

NOT DESIGNATED FOR PUBLICATION

No. 104,315

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

TIMOTHY R. UNDERWOOD,
Appellant,

and

TERRY K. UNDERWOOD,
Appellee,

MEMORANDUM OPINION

Appeal from Johnson District Court; J. CHARLES DROEGE, judge. Opinion filed December 23, 2011. Vacated and remanded with directions.

Mark A. Rohrbaugh, of Fletcher & Rohrbaugh, LLP, of Olathe, for appellant.

Scott M. Mann and *Shannon Kelman*, of Evans & Mullinix, P.A., of Shawnee, for appellee.

Before LEBEN, P.J., GREEN, and MARQUARDT, JJ.

LEBEN, J.: Timothy Underwood agreed in a divorce settlement to pay \$1,298 per month to his ex-wife, Terry. But when Timothy lost his job shortly after the divorce, he sought to terminate his maintenance based on the loss in his income, which he considered a material change in circumstances.

The district court denied Timothy's motion, concluding that the parties' separation agreement didn't allow for the court to make changes in the maintenance payments that weren't specifically provided for in the agreement. But the parties' written agreement did provide that "the court shall reserve jurisdiction to modify or terminate maintenance . . . as provided in K.S.A. §60-1610(b)(2)." That statute generally gives the district court the authority to reduce maintenance based on a material change in circumstances, like loss of employment. We conclude that the language in the parties' settlement agreement referencing modification under K.S.A. 60-1610(b)(2) gave the district court jurisdiction to consider Timothy's motion on its merits.

The district court also said that even if it had jurisdiction to modify Timothy's payments, it did not believe that would be equitable. Thus, the district court provided an alternative basis for its decision in the event it had wrongly concluded that it had no jurisdiction to modify maintenance. We may set aside a district court's ruling refusing to modify maintenance payments under K.S.A. 60-1610(b)(2) only for abuse of discretion. In this case, however, after a careful review of the record, we think there is enough indication that the district court gave insufficient consideration to the issues before it that we must set aside its judgment and remand for further consideration of the merits of Timothy's motion.

We will refer in our opinion only to the essential facts and procedural matters necessary to give context to our ruling. We refer to the Kansas divorce statutes as they existed at the time this case was heard by the district court.

I. The District Court Had Jurisdiction to Reduce or Terminate Maintenance if the Parties' Circumstances Changed Significantly.

The first issue we must decide is whether the district court had subject-matter jurisdiction to modify Timothy's maintenance payments.

When spouses settle their divorce case with a contractual settlement agreement, they have the power as contracting parties to define the terms under which maintenance will be paid. Accordingly, they can provide for modification or for no modification, and if modification is allowed they can state the conditions under which maintenance may be modified. When parties do *not* reach a settlement and the court awards maintenance, then K.S.A. 60-1610 provides that the court may modify maintenance downward based on changed conditions. See *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 962-63, 255 P.3d 34 (2011).

Here, the Underwoods settled their case and provided for \$1,298 per month in maintenance for 101 months unless the death of either party or Terry's remarriage or cohabitation triggered an earlier end date. But the settlement agreement also incorporated court authority to modify maintenance under K.S.A. 60-1610: "The parties agree that the court shall reserve jurisdiction to modify or terminate maintenance awarded to Wife as provided in K.S.A. §60-1610(b)(2)."

What the parties now disagree about is whether that provision allows the court to reduce or terminate maintenance based on changed circumstances, such as Timothy's loss of employment.

Answering that question requires that we interpret the parties' contract and the statute. In examining the meaning of statutes and written contracts, we must review the

matter independently, without any required deference to the district court. See *Strieby*, 45 Kan. App. 2d at 961.

Terry insists that the settlement agreement allows termination of maintenance only in the circumstances explicitly set out there: (1) the expiration of 101 months, (2) the death of either party, or (3) her remarriage or cohabitation. She contends that the agreement doesn't provide for modification at all and doesn't provide for termination on any other condition or event.

Timothy cites two unpublished cases from our court finding that similar settlement-agreement language incorporating modification power under K.S.A. 60-1610(b)(2) gave the district court the same jurisdiction it would otherwise have had to modify court-awarded maintenance in a case tried to the court: *In re Marriage of Werth*, No. 91,424, 2005 WL 217165, at *3 (Kan. App. 2005) (unpublished opinion), and *In re Marriage of Trudell*, No. 89,538, 2003 WL 22479542, at *1 (Kan. App. 2003) (unpublished opinion). We agree with the conclusion reached in *Werth* and *Trudell*.

In both of those cases, as in ours, the parties had provided for maintenance that would terminate on several standard events (length of time, death of either party, or remarriage of wife) but had also provided for modification "pursuant to" either K.S.A. 60-1610 generally (in *Trudell*) or K.S.A. 60-1610(b)(2) specifically (in *Werth*). In both cases, our court held that the reference to the statute gave the district court authority to modify maintenance in light of changed circumstances.

Let's consider the provisions found in K.S.A. 60-1610(b)(2) and (b)(3). Subsection (b)(2) provides that "the court may modify the amounts or other conditions for the payment of . . . maintenance . . . that has not already become due," although maintenance

may be modified upward only with the agreement of the party paying it. Subsection (b)(3) provides that matters resolved in a contractual settlement agreement, as in other contracts, may be modified only "[a]s prescribed by the agreement" or later agreed to by the parties.

So when the parties provide that the district court reserves jurisdiction to modify or terminate maintenance under K.S.A. 60-1610(b)(2), what does that mean? For the reason noted by our court in *Werth*, we reject Terry's interpretation that the court has no additional powers of modification under the specified statute—this interpretation would make the sentence reserving jurisdiction under K.S.A. 60-1610 superfluous. See *Werth*, 2005 WL 217165, at *3; Restatement (Second) of Contracts § 203(a) (1979) (providing that a contract interpretation giving effect to all terms is preferable to one that leaves some part of no effect). In Terry's view, the only situation in which the court could hold a hearing to terminate maintenance would be if the parties disputed whether she was cohabitating. (Presumably there would be no dispute about whether she had died or remarried.) But adding a sentence reserving jurisdiction to modify or terminate maintenance generally under K.S.A. 60-1610(b)(2) would be an odd way to provide such a limited power to the court.

We conclude that providing in a divorce settlement agreement that maintenance is modifiable under K.S.A. 60-1610(b)(2) gives the court jurisdiction to modify or terminate maintenance based on any changed circumstances. See Blaylock & Lambdin, *Practitioner's Guide to Kansas Family Law* § 4.3.13 (S. Mann ed., 2010) (noting that the court may modify maintenance when the agreement provides that it is subject to modification under K.S.A. 60-1610). Accordingly, the district court was required to rule on Timothy's motion on its merits.

II. *We Are Unable to Affirm the District Court's Alternate Ruling Denying the Motion to Terminate or Reduce Maintenance.*

In addition to denying Timothy's motion for lack of jurisdiction—a basis we have held faulty—the district court also ruled in the alternative that Timothy had not shown a sufficient basis to obtain relief. Ordinarily, when reviewing a ruling on a motion to modify maintenance, we first look to see whether the factual basis for the court's ruling is supported by substantial evidence. If so, we then must uphold the ruling unless we find that the court has abused its discretion. *In re Marriage of Evans*, 37 Kan. App. 2d 803, 804, 157 P.3d 666 (2007). A court abuses its discretion when its decision is guided by an erroneous legal conclusion or is so arbitrary that no reasonable person would agree with it. *State v. Barnes*, 293 Kan. 240, 262 P.3d 297, 309 (2011).

We have two serious concerns about the district court's ruling on Timothy's motion. First, the primary basis for the court's ruling was its view that it had no jurisdiction to grant relief, which was legally incorrect. Second, our review of the record leaves us with concerns about whether the court gave a fair and open-minded hearing to the merits of the motion, which were considered only in the event the court was wrong on its original legal conclusion that it lacked jurisdiction.

The court held an initial nonevidentiary hearing on March 12, 2010. After Timothy's attorney said he was ready to present brief evidence in support of the motion, Terry's attorney indicated that he wanted more documents about Timothy's pay, job benefits, and expenses before having an evidentiary hearing. The explanation of the need for such records takes more than two full pages of transcript. But when the court asked Timothy's attorney for a response, the court quickly interrupted and indicated that it was very skeptical about granting Timothy any relief:

"[Timothy's attorney]: Judge, the aggrievement of this is a man who had a 160,000 plus dollar a year job that was lost and he's making something more like 60,000 a year and he is [seeking] to terminate his maintenance. We have provided—

"The Court: Well, I can tell you today, I can tell you today the Court is very unlikely to terminate his maintenance. So I mean—he agreed to it in a settlement agreement and the statutory framework is such that while he might be given some sort of relief in terms of maybe a stay or even possibly a reduction, but the Court is not going to terminate his maintenance if he is making money and he's been terminated from another job and he's got the ability to go out and work.

"Hell, I don't care if he goes out and works at Wal-Mart, but he's going to pay maintenance because he agreed to pay maintenance when the case was resolved, but I'm not going to make that final determination because I haven't heard—I haven't heard word one about why he lost his job or why he's unemployed. But you start from a very skeptical viewpoint by the court as to why a person would have his maintenance terminated at this stage. There may be some other relief that he might be afforded in this case, but the problem is I think that [Terry's attorney] indicates that he's not able to move forward because he has not received the information that he's requested."

Later in that hearing, the court invited discussion of the jurisdiction issue. The court said that it did not need to hear evidence to determine that it had no jurisdiction to terminate maintenance:

"So you're asking the Court to terminate spousal maintenance. I can deal with that today without hearing any evidence. The Court will deny the motion to terminate spousal maintenance based upon the statute and based upon what is contained within the property settlement agreement and the decree of divorce because the Court finds that the property settlement agreement states that there are three circumstances under which maintenance can be terminated and that's A, B and C that the Court already read off of the property settlement agreement."

Timothy's counsel then said that if the court would not grant an end to maintenance payments, Timothy sought to reduce them downward under the court's equitable powers in a divorce case. The court agreed to have a hearing on an equitable reduction in maintenance, but reaffirmed that it "wasn't going to terminate maintenance." The court then set an evidentiary hearing for April 7.

After hearing the parties' evidence on April 7, the court first denied the motion to terminate maintenance based on its conclusion that it had no jurisdiction to do so. The court then referenced Timothy's alternative request for the court to reduce maintenance based on considerations of equity, but began that discussion by saying, "I don't think I am necessarily required to [look at the request to reduce maintenance] because we didn't have a trial in this case. I never set the amounts on the maintenance in this case to begin with" The court proceeded to consider the matter, though, and denied any reduction as well:

"[W]hen you look at the equitable situation here, we've got a situation where Mr. Underwood does have funds. Obviously it cuts into his savings, it cuts into his retirement. [But h]e has an income stream and potentially his future income if he can find a job.

"I know the economy is difficult. A 62-year-old man with health problems might have a problem getting a job; however you know, as they say the old 62 is the new 52 or however—it's backwards, I don't know. But people are working in—I mean, people are working in their 70s so I don't necessarily find the age and the health problem to be terribly compelling."

The court also awarded \$3,000 in attorney fees to Terry, a decision the court supported by saying that Timothy's claim for relief simply hadn't been a valid one:

"He's a CEO with a master's degree and has had able counsel throughout this and I just want to make sure he knows that we're not going to continue to litigate this case forever. So there is going to be a cost associated with coming to court if you don't have a good, valid argument. I don't think this was a good, valid argument because the clear language of the document indicates that and I don't know, maybe that was something that was overlooked. But I have seen plenty of property settlement agreements. We've all seen them, where there is a provision in the document that states that maintenance is modifiable upon disability, loss of job, loss of income, or extenuating circumstances. I don't see that here.

"So that's my reason for my ruling"

On this record, we simply do not have sufficient confidence that the matter was fairly considered to affirm the court's alternative ruling denying a reduction in maintenance. Our Supreme Court has noted that "for a district court decision to receive a full measure of . . . deference under the abuse of discretion standard, it must have been based upon a correct understanding of the law." *State v. Hulett*, 293 Kan. 312, 263 P.3d 153, 157 (2011). Here, the district court did not operate on a correct understanding of the law. It rejected Timothy's request to terminate maintenance based on an incorrect legal ruling. Arguably, since it also denied even a reduction in maintenance on the merits, that eliminates any problem with the improper basis for denying Timothy's motion to terminate maintenance altogether. But there is little in the court's ruling to demonstrate that it separated the issues and fairly considered the request to reduce maintenance, and the court concluded the hearing by awarding attorney fees on the basis that Timothy's motion had not presented "a good, valid argument."

We therefore vacate the district court's ruling on Timothy's motion and remand the case for further consideration. On remand, we direct that the case be reassigned to another judge. We do not do this often, and we do so reluctantly.

It is important that those appearing in our courts have confidence that a fair hearing is provided to them. Given the district court's strongly stated views against Timothy's motion, which were based on an incorrect understanding of the law and made before hearing evidence, we believe it would be difficult for Timothy—or even a neutral observer—to be sure that this matter had been fairly adjudicated if we did not require that the motion be decided on remand by a judge who has not already expressed such strongly held views about its outcome.

We should add that we have not concluded that the district judge here was actually biased or unfair; a number of explanations could be provided for the statements we found in the transcript, both ones noted here and not. We simply have concluded that the interests of justice would best be served by reassigning the case to a different judge on remand.

We express no opinion about the proper outcome of the motion on its merits. That is a decision to be made by the district court, with appellate review only for abuse of discretion if the district court's factual findings are supported by substantial evidence.

The judgment of the district court on Timothy's motion to terminate maintenance is vacated. The case is remanded for further proceedings with directions to reassign it to another judge.