

NOT DESIGNATED FOR PUBLICATION

No. 106,139

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

KEITH E. LAZARUS,
Appellant,

and

AMANDA J. LAZARUS,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed October 5, 2012.
Affirmed.

Aaron C. McKee, of McKee Law, L.L.C., of Olathe, for appellant.

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

Before LEBEN, P.J., ATCHESON, J., and BUKATY, S.J.

Per Curiam: The divorce settlement agreement between Keith and Amanda Lazarus awarded Amanda \$10,485 to equalize the division of property, and the payment was to be accomplished with funds from Keith's pensions in the United Kingdom. When—a year later—Keith hadn't paid Amanda that sum, she filed a motion to enforce the agreement because the payment hadn't been completed. The district court concluded that payment should have been made within a reasonable time and that a reasonable time had already been given, so it awarded judgment against Keith.

Keith has appealed, claiming that the district court's order amounted to a modification of the parties' settlement agreement that the district court wasn't authorized to make. But the parties stipulated in their agreement that the court retained jurisdiction to enter "any further orders" until the pension transfer had been completed, and the district court properly concluded that the payment was to have been made within a reasonable time. Accordingly, the district court didn't improperly modify the parties' agreement when it entered a judgment against Keith.

Keith also contends that the district court shouldn't have awarded attorney fees against him and that the fee award was excessive. But the parties' agreement provided that the prevailing party would be entitled to attorney fees in an action to enforce the agreement, and we find nothing unreasonable in the amount of fees awarded by the district court. We therefore affirm its judgment.

FACTUAL BACKGROUND

In September 2009, the district court granted Keith and Amanda a divorce. The divorce decree incorporated the parties' settlement agreement and parenting plan. The settlement agreement awarded Amanda \$10,485 as a means to equalize the division of property, and it provided that the funds would come from one or more of Keith's pension plans located in the United Kingdom. The agreement included a stipulation by the parties that the district court retained jurisdiction "to enter any further orders" until the payment had been made. It also provided that if either party filed an action to enforce the agreement, the prevailing party in the dispute would be awarded attorney fees from the person found to be responsible.

Our record shows that the parties received conflicting advice from solicitors (attorneys) in the United Kingdom about whether some of Keith's pension funds there

could be transferred to Amanda. In October 2009, the first solicitor Keith retained advised that it was unlikely that the pension transfer could be accomplished. In May 2010, another solicitor, Caroline Elliott, advised Keith that the pension transfer could be completed within 4 months. In June 2010, Elliott, writing on Keith's behalf, told Amanda that the pension-transfer application couldn't be made in Keith's name because he was about to be remarried. Elliott advised Amanda that she could apply for the pension transfer in her name, but Amanda declined. In August 2010, a third U.K. solicitor, engaged by Amanda, advised that the pension-transfer application was unlikely to be successful.

In September 2010, Amanda filed a motion for enforcement of the settlement agreement and requested a judgment against Keith for the amount owed. In October 2010, the district court ordered Amanda to apply for the pension transfer in her name and scheduled a hearing for February 2011 to allow the parties time to complete the transfer. But even with Amanda's signature on that affidavit, the pension transfer hadn't been completed by February 2011. Keith reported that there was a hearing about the pension-transfer application scheduled for March 2011 in the United Kingdom, and he moved for a continuance of the February 2011 hearing, but the district court denied Keith's continuance motion and entered judgment against him. On April 6, 2011, the district court filed a journal entry and judgment that granted Amanda's motion to enforce the settlement agreement and entered judgment in Amanda's favor against Keith for \$10,485. The district court also awarded Amanda \$7,650 in attorney fees.

Keith has appealed to this court.

ANALYSIS

I. *The District Court Properly Entered Judgment Against Keith.*

Keith's primary argument on appeal is that the district court didn't have authority to modify the marital settlement agreement. Specifically, Keith argues that the court didn't retain jurisdiction to render a judgment against him instead of allowing him to continue to try to transfer money from one of his U.K. pensions. Amanda contends that the settlement agreement provided that the district court had continuing jurisdiction to enter orders related to the payment to equalize property. The district court agreed with Amanda.

Both parties agree that this court has unlimited review over the interpretation and legal effect of written instruments. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 263, 225 P.3d 707 (2010). We therefore interpret the parties' settlement agreement, which is subject to the normal rules of contract interpretation, independently, without any required deference to the district court. *Drummond v. Drummond*, 209 Kan. 86, 91, 495 P.2d 994 (1972); *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 961, 255 P.3d 34 (2011). We also independently review questions of jurisdiction. *Woods v. Unified Gov't of Wyandotte County/KCK*, 294 Kan. 292, 295, 275 P.3d 46 (2012).

Matters settled by an agreement incorporated into a divorce decree—other than matters pertaining to the legal custody, residency, visitation, parenting time, support, or education of the minor children—cannot later be modified by the court except as prescribed by the agreement or as later consented to by the parties. K.S.A. 2010 Supp. 60-1610(b)(3); see K.S.A. 2011 Supp. 23-2712(b). For example, a trial court doesn't have subject-matter jurisdiction to modify a maintenance agreement if the agreement specifies

the only manner by which it can be modified. *In re Marriage of Gurganus*, 34 Kan. App. 2d 713, 716-17, 124 P.3d 92 (2005).

Amanda points to the provision of the settlement agreement regarding the pension payment under the heading "Division of Property," which concluded with the court retaining jurisdiction "to enter any further orders" until the pension transfer or award had been completed:

"7. Wife is awarded as property division equalization a total of exactly £7,436.00, the equivalent of \$10,485.00 at the exchange rate of \$1.41 to £1.00, in net value or amount received from one or a combination of more than one of Husband's below-described pension plans or schemes located in the United Kingdom, valued as of June 25, 2009. The parties shall jointly comply with any requirements of the pension plan administrator regarding the transfer of this net award into Wife's sole name. Husband shall be solely responsible for the first \$500.00 in any actual out-of-pocket fees or costs . . . , including any attorney's fees, associated with effectuating this transfer of the above net amount from his pension benefits to Wife, and the parties shall equally share in any actual out-of-pocket fees or costs beyond \$500.00. 'Out-of-pocket' costs or fees do not include fees or costs that may be charged by the pension plan towards the pension benefits or account value of Husband, which shall be charged to Husband's remaining account or benefit value and shall not be charged against Wife's net award, as an administrative cost of effectuating this transfer to Wife. In the event that the plan awards Wife less than the total net amount awarded to her in this provision, Husband shall be liable to Wife for the difference, payable in lump sum within 30 days after the above transfer. The parties stipulate that the Court shall retain jurisdiction to enter any further orders until this pension transfer or award has been completed[.]"

Amanda argues that the parties' stipulation that the court retain jurisdiction until the transfer has been completed gave the district court authority to enter judgment against Keith when the transfer or payment wasn't made within a reasonable time.

Here, the question turns on the effect of this sentence: "The parties stipulate that the Court shall retain jurisdiction to enter any further orders until this pension transfer or award has been completed." A settlement agreement is subject to the normal rules of contract interpretation. *Drummond*, 209 Kan. at 91; *Strieby*, 45 Kan. App. 2d at 961. "The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

The provision seems to anticipate that the court should retain jurisdiction until Amanda receives the \$10,485. The provision gave the district court authority "to enter any further orders" until the payment is complete. The parties' agreement doesn't explain "any further orders," and there is no language limiting its scope. Thus, the broad contract language seems to do what it literally says—give the district court authority to enter "any further orders" related to the property-division-equalization award. Under that interpretation, the district court's order entering judgment against Keith in favor of Amanda in the amount of \$10,485 falls within the scope of any further order related to the award. The parties do not dispute that neither a pension transfer nor an award payment had been completed at the time of the district court's order. Therefore, it would appear that the district court had jurisdiction to enter judgment against Keith, though Keith presents several additional arguments against this result that we must consider.

Keith's primary argument is based on a standard provision in the parties' agreement that the agreement could only be modified by a writing signed by both parties:

"I. Absolute Agreement. That this agreement is absolute and irrevocable and is not conditioned upon the parties being divorced or upon approval by the Court; that this Agreement shall be considered to be contractual between them and binding upon the parties, their executors, administrators, heirs, devisees, beneficiaries, assigns, or other

legal representatives, where applicable for the purpose of carrying out the terms thereof; that if, at some later date, any modification hereof is agreed upon between the parties, the same shall be reduced to writing, signed and acknowledged by them before it shall become effective."

Essentially, Keith argues that the district court didn't have the authority to modify the agreement without both parties' written consent. Keith points to language in the journal entry to show that the court modified the agreement without his consent: "Accordingly, the Court modifies the Settlement Agreement to provide that three (3) months of time following the entry of the Decree was reasonably sufficient to accomplish the pension transfer." Keith characterizes the district court's order as modifying or redrafting the agreement.

Even if this characterization is true, however, the district court had express authority to "enter any further orders" related to the property-division-equalization award. By the clear terms of the agreement, *any* further orders—without limitation—include orders that modify or redraft the provision in any way to bring about the intent of the parties that Keith pay Amanda \$10,485 to complete an equitable division of property. Otherwise, the sentence stipulating that the district court retains jurisdiction would be meaningless.

The contract's absolute-agreement provision doesn't expressly prohibit the district court from modifying the agreement, it only provides that any modification agreed to by the parties must be signed and in writing to be effective. And although K.S.A. 2010 Supp. 60-1610(b)(3) does prohibit the district court from modifying a separation agreement except as prescribed by the parties' agreement, the agreement between Keith and Amanda provided that the district court retained jurisdiction to enter any further orders until the award was completed.

Our conclusion that the district court had authority to enter this judgment is reinforced by the basic principle of contract construction that a reasonable time will be implied if a contract doesn't specify the time of performance. *Arnold v. S.J.L. of Kansas Corp.*, 249 Kan. 746, 749, 822 P.2d 64 (1991); *Hattan v. Schoenhofer*, No. 99,734, 2009 WL 2902570, at *7 (Kan. App. 2009) (unpublished opinion); *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1138 (10th Cir. 2008) (interpreting Kansas law). Keith argues that the agreement didn't specify a deadline for the pension transfer. But the district court had authority to imply a reasonable time for payment into the agreement. What constitutes a reasonable time depends on the facts and circumstances of each case and is a matter for the district court to determine. *Singer Company v. Makad, Inc.*, 213 Kan. 725, Syl. ¶ 8, 518 P.2d 493 (1974). Moreover, the district court sits as a court of equity in divorce cases. *Weber v. Weber*, 189 Kan. 661, 665-66, 371 P.2d 147 (1962); *In re Marriage of Wilson*, 13 Kan. App. 2d 291, 297, 768 P.2d 835 (1989), *aff'd* 245 Kan. 178, 777 P.2d 773 (1989).

The district court's equitable ruling that—by February 2011—Keith had already had a reasonable time to either complete the transfer or make an equivalent payment is itself a reasonable conclusion. Here, the property-division-equalization award of \$10,485 was listed in conjunction with a lump-sum cash payment of \$2,575 that was due to be paid to Amanda within 30 days of June 25, 2009. Other deadlines included in the agreement required Amanda to refinance the former marital residence in her name within 6 months from the date of the agreement and required certain life-insurance policies and credit accounts to be terminated within 30 days. There is no indication in the settlement agreement that the pension transfer was intended to be a long-term transaction. Rather, the other terms in the agreement indicate that the parties intended for the property division to be completed in a reasonable time. Further, the district court reviewed almost 40 exhibits of correspondence to conclude that 3 months was a reasonable time to accomplish the pension transfer. It seems likely that agreeing to transfer funds from Keith's pensions was intended to equalize the property division more expediently than

other options, such as monthly payments. The district court was within its authority to imply a reasonable time for performance into the agreement. See *Arnold*, 249 Kan. at 749. And 3 months was a reasonable time for Keith to complete the award given the facts and circumstances of the settlement agreement and the pension transfer. See *Singer Company*, 213 Kan. 725, Syl. ¶ 8.

Keith speculates that the purpose of the parties' stipulation was to allow the court to act later in anticipation that Keith's pension funds wouldn't be payable to him until he reached a certain age or was vested in a retirement plan. Keith cites two cases from this court recognizing the reserve-jurisdiction method of valuing an unvested military pension. See *In re Marriage of Harrison*, 13 Kan. App. 2d 313, 316, 769 P.2d 678 (1989); *In re Marriage of Collins*, No. 105,217, 2012 WL 140219, at *3 (Kan. App. 2012) (unpublished opinion). The reserve-jurisdiction method allows a court to retain jurisdiction to award an appropriate percentage of a pension to a nonpensioned spouse when it is actually paid to the pensioned spouse. *Harrison*, 13 Kan. App. 2d at 316; *Collins*, 2012 WL 140219, at *3. But there is nothing in the settlement agreement or in the record to support Keith's speculation. Rather, the agreement called for a fixed amount to be paid, not a percentage, and it makes no mention of limitations based on age or whether Keith's pensions are vested. And the record doesn't include any claim that any of the pensions are unvested or payable at a certain age. Thus, there is no language in the agreement indicating this was the intention of the parties. Again, the plain language of the agreement gave the district court broad authority to enter any further orders until Amanda was paid.

Keith also raises three additional arguments. First, he argues that Amanda should share the blame for the pension transfer not taking place in a reasonable time. The settlement agreement expressly required both parties to "jointly comply with any requirements of the pension plan administrator regarding the transfer of this net award into Wife's sole name." But here, the pension-plan administrator never was involved in

the transaction. Keith alleges that Amanda failed to cooperate, but Amanda was under no obligation to cooperate with Keith's U.K. solicitor until she was ordered to do so by the district court. Thus, the clause requiring compliance with the pension-plan administrator has no bearing in this case.

Second, Keith argues at length that Amanda failed to show that the pension transfer wasn't possible. Specifically, Keith contends that Amanda failed to seek U.K. legal advice in a timely manner and that she could have made the application in her own name sooner. But Keith fails to point to anything in the settlement agreement that required Amanda to do anything except comply with any requirements of the pension-plan administrator. Nor is there anything in the settlement agreement that required a showing that the pension transfer wasn't possible before authorizing an alternate solution. Even if the pension transfer was possible, an alternate solution was authorized by the settlement agreement because the parties stipulated that the district court had authority to issue "any further orders" until Amanda had been paid. Thus, the district court's authority wasn't contingent on whether the pension transfer was actually possible.

Last, Keith argues that the district court erred by denying his motion for a continuance in February 2011 to allow time to consider the results of a hearing in the United Kingdom scheduled for March 2011. The district court has discretion to grant or deny a continuance. K.S.A. 2010 Supp. 60-240(b). We review a district court's denial of a motion for continuance for abuse of discretion, and that discretion is abused only if no reasonable person would agree with the district court's view. *In re J.A.H.*, 285 Kan. 375, 384-85, 172 P.3d 1 (2007). Here, Amanda filed a motion for enforcement of the settlement agreement and for judgment against Keith on September 20, 2010. On October 14, 2010, the district court ordered Amanda to submit an affidavit to facilitate the pension-transfer application. At the end of the hearing, the district court declared that it was setting another hearing for February 24, 2011, "to see if [the pension transfer] got done" and to consider entering judgment against Keith if it didn't. When the February 24

hearing occurred, the pension transfer hadn't been completed. The district court denied Keith's motion for continuance and entered judgment against Keith. The district court had discretion to deny Keith's motion, and it wasn't unreasonable to do so when the pension transfer still hadn't been completed 5 months after Amanda's motion for judgment and 17 months after the divorce decree. Therefore, the district court didn't abuse its discretion by denying Keith's motion for a continuance.

II. *The District Court Didn't Abuse Its Discretion in Awarding Attorney Fees.*

Keith argues that the award of attorney fees in Amanda's favor was unjust, that the amount awarded was unreasonable, and that the provision authorizing the award was unenforceable. Specifically, Keith argues that it is unfair to make him pay Amanda's attorney fees when the district court modified the settlement agreement. Keith also questions whether it was necessary for Amanda's attorney to bill for 34 hours to file a motion and attend two 15-minute hearings. Further, Keith contends that the attorney-fee provision should be unenforceable as against public policy because it deters settlement. Amanda argues that the district court alternatively had authority to award attorney fees either through the agreement or by statute.

We have unlimited review over questions of law, including whether a district court had authority to award attorney fees. *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009). If a district court has authority to award attorney fees, we then review the district court's decision for abuse of discretion. 289 Kan. at 1200. The amount of an award of attorney fees is within the sound discretion of the district court and won't be disturbed on appeal unless there's a showing that the district court abused its discretion. 289 Kan. at 1200. And a district court may not award attorney fees without statutory authority or an agreement by the parties. 289 Kan. at 1200.

Here, the district court had authority to award attorney fees under the parties' settlement agreement. The agreement provided that if either party filed an action to enforce the agreement, then "the party determined to be responsible to the other, whether such determination is made by adjudication or settlement, shall indemnify and hold the prevailing party harmless from all attorney fees, court costs and related expenses incurred by such party." Amanda filed a motion to enforce the settlement agreement, and the district court determined that Keith was responsible to pay Amanda through a judgment and enforced the agreement. Thus, the parties' agreement granted the district court authority to order Keith to pay Amanda attorney fees as the prevailing party. The district court's decision to award the fees was reasonable because Keith had failed to complete the pension transfer for 17 months after the divorce decree, a failure that resulted in Amanda incurring legal fees to obtain a judgment.

As to the amount of the attorney-fee award, we find no abuse of discretion. The district court awarded Amanda \$7,650, or 34 hours at \$225 per hour. She had requested \$10,200, or 34 hours at \$300 per hour. The district court reviewed an exhibit of billing that detailed hours worked during a 9-month period. The exhibit reflects that Amanda's attorney did more than simply file a motion and attend two 15-minute hearings, as Keith alleges.

The district court is considered an expert on the issue of attorney fees. While the appellate court also is considered an expert, we do not substitute our judgment for that of the district court unless its determination is so unreasonable that the interests of justice call upon us to modify the amount of its award. See *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006). The amount awarded here was reasonable, and we find no abuse of discretion. See *Unruh*, 289 Kan. at 1200.

Finally, Keith alleges that the attorney-fee provision in the settlement agreement should be deemed unenforceable as against public policy. But public policy must be

clearly declared by the constitution, statutes, or the courts, and it must be so definite that its existence isn't subject to any doubt. *Campbell v. Husky Hogs*, 292 Kan. 225, 230, 255 P.3d 1 (2011). Generally, the burden of proving that a contract clause is unenforceable falls on the party challenging the provision. See *Carrothers Constr. Co. v. City of South Hutchinson*, 288 Kan. 743, 755, 207 P.3d 231 (2009) (discussing liquidated-damages provisions). Here, Keith doesn't cite to the state constitution or any statutes or judicial opinions to support his assertion that the attorney-fee provision violates public policy. We know of no statute and no caselaw precluding the parties in a divorce case from providing that the prevailing party should recover attorney fees—as Amanda will here—in the event a motion to enforce the agreement is required.

We affirm the district court's judgment.