific assets of the

marital estate. But we find the district court erred in removing this property from the marital estate. The property subject to Intervenors' liens remains part of the marital estate and must be divided between the spouses by decree under Kansas' statutory procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Wife worked for Intervenors as a business administrator for many years. In May 2017, Intervenors discovered that Wife had been secretly taking millions of dollars from the two businesses. Husband and Wife lived a comfortable lifestyle despite Wife's only employment as a business administrator and Husband's only reported source of income being social security retirement benefits. They owned residences in Wichita and Phoenix; farmland; an extensive art collection including paintings, sculptures, vases, and wine glasses; memberships in Exclusive Resorts; two Mercedes and a Lexus.

On October 31, 2017, Intervenors filed a lawsuit (civil action) against Husband, Wife, and various entities that Husband and Wife owned, alleging that Wife stole over \$6 million from Intervenors during her time of employment. The pleadings in the civil action alleged that Husband conspired with Wife to embezzle the funds from Intervenors and that Husband aided and abetted Wife in the embezzlement. The pleadings also alleged that Husband and Wife used the embezzled funds to maintain an extravagant lifestyle they could not otherwise afford, and they used the embezzled funds to support their businesses and acquire real estate and other assets.

After Intervenors had filed their civil action against Husband and Wife, Husband filed for divorce from Wife. Wife did not respond in either case. On July 27, 2018, the district court awarded Intervenors a default judgment against Wife in the civil action for \$6,265,221.06 in actual damages and \$4,859,823.96 in punitive damages, plus interest and costs. Intervenors have obtained no judgment against Husband in the civil action as of the time of this appeal. On August 8, 2018, the district court granted a default decree

of divorce between Husband and Wife that reserved the issue of property division for the future. No division of property between Husband and Wife has been ordered in the divorce case as of the time of this appeal.

Pretrial motions and proceedings

After obtaining the default judgment against Wife, Intervenors moved in the civil action to seize, store, and dispose of certain personal property belonging to Wife. In response, Husband argued that the pending divorce prohibited Intervenors from executing against any marital property until after the court presiding over the divorce divided the property. During a hearing on the motions in the civil action, Husband argued extensively that issues about property had to be taken up in the divorce case, which had exclusive jurisdiction over the marital estate. On October 19, 2018, the district court in the civil action found that it lacked jurisdiction to grant the relief that Intervenors had requested, and it denied Intervenors' motion without prejudice.

In the divorce case, Husband moved for summary judgment on Intervenors' claims to any marital property. Husband argued that Intervenors could not assert an equitable claim against the marital estate because they only obtained a money judgment against Wife in the civil action, they did not have a civil judgment against Husband, and caselaw prohibited execution against the marital estate during a pending divorce. After hearing arguments of counsel, the district court denied summary judgment and found that Husband was judicially estopped from contesting Intervenors' claims in the divorce case because it conflicted with the position he had argued in the civil action.

In a trial memorandum filed in the divorce case, Intervenors claimed the following marital property was subject to a constructive trust or equitable lien in favor of Intervenors because the purchase of the property could be traced to embezzled funds:

- Items of art such as paintings, sculptures, vases, and wine glasses;
- Membership interest in Exclusive Resorts;
- Real estate such as the Gatewood residence, Arizona residence, and farmland;
- Fidelity brokerage account;
- Farm implement; and
- Life insurance policies.

Husband filed a trial memorandum objecting to Intervenors' claims for a constructive trust and equitable liens asserting, among other arguments, that the Kansas Supreme Court's decision in *In re Marriage of Smith*, 241 Kan. 249, 737 P.2d 469 (1987), prohibits creditors from executing on property in a marital estate based on a judgment obtained against one spouse during a divorce action until a determination is made on how the property should be divided in the divorce. Husband also asserted that Wife had reimbursed Intervenors over \$2 million and specifically identified the reimbursement checks to embezzled funds. As a result, Husband argued that liens should not attach to property traced to embezzled funds after Wife had repaid the specific debts.

The bench trial

The divorce case proceeded to a bench trial on April 8, 2021. At the beginning of the trial, Intervenors' counsel introduced, and the district court admitted, almost 50 exhibits tracing the acquisition of specific assets in the marital estate to funds embezzled by Wife. Likewise, Husband's counsel introduced, and the district court admitted, Exhibits A through D consisting of Wife's reimbursement checks purportedly showing how Wife matched each reimbursement check with funds she had stolen from Intervenors. The exhibits showed that in 2016 Wife had secretly repaid \$1,856,803.34 of the money she had stolen from Intervenors before the theft was discovered. Wife repaid another \$149,167.16 in July 2017 after the theft was discovered. The parties agreed they

did not need to address each exhibit at trial because the facts on the tracing of assets to embezzled funds were not in dispute—only the legal effect of the reimbursement payments was being contested in the trial.

Only two witnesses testified at the trial. Intervenors called Tracey Reed, a legal assistant for their counsel's law firm. Reed testified that she identified and traced the specific instances and amounts of Wife's thefts and partial repayments. Reed testified that after she traced the stolen and repaid funds, she was instructed to apply the repayments chronologically starting with the earliest known thefts in 2006. This method of repayment led to Wife's debt being repaid for the amounts she stole in or before 2009, with all debts from 2010 and after still outstanding.

Husband called Jeffrey Quirin, Ph.D., a professor of accounting, as a witness. Quirin testified that when Wife deposited her reimbursement checks, she wrote on the memo lines a check number for an earlier check that she had used to steal Intervenors' funds. Wife also matched her repayment amounts to the exact amount taken in each check referenced in the repayment checks' memo line. Using this "specific identification" method of repayment, Quirin testified that Intervenors had been fully reimbursed for the embezzled funds used to purchase the artwork and items at the Arizona property, and they had been partially reimbursed for the embezzled funds used to purchase some of the other property subject to Intervenors' claimed equitable liens. But Quirin also testified that his opinion was not based on Kansas law, he did not know how Kansas law would treat the facts, and he would not challenge how the court ruled on the matter.

The district court's decision

On March 15, 2022, the district court filed a 22-page memorandum decision ruling in Intervenors' favor. In broad terms, the district court reasserted its summary judgment ruling that Husband was judicially estopped from contesting Intervenors' claims asserting

a constructive trust and equitable liens against specific assets traced to the stolen funds, reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action. Alternatively, the district court ruled on the merits of Intervenors' claims. The district court denied Intervenors' request for an equitable lien on farmland in the marital estate. But the district court granted Intervenors' request for equitable liens against the remaining assets they had traced to funds embezzled by Wife. The district court stated: "The Court's rulings above are predicated on the notion that assets purchased with stolen money are not properly part of the marital estate." Finally, the district court found that Intervenors could apply Wife's repayments as they saw fit and the general rule allowing a debtor to apply payments to specific debts did not affect Intervenors' equitable liens on specific assets traced to stolen funds.

On May 25, 2022, the district court issued its "Judgment Imposing Equitable Lien on Specific Assets." The judgment reaffirmed the district court's memorandum decision imposing an equitable lien in favor of Intervenors on certain property "thereby removing such property or the portion subject to an equitable lien from the marital estate." The judgment listed the assets to which an equitable lien attached including the principal and interest values of the debt associated with each asset. It authorized Intervenors to execute on the property subject to their liens pending an appeal, except for the Gatewood residence and the life insurance policies, but directed that the net proceeds of any sale must be deposited with the clerk of the district court. Our record does not reflect whether any property has been sold pending this appeal. The district court directed entry of judgment under K.S.A. 60-254(b), and Husband timely appealed.

On appeal, Husband claims the district court erred in finding he was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to stolen funds. Husband also argues that the district court's order granting Intervenors equitable liens against property in the marital estate "directly contravenes Kansas Supreme Court precedent, disregards the statutory

definition of marital property, exceeds the divorce court's equitable authority, and erroneously substitutes equitable relief for execution." Finally, Husband argues that if it was proper for the district court to grant equitable liens against property traced to embezzled funds, the liens should not have been granted against property traced to embezzled funds that Wife had reimbursed. We will address each issue in turn.

Husband does not challenge in this appeal any findings made by the district court tracing embezzled funds to specific assets in the marital estate and the principal and interest values of the debt associated with each asset. An issue not briefed is considered waived or abandoned. *Cook v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008).

DISTRICT COURT'S RULING APPLYING JUDICIAL ESTOPPEL

To begin, we will address whether the district court erred in finding that Husband was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to the stolen funds, based on the district court's reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action. Husband argues on appeal that the harsh remedy of judicial estoppel was inappropriate, given that his arguments in the two cases remained consistent, did not mislead the district court, and afforded Husband no unfair advantage. Intervenors respond that Husband should be estopped from changing his earlier position taken in the civil action.

"Judicial estoppel precludes a party from taking one position in a case to induce the court to act in a certain way and then taking a contrary or conflicting position in a related proceeding involving the same opposing parties." *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 262, 261 P.3d 943 (2011). A court may apply judicial estoppel to preserve "the essential integrity of the judicial process." 46 Kan. App. 2d at 263. Kansas courts have not established a definitive standard of review for judicial

estoppel, but this court has acknowledged with approval that most federal courts, including the Tenth Circuit, apply an abuse of discretion standard. *Midwest Crane and Rigging v. Schneider*, No. 113,725, 2016 WL 1391805, at *10 (Kan. App. 2016) (unpublished opinion). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

Intervenors at first moved in the civil action to seize, store, and dispose of certain personal property belonging to Wife. Husband argued—correctly—that the holding in *Smith* required that any claims to marital property must be adjudicated in the divorce case which had exclusive jurisdiction over the marital estate. The district court in the civil action agreed with Husband and found that it lacked jurisdiction to grant the relief that Intervenors had requested, and it denied Intervenors' motion without prejudice. But later in the divorce case, the district court ruled that Husband was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to the stolen funds, reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action.

Husband now claims that judicial estoppel is inappropriate because he did not concede to any of Intervenors' claims in the civil action, and instead only argued that the issue must be taken up in the divorce case. We agree. The record shows that Husband did not concede to any of Intervenors' claims to the property in the civil case; he merely contended that Intervenors' claims should be argued in a different forum. Husband's arguments in the civil action did not extend further than that. Nothing about Husband's position in the civil action precluded him from arguing against the merits of Intervenors' claims in the divorce case. Indeed, the record shows that Husband raised nearly identical arguments in both cases. The district court erred to whatever extent it relied on judicial estoppel in ruling for Intervenors in the divorce case.

But we see this error as a nonissue. Even though the district court erred in applying judicial estoppel, the error did not matter because the district court still addressed the merits of the parties' claims and objections. As the district court stated in its memorandum decision: "In any event, even if [Husband] was not judicially estopped from objecting to the Intervenor's claim of an equitable lien on certain assets of the marital estate, the objection is without merit." The district court proceeded to address whether Intervenor's claims for equitable liens against specific assets in the marital estate were barred by *Smith* and how to account for Wife's reimbursement checks. Ultimately, the district court resolved the parties' claims on those issues on the merits. Thus, the district court's ruling on judicial estoppel was not reversible error.

DID THE DISTRICT COURT ERR IN FINDING THAT IT COULD GRANT INTERVENORS' REQUEST FOR EQUITABLE LIENS AGAINST SPECIFIC ASSETS IN THE MARITAL ESTATE?

Husband's main argument on appeal is that the district court's order granting Intervenor's equitable liens against property in the marital estate "directly contravenes Kansas Supreme Court precedent, disregards the statutory definition of marital property, exceeds the divorce court's equitable authority, and erroneously substitutes equitable relief for execution." More specifically, Husband argues that *Smith* directly precludes the district court from granting an equitable lien on the property. Husband also argues there is no exception to K.S.A. 2022 Supp. 23-2801's mandate that all property owned by married persons or acquired by either spouse after marriage becomes marital property at the time of the commencement of an action for divorce and remains in the marital estate until it is divided between the spouses by decree. Husband asserts that while the district court has broad discretion to equitably divide property between spouses in a divorce action, that equitable discretion does not extend to the determination of what assets comprise the marital estate. Finally, Husband argues that it was error to grant Intervenor's a postjudgment equitable remedy to collect its judgment when Intervenor had only elected the legal remedy of a money judgment against Wife.

Intervenors assert that the divorce court's exclusive jurisdiction over the marital estate includes the power to determine a third party's interest in specific assets in the marital estate. Intervenors distinguish *Smith* and explain why that case does not control the outcome of this appeal. Intervenors also explain why they can assert a constructive trust and equitable liens against specific assets traced to stolen funds even though they only have a money judgment against Wife.

The parties agree that resolution of this issue involves the interpretation of statutes and the application of law to undisputed facts. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Naheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). The application of law to undisputed facts is subject to unlimited review. *University of Kansas Hosp. Auth. v. Board of Wabaunsee County Comm'rs*, 299 Kan. 942, 951, 327 P.3d 430 (2014).

In re Marriage of Smith

Husband first argues that *Smith* directly precludes the district court from granting Intervenors' request for an equitable lien against property of the marital estate before the divorce court had divided the property between Husband and Wife. *Smith* involved facts like those here. In *Smith*, the husband filed for divorce and while the divorce case was pending, the husband's employer discovered that he had wrongfully converted corporate funds during his employment. The employer sued the husband for embezzlement, fraud, and conversion, and obtained a money judgment against him while the divorce was still pending. The employer intervened in the divorce case and sought to collect its judgment against the husband by executing on the property in the marital estate. The district court ruled in the employer's favor and found that the employer's interest in the property took priority over any claim that the wife had to the marital estate. On appeal, this court reversed the district court's judgment. 241 Kan. at 249-50.

The Kansas Supreme Court took the case and considered the issue of "whether the Court of Appeals erred in holding that a creditor who obtains a judgment against one spouse during the pendency of a divorce action is precluded from collecting its judgment by executing against or claiming a lien on property owned individually or jointly by the debtor spouse." 241 Kan. at 250-51. The Kansas Supreme Court affirmed this court's ruling with the following holding:

"We hold that the filing of a petition for divorce creates a species of common or co-ownership and a vested interest in one spouse in all the property individually or jointly owned by the other, the extent of which is to be determined pursuant to K.S.A. 1986 Supp. 60-1610(b). Until that determination is made by the trial court, the property is not subject to a lien or execution *based on a judgment obtained against one spouse during the pendency of the divorce action.*" (Emphasis added.) 241 Kan at 256.

At first glance, the holding in *Smith* indeed seems to support Husband's argument here that the district court could not grant Intervenors' request for an equitable lien against any property in the marital estate until the divorce court divided the property between Husband and Wife. But as Intervenors explain, one important distinction between *Smith* and the case here is that the creditor in *Smith* made no claim tracing specific assets of the marital estate to the stolen funds. As the *Smith* court stated: "We note that there is no evidence in the present case to indicate that the property appellee seeks to acquire is the product of the assets that [the husband] converted, or that [the wife] knew of the conversion." 241 Kan. at 254. Here, it has been determined by the district court—and not challenged on appeal—that the property subject to Intervenors' claimed equitable liens is the product of the assets that Wife converted.

In *Smith*, the husband's employer-creditor had a money judgment against husband and was trying to collect that judgment by executing on property of the marital estate while the divorce was pending and before the court had divided the property between the husband and the wife. The employer-creditor made no claim tracing specific assets of the

marital estate to funds the husband had embezzled. *Smith* plainly prohibits that kind of interference in marital property while a divorce is pending. But that is not what is happening here. Intervenors have established a constructive trust tracing specifically identified assets purchased by Husband and Wife with funds Wife embezzled from Intervenors. Intervenors assert that the constructive trust against specific assets gives them an interest in those assets that is superior to the interest held by either spouse.

Intervenors point to an even more important reason why the holding in *Smith* does not apply here. *Smith* holds that until marital property is divided between the spouses in a divorce, the property is not subject to a lien or execution "based upon a judgment obtained against one spouse during the pendency of the divorce action." 241 Kan. at 256. But Intervenors' constructive trust against assets traced to stolen funds is not based on their judgment against Wife in the civil action. Intervenors acknowledge in their brief that they cannot execute on their judgment against Wife in the civil action by trying to attach a lien against undivided property in the marital estate. But that is not what they are doing here. Intervenors have pursued the constructive trust and equitable lien theory only against Husband as part of the equitable remedy they are seeking in the divorce case.

The district court's memorandum decision found that "[t]he *Smith* decision stands for the proposition that assets of the marriage that are the by-product of fraud are not part of the marital estate and are subject to the claims of the party against whom the fraud was committed." On appeal, Husband asserts this statement is incorrect, and we agree in part. As we will explain, the statutory definition of marital property includes all property owned by married persons or acquired by either spouse after marriage. That includes the property Husband and Wife purchased with the money Wife embezzled from Intervenors. But although this property is part of the marital estate—and the district court erred in finding it was not—the court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, it also

includes the power to determine a third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.

Still, Husband insists that the district court cannot grant a lien on any marital property in a pending divorce until the court first divides the property between the spouses, and he emphasizes one sentence from *Smith* to support his argument. The *Smith* court, in discussing the rights of third-party creditors with potential claims against marital property in a pending divorce, observed that "[i]f the third party could prove that the property *decreed* to the nondebtor spouse was the product of fraud against it, it would have a claim to that property." (Emphasis added.) 241 Kan. at 255. Husband argues in his brief that by using the term "decreed" in this sentence, the *Smith* court "contemplat[ed] that even assets of the marriage that a third party claims or has proved to be by-products of fraud *are* part of the marital estate and subject to division."

As we said, the assets Husband and Wife purchased with stolen money *are* part of the marital estate. But that fact does not necessarily mean that the property must be divided between Husband and Wife before the district court can determine a third party's claimed interest in the property. Here, the district court traced assets in the marital estate to money that Wife embezzled from Intervenors—and those findings are not challenged on appeal. As we will explain, the district court had the authority and did not err in granting Intervenors' request for equitable liens against those assets.

A careful reading of *Smith* reveals that it is distinguishable and does not control the outcome of this appeal. We disagree with Husband's fundamental assertion that the district court's order granting Intervenors equitable liens against property in the marital estate directly contravenes Kansas Supreme Court precedent in *Smith*.

Statutory definition of marital property

Husband next argues that the district court's judgment for Intervenors disregards the statutory definition of marital property. K.S.A. 2022 Supp. 23-2801 states:

"(a) All property owned by married persons, . . . or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment.

"(b) Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 2022 Supp. 23-2802, and amendments thereto."

The predecessor statute to K.S.A. 2022 Supp. 23-2801 was K.S.A. 23-201(b) which also defined marital property as all property owned by married persons or acquired by either spouse after the marriage. K.S.A. 2022 Supp. 23-2802(a) sets forth a procedure for the division of marital property between spouses by decree. In making the division of property, the district court shall consider several factors in the statute. K.S.A. 2022 Supp. 23-2802(c); see also K.S.A. 60-1610(b)(1) (predecessor statute which sets forth the same procedure for the division of marital property between the spouses by decree and factors for the court to consider).

Husband asserts there is no exception to K.S.A. 2022 Supp. 23-2801's mandate that all property owned by married persons or acquired by either spouse after marriage becomes marital property when a divorce commences and remains in the marital estate until it is divided between the spouses by decree. Intervenors acknowledge the statutory definition of marital property and agree that a divorce court has exclusive jurisdiction over the property in a marital estate. But Intervenors assert the divorce court's exclusive

jurisdiction over the marital estate includes the power to determine a third party's interest in marital property and nothing in the statutes prohibits this procedure.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *Montgomery v. Saleh*, 311 Kan. 649, 654, 466 P.3d 902 (2020). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. 311 Kan. at 654. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 311 Kan. at 654-55. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

It is well settled law in Kansas that upon the filing of a petition for divorce each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held by them. *Smith*, 241 Kan. at 251; *Cady v. Cady*, 224 Kan. 339, 344, 581 P.2d 358 (1978). Under K.S.A. 2022 Supp. 23-2801, marital property includes all property owned by married persons or acquired by either spouse after the marriage. The parties do not dispute this definition, even though the district court found otherwise when it stated that "assets purchased with stolen money are not properly part of the marital estate." As we said, this finding was legally erroneous and contrary to the plain and unambiguous language of K.S.A. 2022 Supp. 23-2801(a). See *Nicholas v. Nicholas*, 277 Kan. 171, 177-84, 83 P.3d 214 (2004) (discussing marital property and holding that a spouse did not dispose of marital property by changing the beneficiary on pay on death accounts, transfer on death accounts, and life insurance policies).

Divorce court's power to determine third party's interest in marital property

While the parties agree on the meaning of marital property and that a divorce court has exclusive jurisdiction over the property in a marital estate, they disagree on the court's power to determine a third party's claimed interest in marital property. Husband asserts that all marital property must be divided between the spouses by decree and that the court lacks the power to determine a third party's claimed interest in the property. Intervenors assert that the divorce court's exclusive jurisdiction over the marital estate includes the power to determine a third party's claimed interest in the property.

Intervenors cite two older Kansas Supreme Court cases to support their argument. In *Cadwell v. Cadwell*, 162 Kan. 552, 178 P.2d 266 (1947), a wife filed for a divorce from her husband seeking custody of their four-year-old son and also a division of real and personal property. A third party, the wife's mother, petitioned to intervene in the divorce, claiming that she had furnished the husband and wife with sums of money and that she was the owner of certain items of personal property in the marital estate and the equitable owner of the real estate. The husband moved to strike the petition to intervene, which the district court denied. On appeal, the Kansas Supreme Court affirmed the district court's decision to allow the third party to intervene in the divorce case to assert her claimed interest in the marital property. 162 Kan. at 555-58.

In *Breidenthal v. Breidenthal*, 182 Kan. 23, 318 P.2d 981 (1957), a wife filed for divorce from her husband seeking child custody, alimony, and property division. As part of the divorce action, the wife joined as parties four members of a family partnership in which her husband allegedly owned a one-fifth interest, and secured an order restraining the defendants from altering the partnership interests until she could fully determine the value of her husband's interest in the partnership. The district court sustained a motion by the defendants other than the husband to dismiss the action and dissolve the restraining order as to them on the ground that they could not be joined as parties in a divorce action.

On appeal, the Kansas Supreme Court reversed the district court's order dismissing the action against the defendants other than the husband and dissolving the restraining order as to them. 182 Kan. at 33. While recognizing that the husband and wife are generally the only proper parties to a divorce action, the Kansas Supreme Court stated:

"However, the right of a wife to name as defendants third parties to whom the husband has conveyed his property in fraud of her rights, or third parties having, or claiming to have an interest in property involved in a divorce action, is universally accepted as the prevailing rule on the ground that the court, in the exercise of its duty to determine a reasonable amount of alimony to be awarded to the plaintiff, *must determine whether the property is in fact owned by the husband or by the third [party] defendant.* [Citation omitted.]" (Emphasis added.) 182 Kan. at 28.

Breidenthal and *Cadwell* hold that third parties asserting an interest in property of a marital estate can intervene or be joined as parties in a divorce action. In this situation, the divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, but it also includes the power to determine the third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.

On appeal, Husband does not dispute that MKWS and ESPA could intervene as third parties in the divorce case, consistent with the rules of civil procedure. See K.S.A. 2022 Supp. 60-219; K.S.A. 2022 Supp. 60-224. But Husband asserts that after MKWS and ESPA intervened in the divorce case, the court had no power to determine their interest in the marital property. Husband argues that the divorce court only has the power to equitably divide the marital property between the spouses and that the district court's order granting Intervenors' request for equitable liens against specific assets in the marital estate traced to stolen funds "exceeds the divorce court's equitable authority."

We disagree. K.S.A. 2022 Supp. 23-2801 is clear and unambiguous to the extent that it defines marital property, but it does not address the situation in which a third party intervenes in the divorce case and claims an interest in the property. Likewise, K.S.A. 2022 Supp. 23-2802 is clear and unambiguous in describing how marital property is divided between the spouses by a divorce decree. But the divorce court's order granting Intervenors' request for equitable liens against the marital property traced to stolen funds is based on a constructive trust theory that is a remedy separate and distinct from the statutes governing the division of marital property between the spouses by decree. The divorce court's power to determine all interests in marital property is necessary for the court to properly perform its duties of equitably dividing the marital property.

There is no question the divorce court has the exclusive jurisdiction to resolve competing interests in marital property. The divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, but it also includes the power to determine a third party's interest in the property. Stated another way, all property owned by married persons or acquired by either spouse after the marriage is marital property, but if there is a dispute involving a third party's interest in the property and the interest held by either spouse, it must be resolved by the divorce court. Nothing about this process is contrary to the statutes defining marital property and the procedure for dividing property by a divorce decree.

Election of remedies

Finally, Husband argues that it was error to grant Intervenors a postjudgment equitable remedy to collect its judgment when Intervenors had only elected the legal remedy of a money judgment against Wife. But as the district court found, Husband's argument is premised on his misunderstanding of a constructive trust. A constructive trust "is a remedy for unjust enrichment." *Nelson v. Nelson*, 288 Kan. 570, 579, 205 P.3d 715 (2009). "[T]he constructive trust remedy is res specific; a constructive trust is essentially

a tracing remedy, allowing recovery of the specific asset or assets taken from the plaintiff, any property substituted for it, and any gain in its value." 288 Kan. at 580. "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if permitted to retain the property, a constructive trust arises." 288 Kan. 570, Syl. ¶ 7.

Husband cites *Walsh v. Weber*, No. 113,972, 2016 WL 4750102, at *25 (Kan. App. 2016) (unpublished opinion), for the proposition that a district court "may impose a personal money judgment or an equitable remedy such as [a] constructive trust, but not both." See also *Griffith v. Stout Remodeling, Inc.*, 219 Kan. 408, 411-12, 548 P.2d 1238 (1976) (discussing doctrine of election of remedies as an application of the law preventing a party from taking or occupying inconsistent positions). But as Intervenors point out, to any extent they needed to elect remedies, it applied only to their claims against Wife. As we have already discussed, Intervenors' claimed constructive trust covering assets traced to the stolen funds is not based on their judgment against Wife in the civil action. Intervenors have pursued the constructive trust and equitable lien theory only against Husband. The doctrine of election of remedies does not apply here.

In sum, we disagree with Husband's fundamental assertion that the district court's order granting Intervenors equitable liens against property in the marital estate directly contravenes Kansas Supreme Court precedent in *Smith*. The property purchased with funds Wife embezzled from Intervenors is marital property, and the district court erred in finding otherwise. But the divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide marital property between the spouses, it also includes the power to determine a third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse. Nothing about this process is contrary to the statutes defining marital property and the procedure for the district court to divide property between the spouses by a divorce decree. Finally,

the remedy of a constructive trust and equitable liens against specific assets traced to the stolen funds did not violate the doctrine of election of remedies.

Husband argues that we must reverse the district court's judgment and remand with directions for the district court to equitably divide the marital property between Husband and Wife before it can grant Intervenors' request for any liens on the property. K.S.A. 2022 Supp. 23-2802 sets forth a procedure for the district court to divide marital property between the spouses by a divorce decree, but it does not say the property must be divided by decree before the district court can determine a third party's interest in the property. In fact, Husband fails to explain how the district court could equitably divide the property between the spouses without first determining Intervenors' interest in the property. After all, it would not be equitable for the district court to divide the marital property between the spouses and then have Husband find out later that much of the property awarded to him is subject to Intervenors' claims.

Instead, it seems like the district court took the better approach—it first determined Intervenors' interest in the marital property so it will know to what extent the property is subject to equitable liens before dividing the property between the spouses. This procedure is consistent with K.S.A. 2022 Supp. 23-2802(c) which provides that in making the division of property, the district court shall consider many factors including "such other factors as the court considers necessary to make a just and reasonable division of property." Under the facts presented here, we conclude the district court did not err in granting Intervenors' request for a constructive trust and equitable liens against specific assets traced to funds Wife embezzled from Intervenors.

SHOULD THE LIENS HAVE BEEN GRANTED AGAINST PROPERTY TIED TO EMBEZZLED FUNDS THAT WIFE REIMBURSED?

Husband next claims that the district court erred in allowing Intervenors to apply Wife's repayments as they saw fit rather than as Wife directed. Husband asserts that under the general rule, voluntary payments made by a debtor to a creditor must be applied as the debtor directs, and even embezzlers are permitted to direct how their voluntary payments are to be applied. Husband argues that Wife's repayments were voluntary and that she communicated her directions on how the repayments were to be applied. Thus, Husband argues that if it were proper for the district court to grant equitable liens against property traced to embezzled funds, the "liens should not have been granted against property tied to embezzlement checks that were specifically reimbursed."

Intervenors argue that the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated does not apply in cases of theft. And even if the general rule did apply here, Intervenors argue that Wife's repayments were not voluntary; Wife failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments; Wife repaid the wrong creditor and thus did not properly direct how the repayments should be applied; and Wife did not pay any interest on her debts which was necessary to satisfy the debts.

Although Husband designated an expert witness to testify about how Wife's repayments should be applied, the witness conceded his opinion was not based on Kansas law, and he did not know how Kansas law would treat the facts involving Wife's repayments of some of the embezzled funds. The parties agreed the facts were not in dispute and only the legal effect of the reimbursement payments was being contested at trial. The application of law to undisputed facts is subject to unlimited review. *University of Kansas Hosp. Auth.*, 299 Kan. at 951.

We will briefly review the relevant facts. In 2016, before Wife's embezzlement was discovered, she deposited into ESPA's account \$1,856,803.34 that she took from MKWS. Wife also deposited into MKWS's account another \$149,167.16 after her theft was discovered. On the various checks she deposited, she wrote a number on the memo line corresponding to the check numbers of various checks that she used to embezzle the money in the first place. The repayment checks were also written in the exact amounts as the checks referenced in the memo line. After discovering Wife's scheme, Intervenors applied her repayments chronologically starting with the earliest known debts instead of to the specific debts referenced in the memo lines of the reimbursement checks.

Based on these undisputed facts, the district court found that the general rule allowing a debtor to direct how voluntary payments should be allocated—which the district court called the "debtor-creditor rule"—did not apply in cases of theft. Alternatively, the district court found that the general rule would not apply here because Wife's repayments were not voluntary; Wife failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments; and Wife repaid the wrong creditor with her reimbursement checks.

"At common law, the general rule is that a debtor has a right to make the appropriation of payments to particular obligations, but if the debtor fails to do so, the right passes to the creditor, and if both fail to do so, the court will make the application. No third person may control or compel an appropriation different from that agreed on or made by the debtor or creditor. The rules relating to the application of payments are used only if the parties have not reached an agreement concerning where the payments are to be applied.

"Once the application of a payment is made to a particular obligation by either the debtor or the creditor, it is final and conclusive. However, the general rules regarding the application of the payments will not be followed when, from the circumstances surrounding the case, it appears that their application would be inequitable or unjust." 60 Am. Jur. 2d, Payment § 55.

Kansas courts recognize the common law rule that a debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses. See, e.g., *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, Syl. ¶ 1, 696 P.2d 936 (1985) ("Voluntary payments made by a debtor shall be applied as the debtor directs, unless the money for the payment is security for the creditor's loan. Then the money belongs to the creditor to apply as it chooses."); *Aetna Casualty and Surety Co. v. Hepler State Bank*, 6 Kan. App. 2d 543, Syl. ¶ 13, 630 P.2d 721 (1981) ("If a debtor owes a creditor more than one debt, in the absence of a direction from the debtor to the creditor as to how a payment is to be applied, the creditor may elect to apply it to any debt he chooses.").

Turning first to whether the general rule applies in theft cases, we find it to be somewhat of a stretch to classify the relationship between Wife and Intervenors as a debtor/creditor relationship. Wife did not borrow money from Intervenors—she stole it. Equity does not favor a claim by either Husband or Wife that Wife should be able to direct how her repayments should be applied. But we note this court has discussed and applied the general rule that a debtor can direct how payments should be applied in two cases involving an employee's embezzlement of company funds. *Home Life Ins. Co. v. Clay*, 13 Kan. App. 2d 435, 440-42, 773 P.2d 666 (1989); *Aetna*, 6 Kan. App. 2d at 554-55. The cases both involved a bank that had cashed fraudulent checks, and the issue was whether the bank's liability for the loss could be offset by a partial recovery of the stolen funds. *Home Life Ins. Co.*, 13 Kan. App. 2d at 440-42; *Aetna*, 6 Kan. App. 2d at 554-55.

Assuming without deciding that the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated can apply in cases involving theft, we agree with the district court that the rule does not apply here to Wife's repayments to Intervenors. To begin, the district court found that the general rule would not apply here because Wife's repayments were not voluntary, but on this point we disagree. Involuntary payments are excluded from the general rule allowing the debtor to direct payments to a

certain debt. *Ram Co.*, 236 Kan. at 756; *In re Hart's Transfer & Storage, Inc.*, 6 Kan. App. 2d 579, 582, 631 P.2d 258 (1981). Kansas courts have typically defined involuntary payments as those compelled by court order or other legal mechanisms. See *State Bank of Downs v. Moss*, 203 Kan. 447, 455-56, 454 P.2d 554 (1969). The district court found that Wife's repayments were involuntary because she was compelled to make them to avoid detection of her theft in a company audit, but there is no authority to support that position. Thus, we find that Wife's repayments to Intervenors, while possibly motivated by an effort to conceal or reduce her culpability, were voluntarily made.

Although Wife's payments were voluntary, she failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments without notifying Intervenors. Under the general rule, the debtor's direction to the creditor on how a payment should be applied must be made at or before payment. 60 Am. Jur. 2d, Payment § 59. Until payment is made, the money is the debtor's property which the debtor is free to apply as he or she sees fit. *Ram Co.*, 236 Kan. at 756. But once payment is made, the money belongs to the creditor and the debtor no longer has authority to direct payment. 60 Am. Jur. 2d, Payment § 59.

This case presents a unique set of facts where Wife secretly made her payments without Intervenors having any knowledge of it at that time. On one hand, Wife did direct her repayments when they were made by written notations to specific checks, but on the other hand, she did not communicate those directions—or the payments themselves—to Intervenors. Because Wife did not make Intervenors aware that she was making payments, Wife essentially communicated her directions only to herself when she deposited the checks and lost ownership of that money. So by the time Intervenors discovered Wife's repayments and her uncommunicated directions, the money was already Intervenors' property to apply as they saw fit.

Finally, we agree with the district court that it matters that Wife repaid the wrong creditor with her reimbursement checks. Before Wife's embezzlement was discovered, she deposited into ESPA's account \$1,856,803.34 that she took from MKWS. As a result of this mix up, Wife failed to adequately communicate her directions how the repayments should be applied to the appropriate debts.

For these reasons, the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated does not apply to Wife's repayments to Intervenors. The district court did not err in allowing Intervenors to apply Wife's repayments as they saw fit. As a result, Wife's reimbursement checks did not affect Intervenors' equitable lien remedy.

CONCLUSION AND REMAND ORDER

This is a divorce case. The filing of the divorce petition between Husband and Wife created a marital estate, and the divorce court has exclusive jurisdiction over the property in the marital estate. All property owned by Husband and Wife or acquired by either of them after the marriage is marital property, including the property purchased with money Wife embezzled from Intervenors. K.S.A. 2022 Supp. 23-2801. The divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, but it also includes the power to determine Intervenors' interest in the property. The district court erred when it found that the assets purchased with stolen money are not part of the marital estate. But it did not err in granting Intervenors' request for a constructive trust and equitable liens against specific assets traced to funds Wife embezzled from Intervenors.

The district court's judgment granting Intervenors' request for equitable liens against specific assets traced to funds Wife embezzled from Intervenors is affirmed. The district court's judgment "removing" this property from the marital estate is reversed. All

marital property when the divorce action commenced must be divided between the spouses by decree under K.S.A. 2022 Supp. 23-2802. Our record reflects that the net proceeds of any marital property that may have been sold has been paid to the clerk of the district court. These proceeds are also marital property and must be divided. Any marital property awarded to Husband in the property division that the district court has traced to stolen funds is subject to Intervenor's equitable liens in the amounts determined by the district court—and not challenged on appeal. After the marital property is divided, Intervenor may execute on their money judgment against Wife. *Smith*, 241 Kan. at 256. The case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded with directions.