

NOT DESIGNATED FOR PUBLICATION

No, 96,424

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MARY COSMAS KOPULOS,

Appellee

and

LEONARD GEORGE KOPULOS,

Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL, judge. Opinion filed April 20, 2007. Affirmed.

Amanda A. Thilges, J. Bradley Short, and Ray L. Borth, of Short & Borth, of Overland Park, for appellant.

Allan K Coon, of Norton, Hubbard, Ruzicka & Creamer, L.C., of Olathe, for appellee.

Before GREENE, P.J., CAPLJNGER, J., and BRAZIL, Si.

Per Curium: Leonard George Kopulos appeals the trial court's denial of his motion to alter or amend its prior order extending maintenance for the support of Mary Cosmas Kopulos. Leonard argues that the trial court lacked subject matter jurisdiction to extend his maintenance obligation and requests that this court remand the case to the trial court to grant judgment against Mary for the maintenance he has paid since the trial courts order. We affirm.

Leonard and Mary were married on May 13, 1984. Three children were born in the marriage: George Louis Kopulos, who is severely handicapped with autism, born on June 7, 1985; Dena Marie Kopulos, born on November 7, 1987; and Demetra Evelyn Kopulos, born on January 24, 1991. In 2000, Mary filed a petition for. The trial court entered a temporary order directing Leonard to pay Mary child support in the amount of \$2,357 per month and maintenance in the amount of \$2,541 per month, both starting on April 1, 2000.

Leonard and Mary signed a separation and property settlement agreement (PSA). In the PSA, Leonard and Mary agreed that Leonard would pay Mary maintenance in the amount of \$2,541 per month for a period of 20 months beginning on April 1, 2000, and continuing through November 1, 2001. Beginning on December 1, 2001, Leonard agreed to pay Mary \$2,386 per month for a period of 47 months. The PSA provided that the last

maintenance payment would be payable on October 5, 2005. The PSA further provided that maintenance could be extended pursuant to K.S.A. 2006 Supp. 60-1610(b)(2) and amendments thereto. The PSA provided that any modifications of its terms must be in writing, signed by both parties, and formally acknowledged. Leonard and Mary further agreed in the *PSA* that Leonard would begin to fund a special needs trust for George's benefit on George's 18th birthday. As of the date of the hearing on Leonard's motion to alter or amend, the trust was not yet ready to be funded.

The trial court granted Leonard and Mary a divorce on November 16, 2001. The trial court found that Leonard and Mary's PSA was valid, just, and equitable; therefore, the court approved the PSA and incorporated it into the divorce decree. In the divorce decree, Leonard was ordered to pay Mary child support in the amount of \$1,799 per month beginning December 1, 2001. Leonard was further ordered to pay Mary maintenance in the amount of \$2,386 per month for 47 months beginning on December 1, 2001. The divorce decree provided that the maintenance provision was "modifiable as set forth in the parties' Separation and Property Settlement Agreement."

On October 28, 2005, Mary filed a pro se motion to extend maintenance. At the hearing on Mary's motion in November 2005, Leonard opposed the motion and argued that it was untimely. The trial court found that Leonard and Mary agreed in the PSA that

Leonard would pay maintenance until October 5, 2005, at which time his maintenance obligation would terminate if not reinstated pursuant to K.S.A. 2006 Supp. 60-1610(b)(2). The court also acknowledged that Mary filed her motion to extend maintenance after the maintenance termination date of October 5, 2005, agreed on in the PSA. The court ruled, however, that it was appropriate to extend maintenance because the settlement agreement permitted extension. The court ordered that maintenance be extended for a period of 3 years ending October 5, 2008.

On December 20, 2005, Leonard filed a motion to alter or amend the trial court's order. In his motion, Leonard argued that the trial court lacked subject matter jurisdiction to grant Mary's request for reinstatement of maintenance because Mary filed her motion after the last maintenance payment was due on October 5, 2005. Leonard further argued that the trial court lacked jurisdiction to modify the terms of the PSA after it had been incorporated into the divorce decree.

At the hearing on Leonard's motion to alter or amend the court's prior order, Mary admitted that she now realized she was 23 days late filing her motion to extend maintenance. Mary explained, however, that she thought she had timely filed her motion because her divorce was not granted until November 16, 2001. The trial court found that Mary's needs had not changed from the time of the divorce when she filed a domestic

relations affidavit (DRA). The court also found that the PSA was ambiguous and that Mary timely filed her motion to extend maintenance. Alternatively, the trial court found that Mary's failure to file her motion before October 5, 2005, was the result of excusable neglect. As a result, the trial court denied Leonard's request to alter or amend its prior order.

Leonard timely appeals.

Analysis

Leonard advances four arguments in support of his contention that the trial court lacked jurisdiction to extend his maintenance obligation to Mary: (1) Mary failed to timely file her motion to extend maintenance; (2) the trial court could not modify the PSA after it had been incorporated into the divorce decree; (3) Mary failed to file and serve a DIM with her motion; and (4) maintenance could not be ordered as a substitute for child support of an adult child. In response, Mary contends that the trial court did not abuse its discretion when it denied Leonard's motion to alter or amend its prior order extending Leonard's maintenance obligation.

Leonard's notice of appeal states that he is appealing "from the Journal Entry

(Reinstating Maintenance) filed herein on March 10, 2006.” The notice of appeal did not mention that Leonard wished to seek review of the trial court’s order granting Mary’s motion to extend maintenance entered on December 12, 2005. An appellant is bound by the issues raised in his or her notice of appeal. *State v. Grant*, 19 Kan. App. 2d 686, 691, 875 P.2d 986, *rev. denied* 255 Kan. 1005 (1994). As a result, this court’s review is limited to issues regarding the trial court’s denial of Leonard’s motion to alter or amend. See 19 Kan. App. 2d at 692.

An appellate court reviews a trial court’s denial of a motion to alter or amend under K.S.A. 60-259(f) for an abuse of discretion. *Wenrich v. Employers Mid. ins. Co.*, 35 Kan. App. 2d 582, 585, 132 P.3d 970 (2006). Discretion is abused only when no reasonable person would take the view adopted by the trial court. *State v. Moses*, 280 Kan. 939, 945, 127 P.3d 330 (2006). Whether jurisdiction exists is a question of law over which this court’s scope of review is unlimited. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006).

Timeliness of Mary's motion

Leonard argues that the trial court did not have jurisdiction to extend his maintenance obligation because Mary filed her motion to extend maintenance after the

expiration date of his maintenance obligation; therefore, Mary's motion did not comply with K.S.A. 2006 Supp. 60-1610(b)(2) as required by the PSA.

K.S.A. 2006 Supp. 60-1610(b)(2) provides in relevant part:

“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, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments.”

The disagreement on this point concerns the expiration date of the stated period of time for maintenance. The trial court found that the terms of the PSA were ambiguous and that Mary's motion to extend maintenance filed on October 28, 2005, was timely filed. Leonard maintains, however, that his maintenance obligation terminated on October 5, 2005; therefore, Mary's motion was untimely.

“A contract between the parties to a divorce action that is approved by the trial court and merged into the judgment also retains its contractual characteristics,” *Dozier v. Dozier*, 252 Kan. 1035, Syl. ¶ 2, 850 P.2d 789 (1993). When interpreting a written contract, the primary rule is to ascertain the intent of the parties. *Liggett v. Employers*

Mut. Casually Co., 273 Kan. 915, 921, 46 P.3d 1120 (2002). Generally, if a written instrument has clear language and can be carried out as written, the rules of construction are not necessary. *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 1005, 974 P.2d 569 (1999).

“An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. 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.]” *Johnson County Bank v. Ross*, 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

The question of whether a written instrument is ambiguous is a question of law subject to de novo review. Before determining that a contract is ambiguous, a court must give the language a fair, reasonable, and practical construction, “Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. [Citation omitted.]” *Liggett*, 273 Kan. at 921. If there is a genuine uncertainty regarding which one of two or more meanings is the proper meaning, then the contract is ambiguous. 273 Kan. at 921.

The PSA provided *inter alia*:

“A. Alimony/Maintenance. The Husband shall pay to the Wife on the 1st day of each month, for the support and maintenance of the Wife during the ensuing month, the sum of \$2,541.00 for a period of 20 months commencing on the 1st day of April, 2000 and continuing through the 1st day of November, 2001, under the Stipulated Temporary Orders, then reduced to \$2,386.00 per month for 47 months beginning on December 1, 2001 and continuing *through the 67th consecutive monthly period*, and last payment on October 5, 2005, representing both temporary and post-decree alimony/maintenance.

“D. Extension of Maintenance, Pursuant to K.S.A. 60-1610(b)(2) and amendments thereto, the parties agree that the original Court shall reserve the power to hear subsequent motions by the Petitioner for reinstatement of maintenance in whole or part for other 67 month periods of time.” (Emphasis added.)

Mary provides the following arguments in support of the trial court’s determination that the PSA was ambiguous: (1) The PSA did not expressly provide that a motion to extend maintenance must be filed prior to the termination date of the original maintenance obligation, and (2) the maintenance provision used the word “reinstatement,” which implies that she and Leonard contemplated the possibility that she would file a motion to extend maintenance after Leonard’s original obligation had ended.

However, the confusion in this case arises when interpreting the meaning of the provision for post-decree maintenance in paragraph A. The PSA provided that post-decree maintenance would begin on December 1, 2001, and *continue through* the 67th consecutive month. Under this language, *the period of Leonard's maintenance obligation* would have ended on October 31, 2005, “through the 67th consecutive monthly period” notwithstanding the fact that the PSA provided that the last payment would be on October 5, 2005. The language of the PSA created an ambiguity regarding when the parties intended Leonard's maintenance obligation to terminate if not extended under paragraph D of the PSA.

The confusion is then compounded in paragraph D providing for an extension pursuant to K.S.A. 2006 Supp. 60-1610(b)(2) which states that a motion for extension be filed, “prior to the expiration of the stated period of time for maintenance payments.”

A reasonable reading of the PSA would suggest that the stated period of time for maintenance payments is “through the 17th consecutive monthly period.”

Leonard testified that he believed his maintenance obligation terminated on October 5, 2005. Mary testified, however, that she believed she had timely filed her motion to extend maintenance because her divorce was not granted until November 16.

2001, and because she continued to receive maintenance payments into November 2005. In addition to the provisions relating to maintenance in the PSA, a spousal maintenance worksheet was filed at the time of the divorce which listed the first maintenance payment due date as April 1, 2000, and the last payment due date as February 1, 2006. Under a reasonable interpretation of the PSA that would best give effect to the parties' intent, the termination date for maintenance payments was October 31, 2005. Mary filed her motion to extend on October 28, 2005; therefore, her motion was timely. As a result, the trial court had jurisdiction to consider Mary's motion under K.S.A. 2006 Supp. 60-1610(b)(2).

The trial court found in the alternative that Mary's failure to file her motion before October 5, 2005, was the result of excusable neglect.

K.S.A. 60-206(b) provides the trial court discretion to enlarge a required time period:

"When by this chapter or by a notice given thereunder or by order of court an act, is required or allowed to be done at or within a specified time, the judge for cause shown may at any time in the judge's discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was

the result of excusable neglect.”

The excusable neglect provision allows “a. trial court some discretion in order to prevent a miscarriage of justice which might occur if blind adherence to set time periods were otherwise required.’ [Citation omitted.]” *Mitchell v. Miller*, 27 Kan. App. 2d 666, 668~ S P.3d 26 (2000). A trial court should consider the circumstances under which the neglect occurred and the effect of an enlargement of the time period upon the rights of all the parties. 27 Kan. App. 2d at 668 (citing *Boyce v. Boyce*, 206 Kan. 53, 55-56, 476 P.2d 625 (1970)). Our Supreme Court has stated:

“When a party in default seeks an enlargement of time based upon excusable neglect under K.S.A. 60-206(b), his request should be supported by evidence of his good faith, he should establish a reasonable excuse for his failure and he should show that the interests of justice can be served by granting the enlargement. After considering these matters the determination should rest in the sound judicial discretion of the trial court!” *Boyce*, 206 Kan. at 56

Leonard claims that K.S.A. 60-206(b) is not applicable in this case because Mary did not request additional time to file her motion before October 5, 2005, nor did Mary file a motion seeking additional time to file her motion to extend maintenance after October 5, 2005, had passed. Rather, the trial court *sua sponte* invoked the excusable

neglect provision. Leonard also argues that the trial court lacked evidentiary support to make a finding of excusable neglect.

In response, Mary asserts that the trial court exercised appropriate discretion when it determined that her failure to file the motion before October 5, 2005, was the result of excusable neglect under K.S.A. 60-206(b). Mary argues that the facts of this case support the trial court's finding of excusable neglect because she did not act in bad faith, she provided an excuse for her neglect, the interests of justice were served, and Leonard was not prejudiced by her arguably late filing.

Under K.S.A. 60-206(b), a trial court may expand the time for filing a motion to extend maintenance after the specified time period has expired when a motion to enlarge such time period has been filed. Here, however, Mary did not move to file her motion to extend maintenance out of time. Therefore, the trial court did not have the discretion to determine whether Mary's alleged failure to timely file her motion was the result of excusable neglect under K.S.A. 60-206(b).

Modification of the PSA

According to Leonard, the trial court lacked jurisdiction under K.S.A. 2006 Supp.

60-1610(b)(3) to modify the *PSA*. Leonard argues that the *PSA* unambiguously provided the manner in which Mary could request an extension of maintenance but because Mary did not timely file her motion, the trial court essentially modified the *PSA* when it extended his maintenance obligation.

K.S.A. 2006 Supp. 60-1610(b)(3) provides in relevant part:

“Matters settled by an agreement incorporated in the [divorce] decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, 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.”

In this case, Leonard’s argument fails because the trial court did not modify the *PSA*. Rather, the trial court interpreted the ambiguous language in the *PSA* regarding when Leonard’s maintenance obligation was meant to terminate under paragraph A. The trial court then determined that Mary timely filed her motion to extend maintenance under the provisions of the *PSA*.

Failure to file and serve a DRA

Leonard argues that the trial court lacked jurisdiction to consider Mary's motion to extend maintenance because Mary failed to provide a DRA as required by Rule 139(t) (2006 Kan. Ct. R. Annot. 201).

Under Rule 139(a), "all motions to modify existing support orders shall be accompanied by a Domestic Relations Affidavit." Rule 139(t) provides that "[a] party filing a motion to modify an existing order of support shall serve a copy of the Domestic Relations Affidavit along with the motion on the adverse party."

Mary admitted at the hearing on Leonard's motion to alter or amend that she failed to file a DRA at the time she filed her motion to extend maintenance. Mary attributed this failure to her lack of knowledge regarding this requirement. Mary also admitted that she failed to provide a new DRA to Leonard. However, Mary explained that at the hearing On her motion to extend maintenance, she had offered to show the trial court a draft of her expenses but the trial court told her that it was not necessary. Mary had also asked during the hearing on her motion whether she needed to provide an updated worksheet and the trial court replied, "no." The trial court found that Mary's needs had not changed from the time of divorce when she filed a DRA. The court stated: "There was really no need to file

another DRA. Her financial situation had not changed. She still earns zero.”

Rule 139 is not applicable in this case because Mary did not file a motion to modify an existing support order. The plain language of Rule 139 provides that a DRA should be filed with a motion to modify an existing support order and served on the adverse party. Mary filed a motion to extend maintenance; however, she did not request a change in the amount of maintenance. Therefore, Mary’s failure to file a DRA and provide a copy to Leonard did not deprive the trial court of jurisdiction to consider Mary’s motion to extend maintenance.

Maintenance as a substitute for child support

Leonard argues that the trial court did not have jurisdiction to extend his maintenance obligation to Mary for the sole purpose of providing financial support for George. Mary asserts that the trial court’s maintenance award was proper because she established a personal need for maintenance.

At the hearing on Leonard’s motion to alter or amend, the trial court stated: “I understand also that maintenance is not supposed to be a substitute for child support for an adult child. But in this case, I don’t see what else to do.” Leonard notes this statement

by the trial court and claims that the court improperly based its decision to extend maintenance on a desire to provide child support for George.

The trial court's statement cannot be viewed in isolation. The trial court stated during the hearing on Mary's motion for extension of maintenance, "I'm really trying to figure out ill don't grant the motion to renew maintenance for her, how hi the world she could possibly live." At the hearing on Leonard's motion to alter or amend, the court explained its prior decision by stating that it had continued maintenance "because that's the only way I can see that these parties can provide care for [George]." The court further explained by stating "the• only way that [George] can be taken care of right now is for [Mary] to stay home and do it. I think it's unrealistic for [Leonard] to think that [Mary] can do any kind of meaningful work and provide care for [George]." The trial court specifically acknowledged that maintenance was not to be imposed to support an adult child.

The court's language indicates that it extended Leonard's maintenance obligation because Mary was unable to meet her financial needs, Mary did not work outside the home, rather, she spent her time caring for George. Therefore, the trial court did not extend Leonard's maintenance for the purpose of providing child support for George.

As a secondary argument, Leonard appears to claim that maintenance was not appropriate in this case because Mary did not present evidence of her financial needs and because he presented evidence that he would not be able to afford to continue paying maintenance once he began to fund George's special needs trust. Mary argues that the timing set forth in the terms of the PSA indicate Leonard agreed he would be obligated to pay both child support and maintenance while funding the special needs trust.

Leonard agreed in the PSA to provide maintenance to Mary for a total of 67 months. The PSA provided that Mary could request an extension of maintenance for an additional 67-month period. In addition to maintenance, Leonard was obligated to provide child support for his minor children. Leonard also agreed to begin funding a special needs trust when George turned 18 in June 2003, Because George is the oldest of Leonard's three children and because Leonard agreed that the original maintenance obligation would not terminate until October 2005, Leonard necessarily agreed in the PSA to fund the trust while still paying maintenance and child support from at least June 2003 to October 2005. In addition, Leonard agreed to the possibility that he would be obligated to fund the trust while paying maintenance and child support for more than the 2-year period between 2003 and 2005, when he agreed that Mary could request an extension of maintenance for an additional 67-month period.

Moreover, Mary presented evidence of her need for maintenance. Mary informed the trial court that she had not been working outside the home because George needed constant care and it was difficult to find a caregiver for him. The court determined that Mary did not earn any wages and that her need for maintenance had not changed since the divorce. Leonard testified, however, that he was earning a little over \$100,000 a year. Therefore, to the extent that Leonard is arguing that maintenance was not appropriate in this case, his argument is unavailing.

The trial court had jurisdiction to consider Mary's motion to extend maintenance, and the court did not abuse its discretion when it denied Leonard's motion to alter or amend its prior order.

Affirmed.

GREENE, J., concurring: I concur in the result reached by my colleagues; the district court should be affirmed.