

NOT DESIGNATED FOR PUBLICATION

No. 102,631

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

PATRICIA A. SOLAR,  
*Appellant,*

and

MICHAEL G. SOLAR,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Johnson District Court; NEIL B. FOTH, judge. Opinion filed October 8, 2010.  
Affirmed.

*Christopher P. Lawson*, of Lawson Law Office, L.L.C., of Overland Park, for appellant.

*Rian F. Ankerholz*, of Ankerholz and Smith, of Overland Park, for appellee.

Before MCANANY, P.J., CAPLINGER, J., and LARSON, S.J.

*Per Curiam*: This is Patricia A. Solar's appeal from the district court's order granting her former husband, Michael G. Solar's motion to terminate spousal maintenance established and terminable under the terms of a separation agreement which became a part of their divorce decree.

The district court conducted an evidentiary hearing and found that Patricia had cohabitated with Forest Eugene Spinner.

Patricia contends on appeal that reversible error exists in the district court's finding of cohabitation and further in its failure to make additional findings of whether she had financial need for continued maintenance.

*Procedural and factual background*

On April 5, 2007, Patricia sued Michael for divorce. The decree of divorce entered on November 28, 2007, adopted and made a part of its journal entry of judgment, the following terms of the parties concerning the commencement and termination of spousal support and maintenance:

"[t]he first of such calculated payments shall commence on the 1st day of February, 2008. Payments shall continue thereafter until (a) Wife's death, (b) Husband's death, (c) Wife's cohabitation as defined in *In re Marriage of Wessling*, 12 Kan. App. 2d 428, 747 P.2d 187, (d) Wife's remarriage, or (e) until the completion of fifty-five (55) full monthly payments, commencing with the January, 2008 payment, which gives Husband durational credit for nine payments made under the Temporary Orders, which commenced in April, 2007. Any disputes regarding the correct maintenance calculation shall be submitted to the court for determination. The parties agree that the Court shall be vested with continuing jurisdiction to review and modify the maintenance payments hereinabove provided consistent with K.S.A. 60-1610(b)(2)."

In October 2008, Michael filed a motion to terminate spousal maintenance under subsection (c), contending Patricia had begun cohabitation with Spinner. The trial court conducted an evidentiary hearing on the motion on March 13, 2009, and issued its detailed memorandum decision on April 10, 2009, in which it found cohabitation and terminated Michael's maintenance obligation as of October 31, 2008.

At the hearing, Michael called Patricia's neighbor, Kelly Thompson, who testified that Spinner spent nights at Patricia's house regularly during the first 10 months of 2008.

Thompson also testified that he had seen Spinner bringing groceries into Patricia's house and that Spinner drove a gold-colored Saturn.

Nick Percy, Patricia's son-in-law, testified that while he was helping paint Patricia's house, he had seen Spinner at the house early in the morning as if he had stayed the night. Percy also testified that Spinner occasionally cooked dinner, took care of the parties' minor son, Chris, and stayed at Patricia's house when she was not there. Percy helped Spinner move a king-sized mattress and several other pieces of furniture from a U-Haul into the basement of Patricia's residence. Finally, Percy testified that Patricia and Spinner purchased a house where Percy and his wife lived and ran a daycare. Percy paid rent in checks made out to Spinner, but Patricia usually came to pick up the checks.

Michael produced and had admitted evidence of mortgage documents showing Patricia and Spinner had taken out a mortgage together on the house where Percy and his wife now lived. Under the terms of the mortgage, Patricia and Spinner were obligated to "occupy, establish, and use the Property as Borrowers principal residence." Michael presented a rental agreement stating the rent payments were to be made to Spinner and Patricia.

During Michael's testimony, it was stipulated that Patricia and Spinner, during the first 10 months of 2008, had gone on two vacations to Mexico, one to San Diego, and one to Grand Lake. It was further stipulated that Patricia and Spinner attended family, social, and other activities together, including family events, a dinner with Spinner's new boss, sporting events, and holidays.

Patricia testified that there had been no 7-day period other than while they were out of town in which she and Spinner had spent every night together. Patricia also testified she had not spent five out of seven nights with Spinner. She testified that she did not provide financial support to Spinner and he did not provide financial support to her.

Patricia testified that Spinner drove her Saturn. Patricia also testified that Spinner stored a king-sized bed at her house while he was moving between apartments, but that he did not normally keep a substantial amount of his belongings at her house and that he did not keep clothing at her house. Patricia admitted that her relationship with Spinner was exclusive and of a sexual nature.

Patricia also testified about the limited liability company (LLC) that she operated with Spinner. The LLC, Tot Spot Home Day Care, had two members, Patricia and Spinner. They kept a joint bank account for depositing the rent checks from Percy. The daycare was set up to benefit Patricia's daughter and allow her to take care of her children in her daycare. According to Patricia, Spinner participated in the LLC to help her out.

There was evidence that on November 16, 2008, Spinner was arrested after police were called to Patricia's residence. Spinner was initially charged with domestic battery. According to the police arrest record, Spinner's address was recorded as 15474 West 147th Drive, Patricia's residence. The charge was later amended to battery, and Spinner pled guilty. Patricia testified the charge was amended from domestic battery to battery because Spinner did not live with her. After another fight, Spinner was charged with criminal damage to property less than \$1,000. The trial judge found that it was obvious that the police believed that Spinner was Patricia's "live-in boyfriend." Despite these matters, Patricia and Spinner remained a committed couple.

Spinner was also called to testify. Spinner testified that he resided in an apartment at 6811 West 138th Terrace and did not live with Patricia. Additionally, Spinner testified that he and Patricia had taken out the mortgage on the house used for the daycare for him to use as his primary residence.

Finally, the court questioned the parties' son Chris, age 14, outside the presence of the parties. Chris testified that Spinner used Patricia's car to go to work and come and go

from Patricia's home. Chris also testified about the miniature greyhound that had been purchased while Spinner was dating Patricia. Chris talked about going to pick up the dog and said that they had two dogs at the house. He also testified that he, Patricia, and Spinner were leaving on a vacation to the Bahamas the Sunday after the hearing.

The trial court, in its memorandum decision, made an extensive review of the evidence and testimony and held that Patricia had cohabitated as defined in *In re Marriage of Wessling*, 12 Kan. App. 2d 428, Syl. ¶ 6, 747 P.2d 187 (1987). The decision specifically stated:

"Although Patty and Gene presented testimony and evidence that Gene leased a separate apartment with separate bills, did not share expenses and did not hold themselves out as husband and wife, the Court finds that they were living together in a status resembling that of the marital relationship and assumed many marital rights, duties and obligations which are usually manifested by married people. After considering all the testimony and exhibits as a whole, the Court believes that prior to Respondent filing his motion, Patty and Gene spent essentially all of their nights together at one place or the other. Gene was often at the house when Patty was not there and he had childcare responsibilities, watching Chris after school or picking him up from school when he is sick. They attended neighborhood functions together. Patty appears to have purchased a car for Gene's use or gave him full use of her vehicle. They bought a dog together which spent most of its time at the house and Chris seems to consider part of his family. Patty entered into a 30-year mortgage with Gene on a house which, if you believe him, was going to be Gene's residence. Otherwise, the couple brought the property together, entered into a long-term financial obligation, started a business together, made Patty's daughter part of the business, provided her with a place to live, and ran the business from an office in Patty's house. Finally, it is obvious that on the night of November 16, 2008, law enforcement officers came to believe that Gene was Patty's live-in boyfriend. The Court further believes that Gene Spinner gave Patty's house as his address when he was booked that night. Mr. Spinner was not credible on this point as well as others."

Patricia timely appealed.

*Analysis of appellate issues*

Patricia first argues the finding that she and Spinner cohabitated. This contention has two prongs. First, that the trial court erred by straying from the definition of cohabitation set forth in *Wessling*. And second, that the facts do not support a finding of the *Wessling* definition of cohabitation.

Predictably, Patricia and Michael initially disagree on the appropriate standard of review in this appeal. Patricia argues the district court applied the improper law in its decision and, therefore, the standard of review is de novo. Michael argues that the appropriate standard of review is to examine the record and determine if there is substantial competent evidence to support the trial court's ruling and whether the trial court abused its discretion.

Our Supreme Court in *In re Marriage of Kuzanek*, 279 Kan. 156, 159, 105 P.3d 1253 (2005), acknowledged that previous cases have been less than clear on this issue, pointing to *In re Marriage of Kopac*, 30 Kan. App. 2d 735, 737, 47 P.3d 425 (2002), and the language Michael above contends should be applied as "multiple standards of review."

Justice Beier in *Kuzanek* goes on to opine:

"The correct appellate standard of review when a party has failed to sustain its burden of proof is the one applied to a negative finding of fact. At times, in order to arrive at a finding of fact, a legal definition must be applied. This is true of cohabitation. The determination of its existence raises an issue of fact, but the fact finder must employ a legal definition of cohabitation in order to arrive at its finding. If cohabitation exists, then the district court must make a legal determination whether maintenance should be terminated." 279 Kan. at 159-60.

In *Kuzanek*, there was a negative finding by the trial court that cohabitation did not exist and our well-known standard that such a finding will not be rejected on appeal unless the party challenging the finding proves arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice was deemed appropriate. 279 Kan. at 160.

The facts in our case and the ruling in the district court differ from *Kuzanek* as Patricia and Michael contracted with each other that spousal maintenance should terminate if Patricia cohabitated as defined by *Wessling* and the district court found affirmatively that cohabitation existed.

With the settlement agreement being incorporated into the divorce decree, the standard of review was established by Judge, later Chief Justice, Davis in *Wessling*, 12 Kan. App. 2d at 430, where he stated:

"A property settlement agreement incorporated into a divorce decree is 'a hybrid in the law having the characteristics of a judgment and retaining the contractual rights of the parties.' *In re Estate of Sweeney*, 210 Kan. 216, 224, 500 P.2d 56 (1972). '[T]he confirmation of the agreement and its merger into the decree does not abolish the contractual aspects of the agreement, but leaves the court in the position to construe the provisions of the agreement consistent with the facts and circumstances and the expressed intentions of the parties.' 210 Kan. at 224. A written instrument may be construed and its legal effect determined by the appellate court. *Cornwell v. Jespersen*, 238 Kan. 110, 116, 708 P.2d 515 (1985). 'The primary rule of construction of a settlement agreement in connection with a divorce action is that, if possible, the court must, as in other contract cases, ascertain and give effect to the mutual intention of the parties at the time the contract was made.' *Hollaway v. Selvidge*, 219 Kan. 345, 349, 548 P.2d 835 (1976). 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)."

We consider this appeal based on the directions of *Wessling* but consistent with the teachings of Justice Beier in *Kuzanek* that a Court of Appeals panel should not reweigh the evidence and credibility of the witnesses. *Kuzanek*, 279 Kan. at 160.

We first determine whether the trial court followed the definition of cohabitation set forth in *Wessling* in reaching its conclusion that Patricia had cohabitated with Spinner requiring spousal maintenance to be terminated. Patricia argues the trial court expanded the definition of cohabitation beyond that set forth in *Wessling*. We do not agree.

There are three main concepts set forth in *Wessling* which define or establish cohabitation. The first was the definition found in Black's Law Dictionary: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." Black's Law Dictionary 236 (5th ed. 1979)." 12 Kan. App. 2d at 432.

*Wessling* also contained the following statement:

"Marriage is the standard by which the trial court must judge whether a couple has cohabited. Contrary to the declaration of the trial court, cohabitation does not necessarily require 'a *full* sharing of bed, board, household duties and tasks.' (Emphasis supplied.) The circumstances of the relationship, including the realities of modern married life, may be considered by the trial court in determining whether the evidence establishes cohabitation." 12 Kan. App. 2d at 432.

The legal meaning of cohabitation in *Wessling* also pointed to earlier Kansas precedent and said:



"In *Biltgen v. Biltgen*, 121 Kan. 716, 250 Pac. 265 (1926), the court rejected the husband's contention that his wife had condoned his extreme cruelty by cohabiting with him. The court adopted the following definition of 'cohabitation':

""The act or state of dwelling together, or in the same place with another; living together as husband and wife; a living together as man and wife. A condition or status of the parties, a status resembling that of the marital relation. Cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time; the term implies continuity." 121 Kan. at 721 (quoting 11 C.J. 952)." 12 Kan. App. 2d at 431.

In arguing that the trial court expanded the definition of cohabitation beyond that set forth in *Wessling*, Patricia attempts to rely on the Supreme Court holding in *Kuzanek* to justify this argument. When the parties' agreement limited the determination of cohabitation to the *Wessling* definition, it is not proper to look to other case law on the issue as the parties bargained for a determination based solely on *Wessling* and not how it might be utilized in some later decision.

Further, Patricia's argument that the *Wessling* definition was not properly applied morphs into an argument that the facts presented do not justify a cohabitation finding which is not really a legal argument, but rather one that there was not sufficient evidence to justify the trial court's decision.

In the district court's memorandum decision, the statement that *Wessling* does not require couples to hold themselves out as husband and wife or have plans to marry correctly shows that the "holding out" element of a common-law marriage is not necessary in order for parties to cohabit.

The district court in its memorandum decision also said:

"Further, if a full sharing of bed and board is not required, then a cohabiting couple can have two residences. As such, under the, 'circumstances of modern marriage and modern life,' this court believes that cohabiting couples can have widely varying degrees of

intermingled life, social and financial responsibilities. Couples that admittedly live together or cohabit could and sometimes do choose to keep their finances completely separate and their personal property identifiable although intermingled. Conversely, a couple with two residences that denies cohabitation may have their financial lives and personal obligations to each other's families much more deeply intertwined and more closely resembling a husband and wife so as to be 'cohabiting' under the legal definition. Such is the case here."

This is clearly an analysis following *Wessling*.

The trial court's decision then fully set forth an analysis of the testimony and evidence that was presented and, in its conclusion, followed *Wessling* holding that cohabitation had been proven by a preponderance of the evidence.

We hold the trial judge did not, as a matter of law, modify or misconstrue cohabitation as defined in *Wessling*, the standard Patricia and Michael agreed to in their settlement agreement.

Although Patricia attempts to couch her reasoning for reversal as being based on the failure of the legal definition of cohabitation, in reality, she asks us to reweigh the evidence and reach a different conclusion. This, we will not do as we have been so instructed by *Kuzanek*, 279 Kan. at 160.

Patricia has not directly argued that there was not substantial competent evidence to support the trial court's decision. But, that may be the ultimate effect of her contentions once her "legal" argument is denied. If this is the case, we affirmatively hold there was a preponderance of substantial competent evidence upon which the finding of cohabitation was based and justified.

Patricia's fall-back argument is that despite its finding of cohabitation, the trial court was also required to make the "necessary legal determination that maintenance should be terminated." Again, we do not so agree.

In this case, the maintenance was not court ordered; it was settled and provided for by the parties' separation agreement.

There is a fundamental difference between maintenance by decree and maintenance settled by a separation agreement. *In re Marriage of Ehinger*, 34 Kan. App. 2d 583, 587, 121 P.3d 467 (2005), *rev. denied* 280 Kan. 982 (2006). While maintenance by decree may be modified by the court upon a showing of material change in circumstances, "[i]t is clear that maintenance settled by a separation agreement that is incorporated into the divorce decree is not subject to subsequent modification by the court except as prescribed by the agreement or as subsequently consented to by the parties." 34 Kan. App. 2d at 587.

The inclusion in the separation agreement of language vesting the court with continuing jurisdiction to "review and modify the maintenance payments herein provided consistent with K.S.A. 60-1610(b)(2)" must be construed to provide that modification must be as governed by the separation agreement. And, the separation agreement specifically provided that "[p]ayments shall continue until . . . (c) Wife's cohabitation . . . ."

With the settlement agreement incorporated into the divorce decree, its specific language must be followed and once cohabitation was factually and legally found, maintenance payments terminated. The district court did not err in so ordering.

Affirmed.