NOT DESIGNATED FOR PUBLICATION

No. 106,760

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ORLANDO LEE,
Appellant,

and

MARGARET E. LEE,
Appellee.

MEMORANDUM OPINION

Appeal from Geary District Court; DAVID R. PLATT, judge. Opinion filed October 19, 2012. Affirmed.

David P. Troup, of Weary Davis, L.C., of Junction City, for appellant.

Janice Norlin, of Marietta, Kellogg and Price, of Salina, for appellee, and *Autumn L. Fox*, of The Law Office of Autumn L. Fox, of Abilene, for appellee district court trustee.

Before BUSER, P.J., MALONE and ARNOLD-BURGER, JJ.

Per Curiam: We are asked to interpret both a settlement agreement that Orlando and Margaret Lee reached when they divorced and a court order issued the following year related to that agreement. The dispute involves the effect that Margaret's remarriage had on two separate paragraphs in the parties' settlement agreement. One paragraph required Orlando to pay $250 per month for 36 months to Margaret as maintenance and explicitly stated that her remarriage would end that obligation. The other paragraph required Orlando to pay 15% of his nondisability military retirement benefit to Margaret as

maintenance if and when he ever became entitled to it; it did not say anything about the effect of any remarriage. When Margaret remarried in 1995, the district court ordered the "maintenance obligation" terminated.

When Orlando retired from the military in 2005, he did not start paying Margaret her 15% share of his nondisability military retirement pay because he believed that her remarriage in 1995 had terminated all maintenance obligations. The district court trustee brought an action to collect the retirement payments. The district court sided with the trustee, and Orlando appeals. We agree with the district court that the settlement agreement and court order were clear and unambiguous and resulted in only the $250 maintenance obligation terminating upon Margaret's remarriage. Accordingly, we affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

The pertinent facts are undisputed. Orlando and Margaret Lee ended their almost 10-year marriage by divorce in March 1995. They reached a settlement agreement that included four separate paragraphs governing Orlando's obligations to pay Margaret "maintenance." Paragraphs 5 and 6 addressed Orlando's maintenance obligations tied to events leading up to the time of the divorce. The next two paragraphs contained Orlando's postdivorce maintenance obligations and are key to issues raised in this appeal. They provided as follows:

> "7. [Orlando] shall pay to [Margaret] additional maintenance intended for her support in the amount of $250 per month commencing April 1, 1995, and continuing for a maximum of 36 months *to terminate* upon the death of either party or *upon [Margaret's] remarriage*. [Margaret] shall be under an affirmative duty to notify [Orlando] promptly in the event [Margaret] should remarry within the next 36 months. All monthly maintenance payments made hereunder shall be paid to the Clerk of the District Court of Geary County, Kansas.

"8. As an additional maintenance allowance to [Margaret], [Orlando] agrees to pay a sum equal to 15% of his Army nondisability retirement pay, should he become entitled to it. The parties recognize and agree that under current federal law, a direct division of said retirement pay requiring the Army Finance Center to pay it directly to [Margaret] cannot be made based upon the duration of the parties' marriage, but [Orlando] will cause said payment to be made upon his retirement by income withholding order. It is the parties' intention that said payment be based upon the gross amount of [Orlando's] nondisability retirement and that it be treated for tax purposes as maintenance and support for [Margaret], so that the payment will be deductible to [Orlando] and taxable to [Margaret]. In the event [Orlando] should leave the Army prior to retirement and become eligible for a lump sum separation bonus based upon his rank and years of service, 15% of the amount of said bonus, to the extent it is not based upon disability, shall be paid to [Margaret] as additional maintenance and support, it being the parties' intention that said payment be tax deductible to [Orlando] and taxable to [Margaret]." (Emphasis added.)

The parties appeared with separate counsel and presented their settlement agreement to the district court at a divorce hearing. After Orlando and Margaret testified that this was their agreement, Orlando's counsel informed the court, "I'm not sure whether this is specifically stated. The—the 36 months . . . of $250 a month, maintenance, that would terminate upon [Margaret's] remarriage." Margaret's counsel confirmed that this was, indeed, their agreement.

The district court approved and incorporated the above-quoted provisions into the divorce decree. An income withholding order (IWO) entered on the same date as the decree lists under the section titled "Spousal Maintenance": $100 for past-due maintenance; $250 for current maintenance; and "15% of any SSB or VSI." Inclusion of this latter provision is curious, however, because it is undisputed that Orlando had not retired at that point.

Margaret remarried late in 1995. In 1996, the district court ordered that because of Margaret's marriage, Orlando's maintenance obligation terminated. An IWO signed by the judge and filed that same day omits all provisions for spousal maintenance.

Almost 15 years later, the district court trustee moved to revive the judgment for maintenance found in paragraph 8 based on Orlando's retirement from the military some time in 2006. Orlando objected, primarily arguing that the 1996 order terminated *all* maintenance obligations as a result of Margaret's remarriage, so there was no judgment to revive. Alternatively, Orlando argued paragraph 8 was actually for property division, in which case the trustee would lack authority to enforce or collect that judgment because it was not for support or restitution—the two types of judgments a court trustee is statutorily authorized to enforce under K.S.A. 23-496(a).

The district court conducted a nonevidentiary hearing on the trustee's motion. In addition to the trustee, Orlando appeared with counsel and Margaret appeared pro se. After reviewing the agreement and hearing the parties' arguments, the district court agreed with the trustee and held that under the plain language of both the parties' settlement agreement and the 1996 order only the maintenance obligation in paragraph 7 terminated upon Margaret's remarriage. Orlando appeals.

THE TERMINATION OF ORLANDO'S MAINTENANCE OBLIGATIONS

In his first issue on appeal, Orlando contends that the only reasonable interpretation of the parties' settlement agreement mandates the conclusion that the parties intended for Margaret's remarriage to terminate *all* maintenance obligations, not just the $250 monthly obligation in paragraph 7.

Standard of review

Our review of the interpretation and legal effect of a property settlement, just like any other contract, is unlimited. *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900-01, 220 P.3d 333 (2009); see *In re Estate of Sweeney*, 210 Kan. 216, 224, 500 P.2d 56 (1972). We are required to 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). If, on the other hand, this court cannot glean the parties' intent from the four corners of their settlement agreement because the words used are subject to two or more possible meanings, then this court will consider the agreement ambiguous. *In re Marriage of Gurganus*, 34 Kan. App. 2d 713, 717, 124 P.3d 92 (2005). In that case, we are required to ascertain the parties' intent "by considering the language employed, the circumstances existing when the agreement was made, the object sought, and other circumstances tending to clarify the parties' real intentions." *Byers v. Snyder*, 44 Kan. App. 2d 380, 386, 237 P.3d 1258 (2010), *rev. denied* 292 Kan. 964 (2011).

Paragraphs 7 and 8 of the settlement agreement are unambiguous.

We find no ambiguity in the settlement agreement. The parties contracted for separate maintenance obligations divided into four paragraphs, and only paragraph 7 specifically provided that Margaret's remarriage would terminate the obligation.

In arguing that all other maintenance provisions terminated too, Orlando wants this court to improperly isolate the term "maintenance" in paragraph 7 without acknowledging its surrounding context. The language regarding the termination effect of Margaret's remarriage immediately followed the monthly maintenance obligation of $250 in the same sentence without any comma, period, or other form of grammatical

separation. Moreover, Margaret was under an affirmative duty to notify Orlando of any remarriage only within the 36-month period in which he was obligated to pay her $250 per month. No similar termination language appears in paragraph 8. This context alone demonstrates that the parties intended for only the $250 monthly maintenance to terminate upon Margaret's remarriage.

The 1996 order was not ambiguous.

Orlando also relies upon the district court's 1996 order in arguing that his maintenance obligation in paragraph 8 terminated upon Margaret's remarriage. He contends that by broadly terminating his maintenance obligation, the court's 1996 order was unlimited in its scope and terminated all maintenance, not just that in paragraph 7, which he says is why he did not make any payments to Margaret after he retired from the military in 2005.

According to Orlando, if Margaret thought otherwise, she was obligated to file a motion for relief from the judgment under K.S.A. 60-260 when he retired from the military in early 2005 and made no payments; but she never did so. Orlando also suggests that the district court lacked jurisdiction or any factual basis to modify its 1996 order, which Orlando claims is what the court effectively did without directly saying so. In support, Orlando cites *In re Marriage of Larson*, 257 Kan. 456, 894 P.2d 809 (1994). *Larson* interpreted K.S.A. 60-260(b) to require a motion to modify filed under subsections (1), (2), or (3) of that statute to be filed within a reasonable time and not more than 1 year after the judgment the party seeks to modify. 257 Kan. at 461. *Larson* did not consider whether such a motion was required under these circumstances. We believe it was not for the following reason.

There is no ambiguity in the district court's 1996 order. The order simply states:

"1. [Margaret] remarried on December 31, 1995, and has moved into post housing with her new husband.

"2. *Accordingly*, [Orlando's] maintenance obligation should terminate effective December 1995, and a new Income Withholding Order should be entered in the amount of $200 per month for current support." (Emphasis added.)

The order links, by use of the word "[a]ccordingly," Margaret's remarriage with the termination of the maintenance obligation associated with her remarriage that being the $250 monthly maintenance outlined in paragraph 7 of the settlement agreement. Thus, Margaret was under no obligation to move to modify the 1996 order under K.S.A. 60-260, and the district court did not improperly modify the 1996 order when it entered its judgment now on review here.

In sum, to now treat the termination-upon-remarriage language in paragraph 7 as applying to all paragraphs in the settlement agreement that govern Orlando's various maintenance obligations—including paragraph 8, which maintenance obligation would not even be invoked unless and until Orlando began to receive nondisability military retirement benefits—would require this court to ignore the parties' careful language used to govern Orlando's various maintenance obligations. Orlando's argument that the court's 1996 order was ambiguous also asks this court to ignore the court's careful use of the term accordingly. This court cannot, and will not, do so.

Even if we were to find the language ambiguous, the result is the same.

Without applying any presumptions in favor of one party over the other, we conclude that even if the settlement agreement or the 1996 order could be deemed somehow ambiguous, the result is the same. Where there is ambiguity concerning a vital point in a contract—here, whether the maintenance obligation in paragraph 8 terminated upon Margaret's remarriage—one tool to aid in construction of the contract is the

consideration of parol evidence, which is evidence of circumstances existing outside of the four corners of the contract. See *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 452, 827 P.2d 24 (1992).

We need only look to the transcript of the divorce hearing to confirm that the parties intended that Margaret's remarriage would only terminate the $250 monthly maintenance found in paragraph 7. As noted above, after Orlando and Margaret testified about their agreement, Orlando's counsel informed the court, "I'm not sure whether this is specifically stated. The—the 36 months . . . of $250 a month, maintenance, that would terminate upon [Margaret's] remarriage." Margaret's counsel confirmed that this was, indeed, their agreement. This parol evidence demonstrates that the parties obviously intended for only the maintenance in paragraph 7 to terminate if Margaret remarried.

The IWO's prepared before and after Margaret's remarriage are the only relevant evidence found in the record that might suggest a contrary conclusion. The original IWO contained the military retirement pay provision handwritten above the current and past maintenance figures; the IWO entered subsequent to Margaret's remarriage did not. But even this parol evidence does not mandate a different result because Orlando had not even retired when either IWO was entered. Thus, any mention or omission of Margaret's entitlement to a percentage of his nondisability military retirement pay in the IWO's is irrelevant.

For the above reasons, we conclude that the plain language of the parties' settlement agreement incorporated in the divorce decree and the district court's 1996 order clearly establish that Orlando's obligation to pay maintenance in the form of 15% of his nondisability retirement pay did not terminate upon Margaret's remarriage. Accordingly, the decision of the district court is affirmed.

ENFORCEABILITY OF PARAGRAPH 8

Orlando's second issue on appeal is that paragraph 8 is unenforceable because it improperly characterizes a property division as maintenance in violation of the intent of the Uniform Services Former Spouse Protection Act (USFSPA), 10 U.S.C. § 1408 (2006), and thus "runs afoul of the Supremacy Clause in Article VI, cl. 2 of the United States Constitution." Unfortunately, as the trustee notes, Orlando cites no authority in support of his argument. Nor does he address contrary authority. A panel of this court has already found that the parties can negotiate and agree to treat the division of military retirement benefits as maintenance in a settlement agreement, which is usually done with tax consequences in mind, and to do so does not violate the USFSPA in *In re Marriage of Gurganus*, 34 Kan. App. 2d at 718-19. The *Gurganus* panel held that the 10 U.S.C. § 1408(d)(2) (2000) "merely requires that if not married for 10 years, the retiree must make the payment directly to the ex-spouse, rather than having the government withhold the money and make the payments." 34 Kan. App. 2d at 719. Orlando offers no reason to reach a result contrary to that reached by the *Gurganus* panel. Accordingly, we find Orlando has abandoned this issue. See *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010) (noting that failure to support point in brief with pertinent authority or show why it is sound despite lack of supporting authority or in face of contrary authority is akin to failing to brief the issue, which results in the abandonment of issue on appeal).

Orlando also briefly argues, without supporting authority, that paragraph 8 should be declared void to the extent that it does not limit maintenance payments to 121 months as required by K.S.A. 60-1610(b)(2). But this ignores the fact that K.S.A. 60-1610(b)(2) addresses court-ordered maintenance. "There is a fundamental difference between maintenance by decree and maintenance settled by a separation agreement." *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 962, 255 P.3d 34 (2011). The district court was not called upon here to determine Margaret's entitlement to maintenance. Rather, the parties voluntarily entered into an agreement to resolve their marital rights and

responsibilities. When such agreements are freely and intelligently made, they are uniformly upheld by the courts. *Strieby*, 45 Kan. App. 2d at 962 (quoting *McKinney v. McKinney*, 152 Kan. 372, 374, 103 P.2d 793 [1940]).

Affirmed.