

NOT DESIGNATED FOR PUBLICATION

No. 101,827

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

PAUL K. FLETCHER,
Appellee,

v.

MARY M. FLETCHER, n/k/a MARY M. HAYNES,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed February 26, 2010. Affirmed.

Richard D. Dvorak, of Tomes & Dvorak, Chtd, of Overland Park, for appellant.

William P. Mahoney, of Mahoney Law Office, of Kansas City, for appellee.

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

Per Curiam: Mary M. Fletcher, n/k/a Mary M. Haynes appeals from the trial court's judgment clarifying the court's order regarding division of a military pension. Mary contends that the trial court improperly determined that she was not entitled to cost-of-living allowances based on a percentage of her ex-husband's military retirement pay. We disagree. Accordingly, we affirm.

On February 20, 2001, Paul K. Fletcher and Mary appeared before the District Court of Johnson County and were granted a decree of divorce. As part of the divorce, the parties prepared and submitted a "Stipulation for Record."

The Stipulation for Record contains the following provisions relevant to this appeal.

"5. That the Respondent shall receive a portion of the military retirement of the Petitioner. Such amount to be determined by the attached formula. That said amount is \$886.00 per month. That if Petitioner takes any action (such as accepting disability pay) that reduces the pay the wife receives, then he shall pay her directly the amount by which her share is reduced."

The amount of \$886 is handwritten in the document. No formula was attached at the time the parties filed the Stipulation for Record.

In the divorce decree filed on March 23, 2001, the trial court determined in paragraph 10 of the decree of divorce that the Stipulation for Record was a fair and equitable division of the property of the parties. In paragraph 12 of the decree of divorce, the court ordered the parties to submit a Qualified Domestic Relations Order (QDRO). The QDRO was submitted to the court on November 5, 2001. Only the judge and Paul's attorney's signatures are contained on the QDRO. The QDRO outlines how Paul's military retirement pay was to be divided between Paul and Mary.

In 2007, Mary filed the QDRO with the Defense Finance and Accounting Service (DFAS) to begin receiving her portion of Paul's retirement benefits. In October 2007, Mary received a letter from DFAS telling her that they would be unable to process her request due to several inconsistencies in the QDRO. In November 2007, Paul faxed the Stipulation for Record to DFAS.

After receiving the Stipulation for Record, the DFAS sent a letter to Paul stating that the Stipulation for Record indicated that Mary would receive a fixed payment of \$886 per month as her portion of the military retirement benefits.

On January 8, 2008, Mary moved to clarify the court order regarding division of the military pension

During the hearing, both parties presented evidence to establish the intent of the parties with respect to the Stipulation for Record. Mary argued that she had not agreed to a fixed payment but rather a percentage payment. Mary argued that she had wanted a percentage amount so she would be entitled to benefit from any cost of living allowance (COLA) which might occur. The court denied Mary's motion for clarification and determined that the amount of the retirement benefits she would receive should be \$886 per month.

Mary argues that the standard of review in this case should be de novo, citing the general rule that the scope of appellate review of a written instrument is unlimited. Paul argues that the standard of review is an abuse of discretion when a trial court determines issues in a divorce settled by an agreement incorporated into a decree.

Nevertheless, the trial court considered Mary's motion for clarification as a challenge that the Stipulation for Record was unclear and ambiguous. The trial court determined that the evidence pointed to the parties' intention to have a fixed payment rather than a percentage payment that included COLA adjustments. This finding was based on evaluation of the facts and not the law.

Generally, "[t]he question of whether a written instrument is ambiguous is a question of law subject to de novo review." *City of Arkansas City v. Bruton*, 284 Kan. 815, 829, 166 P.3d 992 (2007). Nevertheless, "if the trial court has made findings of fact and conclusions of law, this court determines whether the factual findings are supported by substantial competent evidence and whether those findings supported the conclusions of law. This court has unlimited review of the conclusions of law." *Wichita Clinic v. Louis*, 39 Kan App. 2d 848, 852, 185 P.3d 946, *rev. denied* 287 Kan. ____ (2008).

Substantial evidence is evidence possessing both relevance and substance and which provides a substantial basis of fact from which the issues can reasonably be

determined. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 836, 127 P.3d 292 (2006); see *Louis*, 39 Kan App. 2d at 852.

The trial court acknowledged that the Stipulation for Record was ambiguous. For example, the stipulation refers to an attached formula that was never attached, but then prescribes a specific amount. The trial court considered evidence presented by both parties and determined that the parties had agreed to a fixed payment from the military retirement benefits of \$886 per month. As stated earlier, we review a trial court's findings to see if they are supported by substantial competent evidence.

The trial court considered several pieces of evidence in making its determination. A key factor was a handwritten formula presented by Paul during the hearing that he argues was the formula referenced by the Stipulation for Record. The trial court determined that this formula was in fact the formula that should have been attached to the Stipulation for Record and that the formula outlined a fixed payment rather than a percentage payment.

In addition to the handwritten formula, the court considered whether the formula contained in the QDRO could have been the formula mentioned in the stipulation. The court found that there was no indication that the parties intended the QDRO to be the formula for determining Mary's share of the retirement benefits. The court mentions that

in reviewing earlier bench notes, the previous judge had found the parties had settled the matter on an earlier occasion.

The trial court's conclusions about the QDRO are supported by the record. In the decree of divorce, the court determined that the Stipulation for Record was fair and equitable and then ordered the creation of a QDRO regarding the division of the military retirement benefits. Given that the QDRO was prepared only after the trial court had determined that the Stipulation for Record was fair and equitable, the formula contained in the QDRO was not the one referred to in the Stipulation for Record.

Finally, the trial court determined that no mention of COLA adjustments existed in the record. Although Mary testified that she had mentioned wanting to receive COLA adjustments, there is no indication within the documents that the parties had considered them. COLA adjustments are not mentioned in either the Stipulation for Record or the QDRO. There are also no arguments in the record before the June 2, 2008, hearing that mention COLA adjustments. Based on this evidence, the trial court's finding that the meaning of the Stipulation for Record was that Mary was to receive a fixed payment of \$886 per month is supported by substantial competent evidence.

Mary also attempts to argue that there was no meeting of the minds during the divorce. Nevertheless, this issue was never raised at the trial court level and will not be considered by this court. "[I]ssues not raised before the trial court cannot be raised on

appeal." *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007). While there are some exceptions to this general rule, in order for the one relevant exception to apply, the issue must be an issue of law. Mary's assertion regarding meeting of the minds is an issue of contract formation, and whether a contract exists is a question of fact. *In re Estate of Hjersted*, 285 Kan. 559, 589, 175 P.3d 810 (2008). Because this issue involved a question of fact, it should have been presented to the trial court since it alone had the authority to determine questions of fact. This was important in order to allow the parties an opportunity to offer all the evidence that they believed was relevant to that issue.

In any event, the Stipulation for Record was signed by Paul, Mary, and their attorneys. The Stipulation for Record called for Mary to receive \$886 per month. Consequently, the Stipulation for Record clearly shows that the parties had manifested to each other their mutual assent about the monthly amount to be paid by Paul.

Moreover, the Stipulation for Record indicates that the attached formula was unnecessary in determining the monthly amount. To illustrate, the Stipulation for Record states: "5. That the Respondent shall receive a portion of the military retirement of the Petitioner. Such amount to be determined by the attached formula. That said amount is \$886.00 per month." The relative pronoun *that* (in the last sentence of the quotation) refers to the word *amount* mentioned in the previous sentence: "Such *amount* to be determined by the attached formula." Moreover, the word *said* is used as an adjective to modify the word *amount* in the relative pronoun sentence. According to *Merriam-*

Webster's Collegiate Dictionary 1096 (11th ed. 2003), *said*, used as an adjective, is defined as "aforementioned." As a result, when you read the two previous sentences together, the attached formula is unnecessary in determining the monthly amount to be paid by Paul.

Expressed intention outwardly manifested by the Stipulation for Record, not the subjective intention of Mary, governed the formation of the agreement between the parties. To the extent that Mary's undisclosed mental intention differs from the expressed intention manifested in the Stipulation for Record, it is entirely immaterial.

Finally, Mary argues in the alternative that the award of \$886 per month is not fair and equitable. Because Mary failed to timely appeal from the decree of divorce, filed March 23, 2001, where the trial court found that the Stipulation for Record was a fair and equitable division of the property, we will not consider this issue.

Affirmed.