NOT DESIGNATED FOR PUBLICATION

No. 106,055

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

COLON PURDIE, JR.,
Appellant,

and

WENDY PURDIE,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; JEAN SCHMIDT, judge. Opinion filed March 16, 2012. Affirmed.

Donald R. Hoffman, of Hoffman & Hoffman, of Topeka, for appellant.

Kevin P. Shepherd, of Topeka, for appellee.

Before GREENE, C.J., PIERRON and MARQUARDT, JJ.

Per Curiam: Colon Purdie claims the district court was without authority to modify his divorce decree 8 years after it was filed and that the district court erred in finding the amended decree was ambiguous. We affirm.

Colon and Wendy Purdie were married on March 4, 1988. During the entire time they were married, Colon served in the United States Army. On May 19, 2003, Colon filed a petition for divorce. Wendy filed an answer and counter-petition. Both parties were represented by counsel during the pendency of the divorce. The parties filed an

agreed Decree of Divorce on October 28, 2003. In December 2003, the parties filed an Amended Decree of Divorce. Paragraph 14 in both decrees is entitled "Pension" and states in its entirety: "All contributions made to Petitioner's [Colon's] retirement account between March 4, 1988, and May 19, 2003, *shall be split equally between the parties or as allowed by military law.*" (Emphasis added.) It is undisputed that the parties had no other retirement account, and Colon would only receive payments from the account after he completed 20 years of service with the United States Army.

Colon completed 20 years of service and retired from the United States Army on December 1, 2010, at which point he started collecting his retirement pay. When Wendy tried to collect her portion of Colon's military retirement pay, she was informed that the language in their decree would not allow her to collect her share of the retirement and specific language approved as an order of the court had to be inserted in the decree.

On December 13, 2010, Wendy filed a motion requesting the district court to amend the divorce decree "in order for the retirement/pension of Petitioner to be properly divided." Wendy filed an amended motion on February 8, 2011, which included more specificity regarding the language the Defense Finance and Accounting Service (DFAS) required for the division of Colon's retirement income. The district court held a hearing on February 8, 2011, at which both parties were present with their attorneys. After hearing evidence, the district court filed a journal entry on March 1, 2011, adding the following language to the amended divorce decree:

> "Respondent/Wife (former spouse) is hereby awarded 50% of the marital share of the service member's (Petitioner/Husband) disposable retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 182.5 months of marriage (March 3, 1988 through May 19, 2003) during the member's creditable military service, divided by the member's total number of months of creditable military service. Once retired, the DFAS will provide the unknown denominator which would be the total number of months the service member accumulated before retirement."

On March 11, 2011, Colon filed a motion to set aside the journal entry. On March 24, 2011, Colon filed a motion to reconsider the journal entry. The district court denied both motions. Colon timely appeals.

AMENDMENT OF THE 2003 DIVORCE DECREE

Colon claims that the district court did not have the authority in 2011 to amend a 2003 divorce decree. Wendy's motion was not seeking to amend the decree but to clarify the language in paragraph 14 to give it meaning. The district court did not amend the decree. It merely clarified the language of the amended decree pursuant to K.S.A. 2010 Supp. 60-260(b). On appeal from a district court's decision on a motion under K.S.A. 2010 Supp. 60-260(b), the standard of review is whether the trial court abused its discretion. *In re Marriage of Leedy*, 279 Kan. 311, 314, 109 P.3d 1130 (2005); *Neagle v. Brooks*, 203 Kan. 323, Syl. ¶ 3, 454 P.2d 544 (1969). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. *State v. Gant*, 288 Kan. 76, 81-82, 201 P.3d 673 (2009). "Discretion is abused only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Zodrow*, 240 Kan. 65, 68, 727 P.2d 435 (1986). The party alleging the abuse has the burden to show such abuse. *In re Marriage of Beardslee*, 22 Kan. App. 2d 787, 790, 922 P.2d 1128, *rev. denied* 260 Kan. 993 (1996).

A divorce decree may be modified under K.S.A. 2010 Supp. 60-1610. "However, where relief is sought because of facts existing at the time of the decree which, if known to the court, would have brought about a different result, relief is available under K.S.A. 60-260(b)." *In re Marriage of Hunt*, 10 Kan. App. 2d 254, 259, 697 P.2d 80 (1985). On February 8, 2011, Wendy filed her amended motion for clarification under K.S.A. 2010 Supp. 60-260(b).

K.S.A. 2010 Supp. 60-260(b) states:

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:
(1) mistake, inadvertence, surprise or excusable neglect
. . . .
(6) any other reason that justifies relief
"(c) . . . A motion under subsection (b) must be made within a reasonable time, and for reasons under paragraphs (b)(1), (2) and (3) no more than one year after the entry of the judgment or order, or the date of the proceeding."

Here, Wendy asserts that the court had the authority to grant her motion under K.S.A. 2010 Supp. 60-260(b)(1) because the DFAS would not allow her to collect her share of Colon's retirement because specific language was required. To comply with the intent of the parties, the district court supplemented language in the amended decree to satisfy the DFAS requirements.

On appeal, Colon argues that the amended decree contains no language that would allow modification under K.S.A. 2010 Supp. 60-260(b). Specifically, Colon argues that the modification cannot be valid under K.S.A. 2010 Supp. 60-260(b)(1) because the motion was filed more than a year after the filing of the decree. Wendy, however, argues that she was unable to file within a year because "the case at issue was nonexistent since Colon had yet to retire." Wendy also contends that she may request relief under K.S.A. 2010 Supp. 60-260(b)(6) and that she filed her motion within a reasonable time. A panel of this court has held that a "reasonable time frame is measured by determining when the movant came into possession of facts justifying the relief as compared to the time when

[she] filed the motion seeking the relief." *Wilson v. Wilson*, 16 Kan. App. 2d 651, 659, 827 P.2d 788, *rev. denied* 250 Kan. 808 (1992).

Colon argues that Wendy did not file the motion within a reasonable time. Wendy filed the motion to clarify the amended decree about 8 years after the divorce. Although 8 years would generally not be considered reasonable, our Supreme Court has held that a "'reasonable time'" is based upon individual facts, such as "whether good cause has been shown for failing to take action sooner." *In re Marriage of Larson*, 257 Kan. 456, 464, 894 P.2d 809 (1995). Here, Colon retired in December 2010. After Wendy was informed that the language in the amended decree would not allow her to collect her portion of Colon's retirement pay, she filed her motion for clarification on December 13, 2010. As soon as Wendy was informed of the inadequacy of the language in the amended decree, she promptly filed her motion. The district court did not abuse its discretion under K.S.A. 60-260(b) in clarifying the amended divorce decree.

AMBIGUITY IN AN AMENDED DIVORCE DECREE

"The 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). "Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect." *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

Here, both parties agreed to the terms stated in the decree and in the amended decree. They agreed that one of their assets was Colon's military retirement and that the contributions to that account during their marriage were to be divided equally or as allowed by military law. Because the decree was agreed to by both parties, it is comparable to a settlement agreement. Settlement agreements are subject to the rules of

contract law. *In re Marriage of Takusagawa*, 38 Kan. App. 2d 401, 403, 166 P.3d 440, *rev. denied* 285 Kan. 1174 (2007).

The primary rule in interpreting a contract is for the court to determine the intent of the parties at the time the contract was formed. *In re Marriage of Wessling*, 12 Kan. App. 2d 428, 430, 747 P.2d 187 (1987). In this case, the district court was required to determine the intent of the parties when the divorce decrees were filed. If the contract terms are clear, the rules of construction are unnecessary and the intent of the parties is determined from the contract itself. *Marquis v. State Farm Fire & Cas.*, 265 Kan. 317, 324, 961 P.2d 1213 (1998).

Ambiguity exists when the contract terms or language is doubtful or has conflicting meanings. *Marquis*, 265 Kan. at 324. A contract is not considered ambiguous unless it is ambiguous on its face, making it "genuinely uncertain which one of two or more meanings is the proper meaning." *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 693, 840 P.2d 456 (1992). Before a contract can be found to be ambiguous, the language must receive a "fair, reasonable, and practical construction." *Marquis*, 265 Kan. at 324.

On appeal, Colon argues that there is nothing ambiguous about the language in paragraph 14 dealing with his pension, which states: "All contributions made to Petitioner's retirement account between March 4, 1988, and May 19, 2003, shall be split equally between the parties or as allowed by military law." Wendy, on the other hand, suggests that it was "clear" that the parties' intention was to divide Colon's military pension, "evident by the agreed and signed sworn affidavit." The only thing, Wendy asserts, that was not clear was the meaning of "all contributions."

The district court agreed, stating:

> "The language contained in the Amended Divorce Decree setting out 'all contribution[s]' can not be so narrowly construed to include only financial contributions to a fund. A contribution may also be the months of service provided to the military in exchange for a 'pension' or retirement benefit."

While not supported by the record, Colon says that military retirement pay "is not a contributory plan—it is a Federal entitlement, which the member either qualifies for or does not and that does not vest in any way prior to the member's retirement." It is true that Colon made no contributions to any retirement account between March 4, 1988, and May 19, 2003. Colon had no retirement account at the time the divorce decrees were filed, other than his expected military retirement pay after 20 years of service.

Colon asserts that "a plain reading of [paragraph] 14 does not lend itself to the conclusion that there is a genuine uncertainty as to which one of two or more meanings is the proper meaning." Here, Colon and Wendy both agreed to the divorce decrees that divided Colon's pension between them; however, the language used could not affect the division. Therefore, because the wording of the decrees would not allow the DFAS to divide Colon's military pension, the district court added the language to resolve the ambiguity. The district court did not err in finding this ambiguity and resolving it.

Affirmed.