NOT DESIGNATED FOR PUBLICATION

No. 106,910

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

SHERYL L. VAN DER STELT,
Appellee,

and

STEVEN E. VAN DER STELT,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed August 10, 2012. Affirmed.

Joseph N. Vader, of Joseph N. Vader, P.A., of Olathe, for appellant.

Ernest C. Ballweg, of Johnston, Ballweg & Modrcin, L.C., of Overland Park, for appellee.

Before ARNOLD-BURGER, P.J., MCANANY, J., and LARSON, S.J.

Per Curiam: This is Steven E. Van Der Stelt's appeal of the district court's decision denying his motion to increase the amount of maintenance he receives each month from his ex-wife, Sheryl L. Van Der Stelt.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second chapter of a divorce between Sheryl and Steven which was finalized in August 2002. Maintenance, which was awarded to Steven, was established by court order and not by an agreement between the parties.

At the final divorce hearing, the district court ordered Sheryl to pay Steven $100 per month in maintenance for 10 years. The district court stated from the bench that it would reserve the right to increase maintenance if Steven's health insurance premiums increased, if Sheryl's annual salary exceeded $55,000, or if the cost of living increased during the time period maintenance was due.

With regard to the cost of living circumstances, the district court explained that if Steven filed a motion to extend maintenance in the future and the consumer price index indicated that $187 currently bought what $100 would have in 2002, then maintenance would be increased to $187 per month. Notably, the judge stated that he was "not placing an automatic cost of living increase in [the divorce decree], I'm simply reserving jurisdiction to increase it based upon the Consumer Price Index numbers."

The record reflects that the divorce decree filed on August 14, 2002, reads as follows with respect to the award of maintenance:

> **"ORDERED, ADJUDGED AND DECREED,** [Sheryl] shall pay maintenance to [Steven] in the sum of $100.00 per month beginning August 1, 2002 and payable on the first day of each month thereafter for 120 months, subject to [Steven's] remarriage, death or cohabitation. The Court reserves jurisdiction to increase maintenance on the happening of any one of the following events:
>
> 1. Health insurance premiums for Respondent are greater than $296.00; and
> 2. Wife's salary is in excess of $55,000 from her employment; and
> 3. By using a cost of living comparison, it is more than the values of July 2002.

> "Before the expiration of 120 months, [Steven] shall have the right to file a motion with the Court to request the extension of the payment of maintenance for an additional 120 months as set forth in K.S.A. 60-1610(b)(2). In addition the Court specifically reserves jurisdiction to hear any subsequent motions for modification, extension or reinstatement of the payment of maintenance set out in K.S.A. 60-1610(b)(2)."

In September 2010, Steven filed a motion to increase the amount of maintenance he receives each month from Sheryl, noting that her income is in excess of $55,000, the cost of living was greater than what it was in 2002, and his monthly health insurance premium was now greater than $296.

Sheryl responded, alleging K.S.A. 60-1610(b)(2) prevented the district court from reserving jurisdiction in order to increase maintenance beyond what was prescribed in the original divorce decree. Without authority to increase maintenance, Sheryl claimed Steven's motion had to be denied.

A hearing was held on Steven's motion. The district court agreed with Sheryl's argument that K.S.A. 60-1610(b)(2) did not allow reservation of jurisdiction in order to increase the amount of maintenance beyond the amount ordered in the original divorce decree and, consequently, denied Steven's motion.

Steven then moved to alter or amend the district court's judgment, arguing the language contained in the original divorce decree established an "escalator clause" which allowed maintenance to be increased in the future upon the happening of any one of the three conditions set out in the divorce decree. In support of this argument, Steven cited *In re Marriage of Monslow*, 259 Kan. 412, 912 P.2d 735 (1996), where our Supreme Court approved a district court decision awarding petitioner maintenance of $450 per month for 48 months, plus 20 percent of the respondent's monthly adjusted gross income that exceeded $4,227 for 48 months. The Supreme Court ruled the 20 percent escalator clause

was valid under K.S.A. 60-1610(b)(2) because the clause merely established a means for adjusting the amount of maintenance due each month without requiring court intervention and subsequent modification of the divorce decree. 259 Kan. at 414-20.

The district court again conducted a hearing. The court denied Steven's motion to alter and amend, concluding the language of the divorce decree did *not* establish a predetermined formula for calculating future increases to maintenance without the intervention of the district court. The court held that such a formula was required in order to be a valid escalator clause pursuant to K.S.A. 60-1610(b)(2) and *Monslow*. Accordingly, Steven's motion was denied.

Steven has timely appealed.

Analysis of Appellate Arguments

Steven's appellate argument is the district court erred when it concluded the language of K.S.A. 60-1610(b)(2) rendered invalid the provision of the 2002 divorce decree allowing the district court to increase maintenance upon the happening of any of the three events specified in the decree. Steven continues his argument that the divorce decree provision is similar to the escalator clause approved in *Monslow* and, therefore, valid under K.S.A. 60-1610(b)(2).

Sheryl counters that the language of the 2002 divorce decree did not establish an escalator clause as allowed by *Monslow* and is in violation of K.S.A. 60-1610(b)(2). These contentions require us to look to the language of K.S.A. 60-1610(b)(2).

Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009). "The fundamental rule governing interpretation of statutes is that the legislature's intent

governs if this court can ascertain that intent. The court presumes that the legislature expressed its intent through the language of the statutory scheme. [Citation omitted.]" 289 Kan. at 1193-94. In that respect, "[a]n appellate court's first task is to 'ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning.'" *Padron v. Lopez*, 289 Kan. 1089, 1097, 220 P.3d 345 (2009).

The language of K.S.A. 60-1610(b)(2) remained unchanged between the filing of the divorce decree in August 2002 and the filing of Steven's motion to increase maintenance in September 2010. The statute states in pertinent part:

> "The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. . . . Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, *but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree*." (Emphasis added.) K.S.A. 2010 Supp. 60-1610(b)(2).

This court has previously held that the language of K.S.A. 60-1610(b)(2) establishes that "[w]hen a court has decreed maintenance based on its own order, it retains the power to modify future maintenance payments which have not already become due." *In re Marriage of Ehinger*, 34 Kan. App. 2d 583, Syl. ¶ 3, 121 P.3d 467 (2005), *rev. denied* 280 Kan. 982 (2006). This is true regardless of whether the district court specifically stated in the decree that it retained the power to modify maintenance in the future. 34 Kan. App. 2d 585, Syl. ¶ 8. Though "[c]ourt-decreed maintenance may be modified downward upon a showing of a material change in circumstances," 34 Kan. App. 2d 585, Syl. ¶ 5, "[m]aintenance may not be modified upward or accelerated beyond

what was prescribed in the original decree without the consent of the party liable for the payment of the maintenance." 34 Kan. App. 2d 585, Syl. ¶ 4; see also *In re Marriage of Fiorella*, No. 102,067, 2010 WL 1687864, at *6 (Kan. App. 2010) (unpublished opinion) ("The plain language of K.S.A. 60-1610(b)(2) provides that a court has the power to modify maintenance without the consent of the party liable for the maintenance, as long as the court does not increase the amount of maintenance beyond the amount prescribed in the original divorce decree. Here, the district court did not have the statutory authority to grant [ex-wife's] request for additional maintenance beyond the amount prescribed in the original divorce decree unless [ex-husband] consented to the increase.").

In resolving this appeal, we again look to the decision of our Supreme Court in *In re Marriage of Monslow*. It was there held that a divorce decree may contain an escalator clause which provides a set means for adjusting the amount of monthly maintenance. Such a clause is valid under K.S.A. 60-1610(b)(2) because adjustments to the amounts of monthly maintenance are automatically made pursuant to the terms contained within the original divorce decree. The escalator clause which was approved in *Monslow* was deemed to be "a means of adjusting maintenance without modifying the original decree." 259 Kan. at 416.

Our review of Justice Allegrucci's *Monslow* opinion, 259 Kan. at 414-20, indicates that escalator clauses may modify the amount of maintenance if "the decree . . . include[s] provisions for modifications which would become operative, without court intervention, upon the occurrence of named circumstances." 259 Kan. at 419-20. It is clear that under the facts in our case, court intervention would be required each time a modification was requested and any change would, in fact, require "modification to the original decree." The language utilized by the district court in the divorce decree involving Steven and Sheryl does not establish an escalator clause that we can approve under the *Monslow* teachings.

The language of the Van Der Stelt 2002 divorce decree, although establishing conditions allowing increases in maintenance, does *not* contain any preset formula for determining how much additional maintenance Sheryl must pay each month if any one of the three events set forth in the original decree should occur. It is *not* a valid escalator clause under *Monslow*.

Further, if the district court followed the provisions and increased maintenance based on the happening of any one of the three events of the original decree, the court would clearly be increasing maintenance "beyond what was prescribed in the original decree" in violation of K.S.A. 60-1610(b)(2).

We hold the district court correctly determined the maintenance provision contained in the 2002 divorce decree was invalid under K.S.A. 60-1610(b)(2) and could not be enforced.

Affirmed.