

NOT DESIGNATED FOR PUBLICATION

No. 103,354

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:
CATHY A. HENRY, n/k/a CATHENRY,
Appellee,

and

FRANK JOE HENRY,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; DAN K. WILEY, judge. Opinion filed March 4, 2011.
Affirmed in part, reversed in part, and remanded with directions.

Joseph W. Booth, of Lenexa, for appellant.

Ronald W. Nelson, of Ronald W. Nelson, P.A., of Lenexa, for appellee.

Before STANDRIDGE, P.J., MCANANY, J., and KNUDSON, S.J.

Per Curiam: Frank Joe Henry (Frank) appeals the district court's decisions arising from his postdivorce motions to modify future spousal maintenance for Cathy A. Henry (Cathy) and, alternatively, to set aside the parties' written property settlement agreement. There are two issues raised on appeal: (1) did the district err in its interpretation of the parties' settlement agreement; and (2) did the district court err in denying his motion to set aside the settlement agreement under K.S.A. 2010 Supp. 60-260(b)?

We hold the spousal maintenance provision within the property settlement agreement is not ambiguous, but the district court erred in its interpretation. We hold the district court did have jurisdiction to consider Frank's motion to modify future maintenance. Consequently, the appeal is remanded to the district court for a determination of Frank's motion on its merits. We further hold the district court did not err in denying Frank's motion to set aside the settlement agreement under K.S.A. 2010 Supp. 60-260(b).

Cathy filed for divorce from Frank on November 5, 2007. The district court held a hearing on the divorce petition on February 21, 2008. Cathy appeared at the hearing with counsel. Frank did not appear personally or by counsel, but the court noted that Frank was aware of the hearing because he had signed the decree. The parties presented the court with a stipulation and property settlement agreement (settlement agreement), which had been signed by Cathy and Frank. The settlement agreement included the following maintenance provision:

"2. **MAINTENANCE:** It is agreed by and between the parties that maintenance shall be paid to [Cathy] in the minimum amount of **One Hundred Thousand Dollars (\$100,000.00)** annually or 25% of [Frank]'s gross income, which consists of [Frank]'s salary and bonuses, whichever is greater, not to exceed \$130,000 annually through the period of 121 months (ending 2018). There is not to be any reduction in the maintenance during the 121[-]month period for any earned income of [Cathy]. However, maintenance may be subject to a proportionate reduction in the event [Frank]'s income decreases."

The district court found the settlement agreement to be valid, just, and equitable based on the "representations that there's the capacity to do this." The decree of divorce was granted, and Cathy and Frank's settlement agreement was incorporated by the district court in the divorce decree.

On December 9, 2008, Frank filed a motion to modify maintenance, arguing there had been a material change in circumstances since the previous order was entered. Both parties submitted written arguments stating their positions on the matter, and the district court considered Frank's motion on March 17, 2009. After hearing the parties' arguments, the district court determined that the settlement agreement was unambiguous and gave the court jurisdiction to modify maintenance, but the court could only modify maintenance between \$100,000 and \$130,000, as provided in the first sentence of the maintenance provision. As a consequence, the district court further determined it was without jurisdiction to consider Frank's motion for a reduction of maintenance in an amount less than \$100,000.

Subsequently, Cathy filed a motion to establish a payment schedule for maintenance. She asked the district court to set out a payment schedule to apportion the \$100,000 in maintenance throughout the year. In her memorandum in support of the motion, Cathy argued that the language of the settlement agreement was ambiguous as to whether maintenance was to be paid annually or monthly, so the court should interpret the parties' intent to be that the payments be monthly.

On June 10, 2009, Frank filed a motion to set aside the February 21, 2008, property settlement agreement pursuant to K.S.A. 2010 Supp. 60-260(b)(1), (4), or (6). In his memorandum in support of his motion, Frank argued the settlement agreement should have been set aside because it was void, was based on his attorney's mistake, and because sloppy drafting justifies the court granting relief from the operation of the judgment.

The district court held a hearing at which the parties argued their positions on Frank's motion to set aside the settlement agreement. At the end of the hearing, the district court stated it would wait to make a decision until the parties were done attempting to mediate or settle. The district court also stated if it decided the settlement

agreement should not be set aside, it would hold another hearing on Cathy's motion to establish a payment schedule.

The parties did not settle, so on September 21, 2009, the district court entered a journal entry in which it found Frank's only valid argument for setting aside the settlement agreement was under K.S.A. 2010 Supp. 60-260(b)(1). The district court held that because a motion under that subsection must be filed within a year of the judgment, Frank's motion was untimely.

The district court later held a hearing on Cathy's motion for a payment schedule and ultimately found the original maintenance order set forth an obligation for monthly maintenance payments. The district court then entered its journal entry from the March 17, 2009, hearing, concluding it was without jurisdiction to consider Frank's motion seeking downward modification of the spousal maintenance obligation.

Frank has filed a timely appeal.

Interpretation of the maintenance provision

Frank argues the district court erred in interpreting the maintenance provision in the settlement agreement. The parties agree that this court must review the district court's decision de novo, as interpretation of marital settlement agreements is subject to normal rules regarding contract interpretation. See *Drummond v. Drummond*, 209 Kan. 86, 91, 495 P.2d 994 (1972); *In re Marriage of Hudson*, 39 Kan. App. 2d 417, 426, 182 P.3d 25 (2008).

When interpreting written contracts, courts must first ascertain the parties' intent. If the terms of the contract are clear, the parties' intent must be determined from the contract language without applying rules of construction. *Carrothers Constr. Co. v. City*

of *South Hutchinson*, 288 Kan. 743, 751, 207 P.3d 231 (2009). Interpreting a contractual provision should not be done by isolating one particular sentence or provision. Courts must construe and consider the entire instrument from its four corners. *City of Arkansas City v. Bruton*, 284 Kan. 815, 832-33, 166 P.3d 992 (2007). "The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.] [Citation omitted.]" *Wichita Clinic v. Louis*, 39 Kan. App. 2d 848, 853, 185 P.3d 946, rev. denied 287 Kan. 769 (2008). The intent of the parties to a separation agreement must be determined from the agreement alone if the terms are unambiguous. *Dodd v. Dodd*, 210 Kan. 50, 55, 499 P.2d 518 (1972).

In interpreting the maintenance provision, the district court found that the third sentence of the maintenance provision, which states "maintenance may be subject to a proportionate reduction in the event [Frank]'s income decreases," meant the district court had jurisdiction to modify Frank's future maintenance that would be owed to Cathy. However, the district court then found that under the first sentence of the maintenance provision, any modification of maintenance by the court could only be within the range of \$100,000 and \$130,000.

Frank first argues that because the third sentence of the maintenance provision is a condition subsequent that does give the district court jurisdiction to modify spousal maintenance upon a showing that his income has decreased. Cathy argues the last sentence of the maintenance provision should not be interpreted as a condition subsequent because such conditions are disfavored and because a condition subsequent does not allow the contract to be modified but allows a party to the contract to void the contract altogether if one side does not perform a specific condition. In his reply brief, Frank claims Cathy improperly portrays the law regarding conditions subsequent.

We are not persuaded that a just resolution of the issue on appeal depends on whether the third sentence is a condition subsequent. K.S.A. 2010 Supp. 60-1610(b)(3) clearly allows for maintenance agreements to be modifiable, and neither party challenges the district court's finding that it had jurisdiction to modify the maintenance provision. Cathy spends her entire response to this issue arguing about conditions subsequent, which, in the end, do not matter to this analysis as there has been no cross-appeal from the district court's determination of limited jurisdiction under the third sentence of the maintenance provision.

Frank's second and more persuasive argument is that the district court's interpretation of the maintenance provision renders meaningless the third sentence of the provision and is inconsistent with the parties' expressed intent. Frank contends that the first sentence of the maintenance paragraph sets out the contractual parameters as to the amount of maintenance, which is to be 25% of his gross income with a minimum of \$100,000 and a maximum of \$130,000, and the third sentence permits the district court to consider modification below \$100,000 per year upon a showing of a material change in circumstances. According to Frank, the district court's interpretation of the maintenance provision effectively nullifies the parties' intent as expressed in the third sentence. Essentially, Frank's argument is that the district court's interpretation of jurisdiction conferred under the third sentence but circumscribed by the first sentence is a legal non sequitur and illusory, a result at odds with the parties' intent as expressed in the maintenance provision. We agree, noting that the district court's interpretation was reached by isolating one sentence rather than by considering the entire maintenance provision. See *Bruton*, 284 Kan. at 832-33.

Our Supreme Court has determined that K.S.A. 2010 Supp. 60-1610(b)(2) allows a divorce decree or settlement agreement to include maintenance that is modifiable based on the language in the agreement without an order of the court. See *In re Marriage of Monslow*, 259 Kan. 412, 420, 912 P.2d 735 (1996) ("It appears that the legislature [in

enacting amendments to K.S.A. 60-1610(b)(2) in 1982] contemplated modifications in maintenance payments to be triggered by events without court action."). But, K.S.A. 2010 Supp. 60-1610(b)(3) provides "[m]atters settled by an agreement incorporated in the decree, . . . shall not be subject to subsequent modification by the court except: (A) *As prescribed by the agreement* or (B) as subsequently consented to by the parties."

(Emphasis added.)

The first sentence of the settlement agreement contemplates modifications in spousal maintenance payments triggered by events that do not require active court intervention. Such modifications are consistent with the provisions of K.S.A. 2010 Supp. 60-1610(b)(2). Conversely, the last sentence in the maintenance provision is consistent with K.S.A. 2010 Supp. 60-1610(b)(3) and expresses the parties' intent to confer continuing jurisdiction upon the district court to modify spousal maintenance based on a showing of changed circumstances. We conclude the maintenance provision of the parties' written agreement read in its entirety is unambiguous and provides for both types of modifications. Our interpretation gives meaning and purpose to the third sentence of the maintenance provision and the expressed intent of the parties.

Accordingly, we remand the case to the district court for evidentiary hearing to consider Frank's motion on its merits requesting modification of maintenance.

Frank's request for alternative relief under K.S.A. 2010 Supp. 60-260(b)

Frank contends the district court erred in denying his motion to set aside the settlement agreement. We have decided to consider his argument on its merits.

Whether to grant relief from a judgment pursuant to K.S.A. 2010 Supp. 60-260(b) is within the sound discretion of the district court, and this court will only reverse the district court on a showing of abuse of discretion. *In re Marriage of Leedy*, 279 Kan. 311,

314, 109 P.3d 1130 (2005). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). Nevertheless, an error of law by the district court is by definition an abuse of discretion. *State v. Moore*, 287 Kan. 121, 135, 194 P.3d 18 (2008).

We conclude the district court's well-written memorandum decision and order dated September 20, 2009, and filed on September 21, 2009, contains detailed findings of fact supporting its legal conclusion that Frank was not entitled to relief under K.S.A. 2010 Supp. 60-260(b). We adopt the reasoning of the district court and its dismissal of Frank's motion to set aside the settlement agreement.

Conclusion

On remand the district court should proceed to hear and consider on its merits Frank's motion to modify spousal maintenance.

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