NOT DESIGNATED FOR PUBLICATION

No. 108,085

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CHRISTOPHER P. SOENKSEN,
Appellee,

and

CARA M. GILLETT, f/k/a SOENKSEN,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed July 5, 2013. Affirmed.

Joseph W. Booth, of Lenexa, for appellant.

Allan E. Coon and *Dana L. Parks*, of Hubbard, Ruzicka, Kreamer & Kincaid L.C., of Olathe, for appellee.

Before MALONE, C.J., PIERRON, J., and JAMES L. BURGESS, District Judge Retired, assigned.

Per Curiam: Cara M. Gillett, f/k/a Cara M. Soenksen, became the manager of an account for each of her three children when she was divorced from their father, Christopher P. Soenksen. Gillett also agreed to pay 75% of the children's school expenses as part of the written separation and property settlement agreement, which the district court incorporated into the divorce decree. Gillett used funds from the children's accounts to pay some of her 75% of the children's school expenses. Soenksen filed a motion to

enforce the Agreement, arguing that Gillett's use of the funds was improper under the Agreement. The district court agreed and ordered Gillett to reimburse the money she had taken out of the account for her personal obligation to pay 75% of the children's school expenses.

On appeal, Gillett argues (1) the district court lacked jurisdiction to consider her management of the accounts in a lawsuit filed to interpret the Agreement and the district court erred in finding the transactions were inappropriate; (2) the district court erred in considering parol evidence when interpreting the Agreement; (3) the district court erred in modifying the Agreement by finding that the accounts Gillett managed were the college accounts mentioned previously in the Agreement; and (4) the district court erred in awarding attorney fees to Soenksen. Because none of Gillett's arguments have merit, we affirm.

FACTS

On September 28, 2005, the district court filed a journal entry and decree of divorce for Christopher and Cara Soenksen, who had been married since October 30, 1993. Soenksen and Gillett had entered into a written separation and property settlement agreement (Agreement), which the district court incorporated into the decree. At the time of the divorce, Soenksen and Gillett had three children, ages 10, 8, and 6. The district court ordered that Soenksen and Gillett share joint custody of the children, subject to the terms of their parenting plan. Neither party was required to pay child support or maintenance. The district court ordered Gillett to pay Soenksen $233,000 as a complete and final settlement of all issues regarding their litigation. The Agreement was attached to the journal entry and decree of divorce.

Section I of the Agreement consisted of the parenting plan. Section I.VI was entitled "Insurance Coverage, Child Support and Extraordinary Expenses." According to

this section, Soenksen agreed to continue to provide health insurance for the children, while Gillett agreed to pay for all uncovered, out-of-pocket medical expenses. Soenksen agreed to pay 25% and Gillett agreed to pay 75% of all of the children's education expenses, with statements or bills of all expenses provided prior to payment. Section I.VI.5 of the agreement concerned college expenses and specifically stated:

> "Father shall pay 25% and Mother shall pay 75% of the children's college expenses not covered by the college accounts set up in the name of each child. Said expenses shall include: tuition, room and board, books, fees, sorority or fraternity expenses and a reasonable allowance. The parties' obligation to support the children's college expenses shall continue until each child reaches age twenty-three, and each child is enrolled as a full time student and the child is passing all courses. Before either parent is obligated under the terms of this provision, each child is responsible for making every effort to obtain grants and or scholarships or student loans."

After considering the assets owned by Gillett before marriage, the assets Gillett inherited during marriage, and Soenksen's agreement to pay 25% of the children's education expenses, the parties agreed that Soenksen would not pay Gillett child support.

Section V of the Agreement discussed division of the parties' property, setting aside the parties' home to Gillett and dividing their various personal property, bank accounts, retirement accounts, and stock. The section included the equalization payment, stating that Gillett would pay Soenksen $233,000 as a complete and final settlement of all issues regarding the litigation. In addition, section V.9, titled "Children's Separate Property," stated:

> "The following investment accounts held at A.G. Edwards have been established in the name of and for the benefit of the parties' minor children, specifically:
>
> "Sabrina Soenksen-Acct. #____539;
> "Eva Soenksen-Acct. #____489; and

"Christopher Robert Soenksen-Act. #____331

"The above accounts shall be set aside to each child individually and managed by Mother during the time of their minority. Mother shall provide Father with quarterly statements for each account."

Finally, section VIII.5 of the Agreement stated: "Each party shall be responsible for any and all attorney's fees and costs incurred by him or her during the course of this action."

On October 20, 2009, Gillett filed a motion to modify child support, arguing that her income had been significantly reduced and the children's expenses had increased. On December 3, 2009, the district court accepted a hearing officer's decision that Soenksen begin paying Gillett $1,163 per month as child support. Soenksen filed a motion for de novo review of the hearing officer's decision. On June 25, 2010, the district court filed a journal entry and decree of modification, stating that Gillett's income had significantly decreased since the date of the decree and two of the children had moved into a different age group. The district court concluded that there had been a material change of circumstances that necessitated a modification of the decree as to child support. The district court modified Soenksen's child support obligation to Gillett to $1,147 per month.

On December 30, 2010, Gillett filed a motion for reimbursement of medical/dental expenses.

On March 15, 2011, Soenksen filed a motion to enforce the Agreement and for other relief. In the motion, Soenksen stated that section I.VI.5 of the Agreement, which discussed the portion of the children's college expenses he and Gillett were required to pay, indicated that they had to pay the portions not covered by college accounts set up in each of the children's names. Because the only accounts set up in the children's names in the Agreement were the A.G. Edwards accounts listed in Section V.9 of the Agreement,

Soenksen argued that these accounts were the college accounts discussed in section I.VI.5 and that the accounts should only be used for college expenses. Soenksen alleged that Gillett began making withdrawals from the accounts to pay for non-college expenses; thus, the withdrawals were improper and violated the terms of the Agreement. Soenksen also alleged that Gillett improperly funded the accounts by cashing out a life insurance policy held by a trust the parties had set up prior to the divorce.

As a result, Soenksen requested that the district court order Gillett

> "to immediately return those funds withdrawn from the children's college accounts; to restore the accounts to a balance representative of reasonable interest earned and appreciation in value; to pay Petitioner's attorney's fees expended by him herein; and for such other and further relief as the Court deems just and proper."

Soenksen also requested that the district court modify the Agreement in order to title the accounts listed in section V.9 as "College Accounts" and provide him exclusive management rights to the accounts.

With his motion, Soenksen filed a verified application for an ex parte order restraining Gillett from withdrawing funds from the "college accounts." In the motion, Soenksen argued again that the A.G. Edwards accounts listed in Section V.9 of the Agreement were the college accounts discussed in section I.VI.5, so the accounts should only be used for college expenses. Soenksen alleged that Gillett began making withdrawals from the accounts, and since none of the children were in college yet, the withdrawals were improper and violated the terms of the Agreement. That same day, the district court entered an ex parte order restraining Gillett from withdrawing funds from the children's accounts, which were now Wells Fargo accounts.

On October 27, 2011, the district court held a hearing on Soenksen's motion to enforce the Agreement and Gillett's motion for reimbursement of medical/dental expenses. At the hearing, Soenksen's attorney argued that he was requesting attorney fees because in May 2010 he had asked Gillett to reimburse the accounts and not use them again, but she had withdrawn an additional $7,500 from them in February 2011 before the ex parte order was granted. Gillett's attorney argued that the district court did not have jurisdiction over the money in the accounts because the accounts were created under the Uniform Transfer to Minors Act (UTMA), K.S.A. 38-1701 *et seq*. Thus, Gillett claimed the action would have to be filed under Chapter 38 and the UTMA statutes. Gillett's attorney also argued that the district court did not retain jurisdiction to modify the Agreement, so it must deny Soenksen's request to modify.

Soenksen and Gillett testified at the hearing. Soenksen testified that the accounts specifically mentioned in the Agreement were set up to save money for college for the children. Soenksen agreed that the money in the accounts was used to benefit the children, but it was not used for his portion of any of the children's expenses. When asked by the district court, Soenksen's attorney admitted Soenksen did not have any of the documents setting up the accounts to show their terms and the rights and responsibilities.

Gillett testified that the accounts at issue in this case were set up with funds from stock owned by her family. According to Gillett, Soenksen was supposed to set up the college accounts mentioned in the Agreement with the equalization payment she made to him. Gillett admitted that she used funds from the accounts for tuition and tithing, which she explained went toward tuition for elementary school. Gillett testified that the account was a UTMA account and that the funds could be used for anything as long as it was for the children's benefit. She stated that a child would have access to his or her account at age 18, and the account would cease being a custodial account when the child turned 21.

Gillett testified that she believed it was appropriate for her to use the funds in the accounts to pay her portion of the children's expenses because she was awarded custodian status over the accounts. The district court then asked Gillett if there was actual tuition for the children's school. Gillett stated that there was tuition for high school, but for grade school the parents were just expected to tithe to the church. If they tithed—which all families were expected to do whether they had children at school or not—then there was no tuition.

After the parties submitted their evidence, the district court determined that it had jurisdiction to enforce and interpret the Agreement. The district court found it did not have jurisdiction in this litigation to consider the issue regarding taking money from a trust to set up the accounts, so the district court made no ruling on that issue. The district court found that tithing was not an expense of the children and that it violated the Agreement for Gillett to take money out of the children's accounts to tithe to the church. The district court determined that Gillett agreed to pay 75% of the children's grade school and high school education, so it was inappropriate for her to take money out of the children's designated separate property to pay what she contractually promised to pay in the Agreement.

Turning to the Agreement itself, the district court found that the language in section I.VI.5 stating that the parents would pay the children's college expenses not covered by college accounts referred to accounts that already existed—specifically, the accounts described in section V.9 of the Agreement. But then the district court reiterated that it was not stating that Gillett could not use the money in the accounts for the children's benefit. It was stating that Gillett could not use the money for things for which she agreed to be personally responsible.

Finally, the district court stated that under Kansas law, each parent was required to provide financial information to the other parent as long as they have common minor

children, so Gillett was awarded $500 in attorney fees because she had to file a motion in order to get Soenksen's financial information. Regarding Soenksen's request for attorney fees, the district court asked the parties whether section VIII.5—which stated that each party was responsible for all attorney fees and costs incurred during the course of the action—would apply to Soenksen's motion. The parties agreed that they would interpret the clause to mean that when they were negotiating their settlement, they each paid their own attorney fees. Thus, the district court found it had discretion to award attorney fees under K.S.A. 60-1601 *et seq.* and took the issue of Soenksen's attorney fees under advisement. Regarding the accounts mentioned in the Agreement, Soenksen's attorney asked if the district court could "make a further ruling with regard to preserving those accounts for college expenses." The district court answered, "No, not this time."

The district court held a telephone conference on January 18, 2012, to discuss attorney fees and any other issues the parties had before the district court issued a journal entry. Toward the end of the hearing, Gillett's attorney stated that Gillett "wanted some clarification on these accounts for future use." Gillett's attorney stated, "I know the Court has found these accounts that they were the college accounts. However, when the children turn 18, the children—they're the children's funds." The district judge responded:

> "They need to seek advice from their counsel on that, and the Court's not going to give an advisory opinion as to what they can or can't do with this money. But I think they need to be asking for legal advice. I don't have the accounts with me. I don't have the accounts in front of me. I don't know what these accounts say the way they were set up. So the Court believes that would be an advisory opinion that would be inappropriate to do at this time."

The district court also found that it had not received any evidence on Gillett's motion regarding reimbursement for medical expenses, so it ordered that she present that to a hearing officer first.

On April 27, 2012, the district court filed a journal entry of judgment on Soenksen's motion. In the journal entry, the district court reiterated its decisions stated at the previous hearings. The district court stated that section I.VI.5 of the agreement referred to accounts that were already in existence, which the district court determined were the accounts set forth in section V.9. It found that tithing was not an expense of the children and taking funds from those accounts for that purpose violated the parties' agreement. The district court also determined that it was inappropriate for Gillett "to remove money from the children's accounts to pay the portion of expenses for which she agreed to be responsible." Thus, the district court concluded that Gillett must reimburse $20.920.92 plus prejudgment and postjudgment interest to the children's accounts.

Additionally, the district court awarded Gillett $500 in attorney fees for having to formally request Soenksen's income information when he failed to timely provide that information. Because Soenksen prevailed on the majority of his claim, the district court awarded him $7,070 in attorney fees.

Gillett timely filed a notice of appeal.

ANALYSIS

Gillett first argues that the children's accounts discussed in section V.9 were not marital assets under K.S.A. 2012 Supp. 23-2801 but were the children's own individual property, so the district court did not have jurisdiction to divide the property in litigation under the original divorce decree, and neither party had an ownership interest in the accounts. Gillett contends that the district court's holding put limitations on her use of the children's accounts, which the district court cannot do.

An appellate court reviews the district court's findings of fact to determine if the findings are supported by substantial competent evidence and if they are sufficient to

support the district court's conclusions of law. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. 288 Kan. at 65. An appellate court has unlimited review of conclusions of law. *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1141, 192 P.3d 614 (2008). Furthermore, whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 637, 270 P.3d 1074 (2011).

Gillett's argument misinterprets the district court's decision. The district court did not find that Gillett was misusing the funds in the children's account. Instead, the district court found that Gillett was not fulfilling her obligation under section I.VI.5 of the Agreement to pay 75% of the children's education expenses. Because Gillett was using the children's accounts to pay 75% of the children's school expenses, it was actually the children who were paying that 75%. Moreover, the district court specifically did not put any limits on what Gillett could use the children's accounts for, as long as she did not use the funds in the accounts for things for which she was contractually obligated to pay.

In addition, Gillett's arguments concerning what a UTMA account can and cannot be used for do not actually challenge the decision made by the district court in this case. In arguing that the district court lacked jurisdiction to enter its decision, Gillett argues that instead of filing this motion in the divorce action, Soenksen should have filed an action under K.S.A. 38-1720, which allows the minor's guardian to petition the district court for an accounting by the custodian.

Unfortunately, Gillett never provided the district court with any evidence that the accounts discussed in section V.9 of the Agreement were created under the UTMA statutes. A UTMA account is created by following specific statutory guidelines. The UTMA applies only to a transfer to minors that "refers to this act in the designation under

subsection (a) of K.S.A. 38-1710 by which the transfer is made." K.S.A. 38-1703. Furthermore, a UTMA transfer is made when "money is paid or delivered to a broker or financial institution for credit to an account . . . , followed in substance by the words: 'as custodian for ____ (name of minor) under the Kansas uniform transfers to minors act.'" K.S.A. 38-1710(a)(2).

Gillett did not show that the UTMA was followed when these accounts were set up. Gillett argues in her reply brief that the nature of the accounts as UTMA accounts was never disputed at trial, but she was the only one who called them that. She also cites the account statements, which include the term UTMA on the statements. But that is not enough to prove that these accounts were set up under the UTMA.

Nevertheless, even if the accounts were UTMA accounts, the result would be the same. Gillett cites *Wilson v. Wilson*, 37 Kan. App. 2d 564, 154 P.3d 1136 (2007), for the position that she could use the money in the children's accounts to pay for anything that benefitted the children, even if it was something for which she would otherwise personally be liable. Specifically, Gillett cites a passage from *Wilson* that states:

> "[W]e conclude there are no provisions in the Kansas UTMA prohibiting a parent custodian from using custodial property to pay expenses for the minor's benefit, even when the expenses are for necessities a parent is generally obligated to provide for his or her child. In fact, such expenditures are expressly authorized under K.S.A. 38-1714(a) and K.S.A. 38-1715(a)." 37 Kan. App. 2d at 573-74.

Yet Gillett was not using the funds to pay an expense that she was generally obligated to provide for her children; she was using the funds to pay an expense that she was contractually obligated to pay. Additionally, *Wilson* also cites cases from other jurisdictions that "hold that custodial funds may not be used by a parent in a divorce action to pay child support, and that such action by a parent constitutes a breach of fiduciary duty." *Wilson*, 37 Kan. App. 2d at 573 (citing *Mangiante v. Niemiec*, 82 Conn.

App. 277, 284, 843 A.2d 656 (2004); *Sutliff v. Sutliff*, 515 Pa. 393, 405, 528 A.2d 1318 (1987); *Shinkoskey v. Shinkoskey*, 19 P.3d 1005, 1009-10 [Utah 2001]).

Gillett then cites an official comment to the Uniform Laws Commission of the UTMA, arguing it supports her position that she can use the children's accounts to pay support she is legally obligated to pay. This argument fails for two reasons. First, Gillett failed to make the argument before the district court. Issues not raised before the district court cannot be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). Second, as stated previously, she failed to show that these were UTMA accounts.

While Gillett was not using the money in the children's accounts to pay child support, she was using the funds to pay for the children's school fees, which she had contractually agreed to pay under the Agreement. The evidence supports the district court's conclusion that Gillett improperly used the children's accounts to pay her obligations under the Agreement.

Gillett argues the district court erred in considering parol evidence when determining that the accounts listed in section V.9 of the Agreement were the accounts referred to in section I.VI.5. The interpretation and legal effect of written instruments are matters of law over which an appellate court exercises unlimited review. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 263, 225 P.3d 707 (2010).

"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. [Citations omitted.]" *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011). If, however, the district court determines that a written contract's language is ambiguous, then extrinsic or parol evidence may be considered in order to construe it. See *Barbara Oil Co. v. Kansas*

Gas Supply Corp., 250 Kan. 438, 452, 827 P.2d 24 (1992); *Mobile Acres, Inc. v. Kurata*, 211 Kan. 833, 838-40, 508 P.2d 889 (1973).

Gillett contends that the district court erred in considering the parties' testimony regarding the accounts listed in section V.9 instead of relying only on the language of the agreement.

Gillett's argument is based on the district court's finding in Paragraph 13 of its journal entry. In this paragraph, the district court stated:

> "Section [I.]VI.5 (page 6) of the agreement refers to accounts that were already in existence; specifically, the accounts set forth in Section V.9 (page 10). It would not make sense if the Agreement referred to accounts that were not already set up and there was no requirement that any future accounts be set up."

Gillett contends that the agreement did not actually say this and the district court must have relied on the parties' testimony to make this conclusion. Nevertheless, Gillett has not shown that the district court relied on any parol evidence in coming to this conclusion. Instead, the district court appears to have relied on the language of the agreement itself. Section I.VI.5 states that the parties shall pay a percentage of "the children's college expenses not covered by *the* college accounts *set up in the name of each child*." (Emphasis added.) It is more specific than just saying that the parties must pay for college expenses if they are not covered by a college account. The Agreement is specific on this point, and absent any evidence that the parties meant for the paragraph to refer to any other account sent up in the name of a child, it was not unreasonable for the district court to interpret section I.VI.5 of the Agreement as discussing the accounts listed in section V.9.

> "An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the

> entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided.' [Citation omitted.]" *Levin v. Maw Oil & Gas*, 290 Kan. 928, 939, 234 P.3d 805 (2010).

The district court simply construed all the provisions of the agreement together, giving effect to all its provisions in harmony rather than in isolation. See *Osterhaus*, 291 Kan. at 778.

Regardless, even if the district court erred in finding that the accounts discussed in section V.9 were the accounts mentioned in section I.VI.5, Gillett does not show how this affects the district court's conclusion that she cannot use the funds to pay her contractually obligated portion of the children's school expenses. Gillett includes the following admission in her appellate brief:

> "[Gillett] may have erred in her calculations of the 75%/25% split of the expenses, charging [Soenksen] for 25% of the whole expense instead of for only the amount not covered by the UTMA, but [Soenksen]'s complaint was not that his contributions were miscalculated. Rather, his complaint was that the UTMA account was tapped for the children's expense instead of [Gillett] paying out of pocket. This concerned the trial court as well."

Gillett then argues that there is nothing saying that the accounts listed in section V.9 can only be used for college. She argues that even Soenksen admitted that they purposefully did not set the accounts up as 529 plans (college tuition savings plan—see 26 U.S.C. § 529 [2006]) so they could have some flexibility in how they invested and how they used the funds if the children did not go to college. But again, the district court did not find that the accounts could only be used for college expenses. Gillett has failed to show she is entitled to any relief based on this argument.

Gillett next argues the district court erred in modifying the Agreement. She contends that the district court modified the agreement by finding that the accounts listed in section V.9 were college accounts. She argues that the district court modified the agreement because it included the following language: "Any provision in the original Separation and Property Settlement Agreement not specifically modified herein will remain in full force and effect." Gillett contends that under K.S.A. 2012 Supp. 23-2712, the district court did not have authority to modify the Agreement in this way.

Soenksen points out that the district court did not grant the two modifications he requested—that the accounts in section V.9 be formally titled "College Accounts" and that he be granted management of the accounts. Soenksen is correct that Gillett's argument here fails. The district court never specifically found that the accounts could only be used for college expenses. Even the district court's statement that the accounts mentioned in section I.VI.5 were the accounts from section V.9 was not a modification of the Agreement but was based on the district court's interpretation of the language of the Agreement. And the district court refused to grant Soenksen's requested modifications. Thus, the district court did not improperly modify the Agreement.

Finally, Gillett argues the district court erred in awarding attorney fees to Soenksen because the Agreement included a full waiver of all claims for attorney fees and costs in this action. "The issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited. [Citation omitted.]" *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009).

Gillett's argument fails because she admitted before the district court that section VIII.5 of the agreement applied only to the initial divorce decree. Gillett, therefore, failed to raise the issue before the district court. See *In re Care & Treatment of Miller*, 289 Kan. at 224-25 (issues not raised before the district court cannot be raised on appeal).

Furthermore, "[a] party may not invite error and then complain of that error on appeal." *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003).

In her reply brief, Gillett attempts to get around her inviting this alleged error by arguing that this is an issue of subject matter jurisdiction, which can be raised at any time. But she fails to support her statement that this attorney fee issue is a question of subject matter jurisdiction.

Affirmed.