

NOT DESIGNATED FOR PUBLICATION

No. 93,730

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

MARY C. DIESEL,
Appellant,

and

MICHAEL E. DIESEL,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; JEAN SCHMIDT, judge. Opinion filed
December 2, 2005. Reversed and remanded with directions.

Alan F. Alderson, of Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C,
of Topeka, for appellant.

J. Richard Lake, of Holton, for appellee.

Before RULON, C.J., PIERRON and HILL, JJ.

Per Curiam: This case requires us to interpret a property settlement agreement and divorce decree in order to determine if the district court could modify a 121-month maintenance award. The district court ruled that the award could only be modified after the expiration of the initial 121-month period. Because the parties expressly recognized the court's authority to modify maintenance payments in the property settlement agreement and because the court restated that right to modify in the divorce decree, we hold that could only mean the maintenance payments already ordered could be modified by the court. We therefore reverse and remand.

Brief Background

The parties have agreed to the facts. Mary C. Diesel and Michael E. Diesel were divorced in Shawnee County on December 16, 1997. The divorce decree incorporated the parties' settlement agreement by reference.

That property settlement agreement stated the following regarding maintenance:

"Maintenance shall be paid to Petitioner by Respondent in the monthly amount of \$5,000 beginning on the 29th day of the month first following the entry of a

decree of a divorce, and on the same day of each of the following one hundred twenty (120) months, or the death of either party, or the remarriage of Petitioner, whichever event first occurs. The [district] [c]ourt shall reserve the right to *modify* or otherwise extend maintenance following expiration of the one hundred twenty-one months. Payment shall be accomplished by Respondent depositing the maintenance award into the checking account of Petitioner's choosing." (Emphasis added.)

The divorce decree also ordered maintenance under the following terms:

"Commencing on the 29th day of the month following the entry of a decree of divorce and on the 29th day of each consecutive month thereafter, Respondent shall pay to Petitioner for Petitioner's support and maintenance the sum of Five Thousand Dollars (\$5,000.00) per month for a period of one hundred twenty-one (121) months. The [district] [c]ourt reserves the power to *modify* or otherwise extend maintenance pursuant to K.S.A. 60-1610.

....

"Respondent's obligation for payment of maintenance to Petitioner shall terminate upon Petitioner's remarriage or upon the death of either party."
(Emphasis added.)

When respondent Michael E. Diesel asked the district court to either terminate or modify maintenance payments to petitioner Mary C. Diesel, his motion was denied. The court ruled that the property settlement agreement should be enforced as it was specifically adopted by the district court and incorporated into the divorce decree. According to the district court's reading, the property settlement agreement "does not allow for modification or extension prior to the expiration of 121 months."

Michael E. Diesel appeals, arguing that the district court did have jurisdiction to modify the maintenance award.

Standard of Review

Our standard of review in this case is unlimited because we are dealing with the interpretation and legal effect of written instruments. See *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

Analysis

An examination of two concepts, "modify" and "reinstatement," is beneficial in resolving this question. The statutes permit a district court to modify already existing

maintenance awards: "[the court] may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court." K.S.A. 2004 Supp. 60-1610(b)(2). Obviously only ongoing payments could be retroactively modified.

Reinstatement, on the other hand, means the extension of maintenance beyond the maximum 121-month period allowed in the initial order. See K.S.A. 2004 Supp. 60-1610(b)(2). Reinstatement is possible if "the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments." K.S.A. 2004 Supp. 60-1610(b)(2). Any motion for reinstatement is to be made by the recipient of maintenance under K.S.A. 2004 Supp. 60-1610(b)(2).

Neither the property settlement agreement nor the divorce decree in this case used the term "reinstatement." However, both reserved to the district court the power to "otherwise extend maintenance," and in context this meant reinstatement. The property settlement agreement specifically referred to the period of time beyond the 121-month maximum allowed by K.S.A. 2004 Supp. 60-1610(b)(2), and the divorce decree referred to the statute itself.

Regarding the use of "modify" in the property settlement agreement and the divorce decree, the district court erroneously read it to apply to the period *after* the initial award of maintenance had run. "In this case, the terms of the agreement regarding maintenance provided for modification or extension after the term of 121 months. That has not yet occurred."

But under K.S.A. 2004 Supp. 60-1610(b)(2), a district court has no jurisdiction to order maintenance beyond the initial term of 121 months unless that power is reserved in the divorce decree (which it was here) *and* the recipient files a motion for reinstatement (which Petitioner has not done). After all, a property settlement agreement retains some contractual characteristics even after incorporation into a divorce decree, *Dozier v. Dozier*, 252 Kan. 1035, 1039, 850 P.2d 789 (1993). The petitioner and respondent could not confer jurisdiction upon the district court to modify maintenance beyond the 121-month term. See *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 814, 987 P.2d 1096 (1999) ("[P]arties cannot confer subject matter jurisdiction by consent, waiver, or estoppel.").

Therefore, unless the term "modify" in the property settlement agreement and the divorce decree is a nullity, it could only mean modification of maintenance already ordered in this case. See *Atteberry v. Ritchie*, 243 Kan. 277, 282, 756 P.2d 424 (1988)

(rejecting an interpretation which would render specific contractual provisions a nullity). As respondent argues, "[w]hy would anyone agree that spousal maintenance must remain fixed and absolute until after it has all been paid?" Respondent is incorrect, however, in asserting the property settlement agreement is ambiguous in this regard. There is no need here, as with ambiguous writings, to consider facts such as the circumstances surrounding the agreement. See *Amoco Production Co. v. Wilson, Inc.*, 266 Kan. 1084, 1088, 976 P.2d 941 (1999) (giving factors considered when writings are ambiguous). It is well established that contracting parties are presumed to know existing law and that such law is read into contracts. *Beckman v. Kansas Dept. of Human Resources*, 30 Kan. App. 2d 606, 613, 43 P.3d 891 (2002). This means that, in addition to the district court's direct citation of the statute in the divorce decree, the law, K.S.A. 2004 Supp. 60-1610(b)(2) is read into the parties' property settlement agreement.

We believe that the parties recognized the district court's authority to modify maintenance in the property settlement agreement, and when the district court restated this right in the divorce decree, it could only have meant modification of maintenance already ordered. The district court erred when it concluded the "circumstances prescribed in the decree," K.S.A. 2004 Supp. 60-1610(b)(2), and those "prescribed by the agreement," K.S.A. 2004 Supp. 60-1610(b)(3), referred to modification after the initial

121-month maintenance award. The court should entertain the motion to modify or terminate maintenance prior to the expiration of 121 months.

Reversed and remanded for further proceedings in conformity with this opinion.