NOT DESIGNATED FOR PUBLICATION

No. 107,732

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ROBERT BRAUTMAN,
*Appellant,*

and

JENNIFER HARDESTY,
*Appellee.*

# MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed April 5, 2013. Affirmed.

*Richard W. Martin, Jr.*, of Martin & Wallentine, LLC, of Olathe, for appellant.

*Lewanna Bell-Lloyd*, of Olathe, for appellee.

Before BRUNS, P.J., GREEN and BUSER, JJ.

*Per Curiam*: In this postdivorce action, Robert Brautman appeals from the trial court's order granting Jennifer Hardesty's motion to modify child support. In her motion, Hardesty sought reimbursement for college expenses based on the parties' settlement agreement. Under the settlement agreement, Hardesty and Brautman agreed to pay a portion of their children's college expenses. On appeal, Brautman contends that the trial court erred in failing to reduce the amount he owed by the financial aid amount that one of his children received. Finding no error, we affirm.

The facts material to this appeal are not largely in dispute. Brautman and Hardesty were married in July 1991. They had two children born during their marriage, Jaynie, born on June 17, 1992, and Bethany, born on April 27, 1997. Brautman and Hardesty divorced in 1998. The decree of divorce incorporated by reference a property settlement agreement dated September 24, 1998. The agreement provided in pertinent part:

> "It is agreed that the Petitioner [Hardesty] and the Respondent [Brautman] will each pay one-third of the reasonable tuition, books, room, and board expenses of a 4 year undergraduate college education (4 consecutive years) and post graduate education (4 to 6 additional consecutive years) for each child, provided, however, that the minor child be enrolled as a full-time student and maintain a GPA of 2.5. Further, prior to selecting their college and/or post graduate education, each of the children shall discuss with their parents the child's future educational selections and projected costs and expenses.
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> "Petitioner and Respondent further agree that the cost of undergraduate and graduate education shall be based upon the tuition, cost of attendance of a state university, such as Kansas State University or Kansas University, and both parties further agree that any monthly living expenses and spending money to be provided to the child shall first be discussed and agreed upon between Petitioner and Respondent.
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> "It is further anticipated that in the event that any of the children attend college, they will attempt to seek part-time and summer employment not conflicting with their studies and other education aids, including scholarships and loans, if available, to help defray the expense of their education."

Jaynie enrolled as a full-time student at York College and because the settlement agreement based the college expenses on a state university, Hardesty calculated the amount she requested from Brautman on Kansas University costs rather than on the cost of York College.

Hardesty's motion was first heard by a hearing officer who granted Hardesty's motion. The hearing officer ordered Brautman to pay $11,030 in college expenses.

After hearing arguments on the motion, the trial court granted Hardesty's motion, finding that Hardesty was entitled to reimbursement from Brautman for his portion of the college expenses incurred by Jaynie. The trial court reduced the hearing officer's award to $7,286.63 towards Jaynie's college expenses. To arrive at this amount, the trial court reduced the total cost owed by scholarships that Jaynie had received. But the trial court refused to reduce the amount by the student loans that Jaynie had taken out for her college education. Brautman argued that the trial court should have also applied the student loans, but the trial court disagreed.

*Did the trial court err in refusing to apply the amount of student loans to the balance owed by the parents for college expenses?*

On appeal, Brautman argues that the trial court erred in failing to reduce the amount he owed in college expenses by the financial aid amount received by Jaynie. Brautman contends that the settlement agreement clearly states that "scholarships AND loans" are to be used to help defray the cost of college. Brautman maintains that while the trial court correctly reduced the amount owed by the scholarships, it failed to reduce the amount by the financial aid.

In response, Hardesty argues that if the court were to reduce the amount owed by the financial aid amount it would negate the agreement of the parties and essentially place the full burden of the payment of college expenses on Jaynie. Hardesty maintains that the student loans were received to assist Jaynie in paying her one-third portion of the college expenses and that Jaynie had to take out the loans because Brautman refused to pay his portion of the expenses.

The interpretation and legal effect of a written instrument are questions of law over which an appellate court exercises unlimited review. *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

In denying Brautman's request to reduce the amount by the financial aid, the trial judge stated: "I think the loans, most children, if they don't have college funds set aside, are going to have to take out loans for their share. I read the agreement as being mom's going to pay a third, dad's going to pay a third, and child remains responsible for a third."

Clearly under the contract, each parent is responsible for paying one-third of the college expenses leaving the child responsible for the final one-third of the expenses. As the trial court correctly noted, most children who are responsible for paying for college will be required to take out financial aid. In this case, if the financial aid amount was used to reduce the obligation of the parents it would most likely leave Jaynie unable to pay her portion of her college expenses. Thus, the financial aid should not reduce the amount that each parent owes.

Under the settlement agreement the parents' obligation is clearly stated. Each parent must pay one-third of the expenses, leaving the final one-third to be paid by Jaynie. Because the financial aid was most likely needed by Jaynie to pay her one-third portion of the expenses, the trial court correctly refused to credit this amount to what the parents owed. Therefore, we determine that the trial court properly refused to reduce the amount owed by the parents by the financial aid amount.

*Did the trial court err in finding that it did not have jurisdiction to modify the terms of the marital settlement agreement?*

Next, Brautman argues that the trial court erred in finding that it did not have jurisdiction to modify the parties' settlement agreement as to child support.

In refusing to set aside Brautman's obligation to pay for his portion of Jaynie's college expenses, the trial judge stated:

> "I read the agreement as being mom's going to pay a third, dad's going to pay a third, and child remains responsible for a third. That's a contract. I'm not going to set it aside. There's not a motion. And, quite frankly, I don't know a way to set that aside. It's part of the parties' agreement they entered into at the time of the divorce. There's no escape clause in there that I see as far as financial insecurity or inability to make that. It's a burden on everyone. And that was the parties' agreement back in 1998 when you were divorced."

To support his argument, Brautman relies on K.S.A. 2012 Supp. 23-2712(b), which states the following:

> "(b) Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to subsequent modification by the court except: (1) As prescribed by the agreement; or (2) as subsequently consented to by the parties."

See former statute K.S.A. 60-1610(b)(3) (same).

Brautman contends that under the plain language of the statute, the trial court had jurisdiction to modify the parties' agreement regarding postsecondary support and education of the child.

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).

As Hardesty correctly argues in her brief, Brautman's reading of K.S.A. 2012 Supp. 23-2712(b) is incorrect. Kansas law is clear that a property settlement agreement, once accepted by the court and incorporated into the divorce decree, may not generally be modified by the court except as prescribed by the agreement or subsequent consent by the parties. *Miller v. Miller*, 6 Kan. App. 2d 193, 194-95, 627 P.2d 365 (1981). Nonetheless,

K.S.A. 2012 Supp. 23-2712(b) unquestionably provides that the trial court retains jurisdiction to modify issues dealing with support or education of *minor* children. The statute does not give the trial court jurisdiction to modify support for postsecondary education unless it is prescribed by the agreement or if the parties consent to the court's modification. In this case, the settlement agreement does not provide the trial court the authority to modify the agreement and clearly Hardesty has not consented to Brautman's requested modification. Therefore, the trial court did not err in finding that it did not have jurisdiction to modify the settlement agreement or set it aside. As the trial court noted, Brautman failed to file a motion to set aside the settlement agreement and therefore, this issue was not properly raised below.

Moreover, even if the trial court had jurisdiction to modify the terms of the marital settlement agreement, the trial court clearly set out its reasons for not doing so.

Affirmed.