

## NOT DESIGNATED FOR PUBLICATION

No. 97,224

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF  
WELDON K. BURTON,  
*Appellant,*

and

PAULA D. BURTON,  
*Appellee.*

## MEMORANDUM OPINION

Appeal from Leavenworth District Court; GUNNAR A. SUNDBY, judge.

Opinion filed September 14, 2007. Reversed and remanded.

*Dan K. Wiley*, of Murray, Tillotson & Wiley, Chartered, of Leavenworth, for  
appellant.

*Joseph W. Booth* and *Ronald W. Nelson*, of Nelson & Booth, of Lenexa, for  
appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

*Per Curiam:* Weldon Burton appeals from the district court's judgment reinstating his obligation to pay his former wife, Paula Burton, monthly maintenance, which had been previously terminated upon Weldon's retirement from the military. Because the original period of maintenance had expired prior to Paula's filing of the motion to reinstate maintenance and the parties had not reserved the right to reinstate maintenance, the district court lacked jurisdiction to reinstate maintenance and we reverse the district court's order.

*Factual and procedural background*

Weldon and Paula Burton married November 24, 1984. On July 10, 2000, the parties entered into an amended stipulation and property settlement agreement (separation agreement). At issue in this appeal is the maintenance provision of that agreement, which provided as follows:

"[Weldon], to fulfill his legal obligation of support, pursuant to Internal Revenue Service Regulation 1.71-1(d)(3), as amended, agrees to make periodic payments of maintenance to [Paula] as follows: Installments of \$1,200.00 per month for a period of 60 months. Such payments shall be

payable monthly on or before the first day of the month commencing June 1, 2000, and continuing each and every month thereafter. The parties agree that said payments shall be terminated only upon the death of either party, remarriage of [Paula], or upon her cohabitation with an adult non-relative male in a marriage-like relationship for a period of 30 or more days. The parties further agree that, while the above provisions constitute an agreement of the parties, the Court shall continue to have jurisdiction to review, modify or terminate the maintenance provisions herein pursuant to K.S.A. 60-1610(b)(2) during the term of maintenance herein upon a showing of a change in circumstances."

On June 20, 2001, Weldon filed a petition for divorce. On April 1, 2002, the district court filed a journal entry of divorce approving and incorporating the separation agreement.

On December 18, 2003, Weldon moved to modify child support and maintenance, noting his anticipated retirement from the military on January 31, 2004, as a change in financial circumstances. In support, Weldon indicated Paula would be receiving a portion of his military retirement in a like amount to what she had been receiving as maintenance.

The district court conducted a hearing on Weldon's motion to modify on April 5, 2004. At the close of the hearing, the district court found the parties' incomes would be approximately equal upon Weldon's retirement. Because of this material change in

circumstances, the district court terminated maintenance effective the month Paula began receiving her portion of Weldon's military retirement. To avoid a gap between the termination of maintenance and Paula's receipt of her portion of Weldon's military retirement pay, the district court further noted:

"Now, obviously, the Court is finding that as of February 1, the maintenance should have terminated and so [what] we'll have to do is we'll have to go back and credit if the retirement portion exceeds, then her maintenance obligation that's hers, if it's short, he'll have to make up that difference. So the Court makes it effective February 1 but he can't stop paying it until and—until such time as his—she starts receiving retirement pay."

On July 19, 2004, the district court's order terminating maintenance effective January 31, 2004, was filed. This order further stated:

"That the Court has terminated maintenance but the Court will order [Weldon] to pay [Paula] \$1,200.00 per month until [Paula] receives direct payments from DFAS of her portion of [Weldon's] military retired pay . . . . The purpose of this order is to prevent a gap arising between the time of the termination of maintenance and the commencement of payments for [Paula's] share of the military retired pay."

On June 20, 2006, Paula moved for direct payment of retirement funds pursuant to the terms of the QDRO governing such or, in the alternative, for an order increasing child support and reinstating maintenance. Paula sought the requested relief due to Weldon's voluntary reinstatement with the military effective May 6, 2006, which meant that she would no longer receive her \$1,331.31 monthly share of his retirement pay.

The court conducted a hearing on Paula's motion and other issues not relevant to this appeal on July 3, 2006. Paula agreed that under the terms of the separation agreement incorporated into the divorce decree, she began receiving \$1,200 monthly maintenance from Weldon on June 1, 2000, and maintenance would have terminated under the separation agreement at the end of 60 months, or in May 2005. Paula also admitted she received more than \$1,200 per month between February 2004 and May 2005, and had Weldon not retired, she would not have received any maintenance payments between June 2005 and the date of the hearing.

Paula argued, however, that because Weldon had voluntarily reenlisted, he had "waived" his retirement. Because the QDRO governing the division of Weldon's military pay defined "military retired pay" as "the amount of monthly retired pay paid or that would be paid to [Weldon], before any deductions, plus any amount [Weldon] would be entitled to receive *notwithstanding any voluntary waiver or renouncement of retired pay*

that [Weldon] may have made", Paula argued Weldon was still obligated to pay her that portion of the retirement benefits she would have received had he not reenlisted.

(Emphasis added.) In the alternative, Paula requested, *inter alia*, reinstatement of maintenance. At the conclusion of the hearing, the district court took under advisement the issue of its authority to reinstate maintenance. The district also announced it would increase Weldon's child support obligation assuming the court could reinstate maintenance.

On July 18, 2006, the district court ruled on the maintenance issue as follows:

"1. The court ordered [Weldon] to pay to [Paula] 60 months of maintenance in the amount of \$1200.00 per month pursuant to the parties' property settlement agreement, effective June 1, 2000.

"2. The court terminated maintenance at a hearing April 4th, 2004, due to the retirement of [Weldon], effective not until the military retired pay 'kicked in.'

"3. At this point, [Weldon] had paid 44 months of maintenance.

"4. [Weldon] reenlisted with the military in February 2006, and the payment of his military retired pay (including [Paula's] share thereof) then ceased.

"5. [Paula] has requested that maintenance be reinstated for remaining 16 months.

"6. That the original term of 60 months has expired (on May 31, 2005) and thus could not be reinstated as permitted in *In Re Harbutz*, [279] Kan. 359 (2005), pursuant to the property settlement agreement.

"7. However, the court believed the order terminating maintenance in April of 2004 was conditioned upon the retirement of [Weldon] from the military and thus as the condition no longer exists, the maintenance is reinstated effective September 1, 2006."

The district court subsequently filed a journal entry governing other matters decided at the July 3, 2006, hearing and granting Paula's motion to increase child support with the calculations based upon the reinstatement of maintenance. Weldon appeals the July 18, 2006, order reinstating maintenance.

#### *Discussion*

On appeal, Weldon argues the district court lacked jurisdiction to reinstate maintenance after the stated period as maintenance payments had expired. Paula counters the court had jurisdiction to modify a past due maintenance obligation or, in the alternative, to enforce or modify the maintenance obligation because the parties agreed to

a total number of payments, regardless of time, and that total number of payments had not been made.

*Standard of review*

This court conducts unlimited review over questions of law regarding the district court's jurisdiction to act. Likewise, where, as here, interpretation of K.S.A. 2006 Supp. 60-1610(b)(2) is required, review is de novo. *In re Marriage of Harbutz*, 279 Kan. 359, 361, 109 P.3d 1191 (2005). To the extent the issue involves the interpretation and legal effect of the parties' separation agreement, which are matters of law, review is also de novo with no deference to the construction given the written instrument by the district court. See *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

The ultimate issue in this appeal is whether the district court had jurisdiction to consider Paula's June 26, 2006, motion to reinstate maintenance.

*Application of K.S.A. 2006 Supp. 60-1610(b)(2)*

K.S.A. 2006 Supp. 60-1610(b)(2) grants the district court jurisdiction to reinstate maintenance if two prerequisites are met:

"If [1] the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance *and* [2] 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." (Emphasis added.)

Neither of these prerequisites was satisfied here. First, although not noted by either party on appeal, neither the divorce decree nor the parties' separation agreement incorporated therein reserved the power of the district court to hear motions for reinstatement of maintenance. Second, as both parties agreed in their testimony and the district court recognized in its July 18, 2006, order, under the plain language of the separation agreement the 60-month stated period of time for maintenance payments expired on May 31, 2005. Paula's motion to reinstate maintenance was not filed until more than 1 year later on June 26, 2006. Thus, even if the parties had reserved the district court's power to consider reinstatement of maintenance, the time to file such a motion had expired under K.S.A. 2006 Supp. 60-1610(b)(2).

Pursuant to the plain, unambiguous language of K.S.A. 2006 Supp. 60-1610(b)(2), the district court lacked jurisdiction to reinstate maintenance.

*Additional arguments concerning application of the separation agreement*

Paula attempts to avoid this result by asserting various arguments concerning her interpretation of the separation agreement and the district court's orders. Each argument is unavailing.

For example, Paula argues the parties' agreement as to maintenance did not terminate upon the passage of a specific amount of time. Rather, she claims, "[t]he deal struck was for 60 payments of \$1,200.00. Weldon made 44 and the court appropriately ordered him to pay the remaining 16 payments."

This argument fails for several reasons. First, our review is precluded by Paula's failure to raise this issue before the district court. See *M.L.M. v. Millen*, 28 Kan. App. 2d 392, 394, 15 P.3d 857 (2000).

Further, even if the issue had been properly raised, Paula's argument that the parties agreed to a set number of maintenance payments without regard to time is contrary

to the record. At the hearing on her motion to reinstate maintenance, Paula admitted she and Weldon agreed maintenance was to terminate at the end of a 60 month period, or in May 2005, and had Weldon not retired, she would not have received any payments between June 2005 and the date of the hearing.

Moreover, Paula's claim that the separation agreement provided for 60 payments regardless of the passage of time is contrary to the plain language of the agreement. The separation agreement provided maintenance was "pursuant to Internal Revenue Service Regulation 1.71-1(d)(3)" and was payable in "[i]ninstallments of \$1,200.00 per month for a period of 60 months. Such payments shall be payable monthly on or before the first day of the month commencing June 1, 2000, and continuing each and every month thereafter."

The cited regulation governing the tax treatment of alimony and separate maintenance payments as income to the recipient explicitly limits its application to situations in which "payments under a decree, instrument, or agreement *are to be paid over a period ending 10 years or less from the date of such decree, instrument or agreement.*" (Emphasis added.) 26 C.F.R. § 1.71-1(d)(30(i) (2006). If we were to conclude that the separation agreement provided for 60 payments with no set term, the tax regulation would have no effect. Also, the separation agreement grants the court

continuing jurisdiction to review, modify, or terminate maintenance as provided in K.S.A. 2006 Supp. 60-1619(b)(2) "during the term of maintenance herein."

Paula seeks to rely upon *In re Marriage of McGee*, No. 61,507, unpublished opinion filed April 21, 1988. *McGee* is distinguishable, however, because there the district court did not terminate the maintenance obligation, it suspended it. Further, unlike the separation agreement in this case, the agreement in *McGee* provided for a set number of payments until such time as a specific amount of maintenance had been paid.

Where the terms of a separation agreement are unambiguous, the parties' intent will be determined from the agreement alone. *In re Marriage of Wessling*, 12 Kan. App. 2d 428, 430, 747 P.2d 187 (1987). Here, the terms of the separation agreement are unambiguous. The parties agreed to maintenance for a period of 60 months, and the district court had jurisdiction to modify or terminate maintenance upon a change in circumstances only during that period.

We conclude the district court lacked jurisdiction under K.S.A. 2006 Supp. 60-1610(b)(2) to consider Paula's motion to reinstate maintenance. Therefore, we reverse the district court's July 18, 2006, order reinstating maintenance and remand to the district court for further proceedings consistent herewith.

**Reversed and remanded.**