NOT DESIGNATED FOR PUBLICATION

No. 109,700

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LORI A. MARTIN,
Appellee,

and

RANDY K. MARTIN,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed January 10, 2014. Affirmed in part, reversed in part, and remanded with directions.

Melissa D. Richards and *Brenda J. Bell*, of Brenda J. Bell, P.A., of Manhattan, for appellant.

Todd A. Luckman, of Stumbo Hanson, L.L.P., of Topeka, and *Tim W. Ryan*, of Jacobson Ryan, L.C., of Manhattan, for appellee.

Before BRUNS, P.J., ARNOLD-BURGER and POWELL, JJ.

Per Curiam: Randy K. Martin appeals the district court's order granting Lori A. Martin's summary judgment motion. Specifically, Randy argues that (1) the divorce decree was void as a matter of law for a violation of his due process; (2) Randy's motion to modify maintenance and child support should have been granted; (3) Randy should have been given a credit on his maintenance payments for direct payments he made to Lori and the parties' children; and (4) he was not required to pay the marital debt assumed for the 2002 Denali and the 2002 Harley-Davidson. We find that the court did not violate

Randy's constitutional right to procedural due process. In addition, the court did not abuse its discretion when it denied Randy's motion to modify maintenance, nor when it found that Randy could not get credit toward his child support arrearage for voluntary direct payments made to his children. Moreover, the court did not err in denying Randy's motion for summary judgment on the issue of marital debt. However, as to Randy's motion to modify child support, we find that the court did have jurisdiction to modify child support and, accordingly, we remand to the district court for a hearing related to Randy's motion to modify child support and to determine whether the property settlement agreement (Agreement) contemplated the extension of child support beyond the age of majority of the children.

FACTUAL AND PROCEDURAL HISTORY

Lori and Randy were married in September 1994 and had twin daughters in April 1995. In April 2006, Lori filed a petition for divorce. The parties requested an emergency hearing on the petition for divorce because Randy's job required him to leave the country in mid-April 2006.

On April 11, 2006, Lori filed a domestic relations affidavit. In addition, the Agreement was signed by both parties and filed. The district court granted Lori's petition for divorce and incorporated the Agreement into the divorce decree. In the Agreement, the parties agreed that maintenance would be paid by Randy to Lori in the amount of $4,750. It was also agreed that Randy would

> "continue paying this amount to be used for the maintenance of [Lori] and the parties' minor children to continue as long hereafter until the development of [Lori's] business of Livinity Network Marketing reaches the level where [Lori's] income equals or surpasses the amount [Randy] has agreed to pay for maintenance at which time this Agreement may be amended to reflect said change of circumstances."

The parties agreed that child support would be included in the amount set out for maintenance. The Agreement also set forth that Randy was "solely responsible for . . . any debts now due and owing . . . ."

Both parties acknowledged that the Agreement was voluntarily entered into and that the Agreement was fair, just, and equitable. In addition, the parties agreed that "[n]o modification or waiver of any of the terms of this Agreement shall be valid unless made in writing, signed by both parties, and formally acknowledged." The Agreement indicated that Randy was given the opportunity to consult with an independent attorney, but chose not to do so.

In May 2012, Lori filed a nonearnings garnishment request asking the district court to order Kansas State Bank to garnish funds owned by Randy in an amount not to exceed $31,192.34. This request appears to be for an arrearage in maintenance payments and in association with a debt paid by Lori that was acquired during the marriage for a 2002 Denali and a 2002 Harley-Davidson motorcycle. The bank was ordered to and did hold $5,045.11 in funds owned by Randy. Randy filed an objection to the garnishment of funds, arguing that the amount was incorrect. However, Randy admitted that the property was not exempt from garnishment.

Randy then filed a motion to modify maintenance and support and to determine disposition of marital property. In the motion, Randy asserted that Lori failed to manage her business to a state of productivity in good faith, thus preventing the event that would trigger a modification of the maintenance payments. In addition, Randy argued that he should be given a credit toward his support obligation for the direct payments he made to Lori and their children.

Lori filed a motion to determine amount of judgment and motion for revivor. In the motion, Lori contended that under the Agreement, Randy was required to pay all

debts assumed during the marriage. This included a debt assumed for a 2002 Denali and a 2002 Harley-Davidson motorcycle. However, Lori made all payments toward this debt except for the final $2,843.46, which was paid by Randy. Lori asked the district court to order Randy to reimburse her for the principal amount of the debt at $32,115.32 and the interest accrued on the debt at $13,327.72.

Lori filed a motion for summary judgment along with a memorandum on the motion. In the motion, she again asserted that Randy should have paid the debt on the 2002 Denali and the 2002 Harley-Davidson and that she should be reimbursed for the payments that she made on the debt. In addition, she argued that Randy was behind on maintenance payments by $30,900. She also argued that Randy's motion to modify maintenance was not filed within a reasonable time and that Randy should not receive a credit toward maintenance payments for payments made directly to the parties' children and for the purchase of the vehicles for their children.

Randy also filed a summary judgment motion with a supporting memorandum. In his motion, Randy asserted that the district court violated his due process rights by failing to fully consider the parties' financial circumstances before it approved the Agreement and incorporated it into the divorce decree. Randy asked that the judgment be considered void as a matter of law. Randy also argued that if the judgment is deemed valid, then maintenance must be modified because Lori hindered the occurrence of the condition subsequent in order to modify maintenance when she was fired from her job for misconduct.

After a hearing, the district court granted Lori's summary judgment motion and denied Randy's summary judgment motion. Randy filed a motion to alter or amend the district court's decision, but it was denied.

Randy filed a timely notice of appeal.

ANALYSIS

Standard of Review

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 962, 298 P.3d 250 (2013).

Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

The divorce decree and Agreement are not void.

Randy contends that the divorce decree with the incorporated Agreement is void as a matter of law because the district court failed to rely on sufficient evidence to find that the Agreement was fair, just, and equitable. Because of this failure, Randy argues that his due process rights were violated, rendering the divorce decree void as a matter of law.

When a judgment is attacked as void under K.S.A. 2012 Supp. 60-260(b)(4), an appellate court must apply a de novo review once the district court has made the necessary findings of fact. This is because a judgment is either valid or void as a matter of law and a district court has no discretion to exercise in such a case. "A judgment is void and therefore a nullity if a court lacked jurisdiction to render it or acted in a manner inconsistent with due process." *In re Adoption of A.A.T.*, 287 Kan. 590, 598, 196 P.3d 1180 (2008), *cert. denied* 556 U.S. 1184 (2009). As such, a void judgment may be vacated at any time. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997).

Randy does not allege that the court lacked subject matter or personal jurisdiction. Instead, he relies solely on a due process violation to argue that the judgment is void. Although Lori solely focuses on the due process elements of notice and an opportunity to be heard, which Randy clearly had here, this court has found that a district court's failure to properly scrutinize a property agreement is also a violation of due process. See *In re Marriage of Kirk*, 24 Kan. App. 2d 31, Syl. ¶¶ 1-2, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997); *In re Marriage of Sumpter*, No. 96,256, 2007 WL 656424, at *4 (Kan. App. 2007) (unpublished opinion) (failure to scrutinize the divorce decree and separation agreement as required by K.S.A. 60-1610[b][3] results in a denial of due process); but see *In re Marriage of Johnson*, No. 89,915, 2003 WL 22990188, at *3-4 (Kan. App. 2003) (unpublished opinion) (district court's failure to properly scrutinize a property settlement agreement is not a violation of due process).

If we follow the rationale in the *Johnson* case and find that failure to scrutinize the divorce decree does not rise to the level of a constitutional due process violation, then Randy's request for relief from judgment was untimely. The divorce decree was filed on April 11, 2006. Randy's argument that the divorce decree is void was not raised until October 11, 2012, when he filed his summary judgment motion. K.S.A. 2012 Supp. 60-260(c) requires that motions to set aside a void judgment must be made within a

"reasonable time." A 6-year delay is unreasonable in light of the fact that Randy never questioned the validity of the divorce decree until Lori brought a garnishment action against him. Accordingly, his attempt to set aside the judgment as void must be dismissed as untimely.

But even assuming, without deciding, that this court's findings in *Kirk* and *Sumpter* are correct, Randy's claim still fails.

In *Kirk*, this court did not specifically find that the district court's failure to scrutinize a separation agreement was a due process violation, but it did find that K.S.A. 60-1610(b)(3) "requires a district court to scrutinize a separation agreement before approving it. Such scrutiny includes a requirement that the district court review evidence in the record sufficient to support the finding that the separation agreement is valid, just, and equitable." 24 Kan. App. 2d at 36. The court in *Kirk* also found that "the absence of evidence in the record to support a finding that the separation agreement is just and equitable is more than a technical defect." 24 Kan. App. 2d at 35.

In *Sumpter*, this court relied on *Kirk* to hold that the "failure to scrutinize the divorce decree under K.S.A. 60-1610(b)(3) constituted a denial of Father's due process rights" and such a denial rendered the divorce decree void. 2007 WL 656424, at *4.

Accordingly, we must be determine if the district court, in this case, properly scrutinized the Agreement and had substantial competent evidence to support its finding that the Agreement was fair, just, and equitable.

When an appellant challenges the district court's findings regarding the "valid, just and equitable" nature of a separation agreement, appellate review is limited to determining whether such factual findings are supported by substantial competent evidence. *In re Marriage of Takusagawa*, 38 Kan. App. 2d 401, 403, 166 P.3d 440, *rev.*

denied 285 Kan. 1174 (2007); see K.S.A. 60-1610(b)(3), now K.S.A. 2012 Supp. 23-2712(a) (requiring court to make such findings before incorporating the agreement into decree).

Substantial competent evidence is that which is both relevant and substantial and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. In other words, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Venters v. Sellers,* 293 Kan. 87, 93, 261 P.3d 538 (2011).

On April 11, 2006, Lori filed her domestic relations affidavit and the Agreement. On that same day, the district court held a hearing and filed the divorce decree. Two days later, the child support worksheet was filed. In an affidavit submitted by Randy, he indicated that the hearing was between 5 and 10 minutes, that the district court did not have the parties' file with him on the bench, no sworn testimony was given, and the district court failed to state that the Agreement was fair, just, and equitable. In addition, Randy was asked about his income, but there was no mention of assets.

First, Randy asserts that because he did not file a domestic relations affidavit as required, see Supreme Court Rule 139 (2013 Kan. Ct. R. Annot. 245), then all the required documents were not before the district court at the time of its decision. Thus, because the district court did not have all of the required documents, the district court lacked the information needed to determine whether the Agreement was just and equitable. There are several problems with this argument.

To fully understand what was required at the time of the original hearing, we pause to review the Supreme Court Rules that were in effect at the time of this divorce. The version of Rule 139 (2005 Kan. Ct. R. Annot. 202) in effect at the time of the divorce was vastly different than the current Rule 139 (2013 Kan. Ct. R. Annot. 245). At the time

of the divorce, Rule 139(a) (2005 Kan. Ct. R. Annot. 202) only required that a domestic relations affidavit be filed when a request was being made for ex parte orders. It did not even require that a child support worksheet accompany a domestic relations affidavit. That provision was not added until September 8, 2006, in Rule 139(g) (2006 Kan. Ct. R. Annot. 201). But Rule 164(a) (2005 Kan. Ct. R. Annot. 216) did require a domestic relations affidavit to be filed with the court in all divorce actions. Rule 164 was merged into Rule 139 in July 2012. See Rule 164 (2013 Kan. Ct. R. Annot. 264). And finally, the 2003 Kansas Child Support Guidelines §§ I, II.B (2005 Kan. Ct. R. Annot. 103) did require a child support worksheet be completed for the court to determine child support.

Next, Rule 139(e) (2005 Kan. Ct. R. Annot. 202) indicated that any party challenging a support order or the facts contained in the domestic relations affidavit was required to file his or her own affidavit along with the party's response or answer. Randy did not challenge the information in the domestic relations affidavit filed by Lori at the time. Moreover, the 2003 Child Support Guidelines § I provided that the calculation of the child support obligation on Line D.9 of the worksheet constituted a rebuttable presumption of a reasonable child support order. "If a party alleges that the Line D.9 support amount is unjust or inappropriate in a particular case, the party seeking the adjustment has the burden of proof to show that an adjustment should apply." Child Support Guidelines § I (2005 Kan. Ct. R. Annot. 103). Again, Randy filed no such objection. Accordingly, with no objections filed with the court or any objections voiced at the hearing, the court could reach no other conclusion than Randy was in agreement with the documents that were filed.

Randy is correct that the current version of Rule 139, which incorporates the former Rule 164, requires both parties to file domestic relations affidavits, but the rule does not now, nor did it in 2006, indicate that a party's failure to file will result in the divorce decree's nullity. See Rule 139 (2013 Kan. Ct. R. Annot. 245); Rule 164 (2005 Kan. Ct. R. Annot. 216); see also *Cook v. Cook*, 231 Kan. 391, 395, 646 P.2d 464 (1982)

("noncompliance with Supreme Court Rule No. 164 [is] not jurisdictional, but [the] rule mandates compliance by counsel, subject to the trial court's discretionary waiver"). Furthermore, because this was an uncontested divorce, the parties may have decided that the domestic relations affidavit that was filed was filed jointly.

Second, Randy argues that Lori's domestic relations affidavit was not presented to the district court at the time of the hearing and was severely deficient in the information it provided. While the domestic relations affidavit was filed at nearly the same time as the divorce decree, the filing time is no indication that the district court did not have the domestic relations affidavit when the hearing was held. The only evidence to suggest that the district court did not have the domestic relations affidavit was contained in Randy's affidavit attached to his summary judgment motion. This is insufficient evidence to establish that the district court did not have the domestic relations affidavit during the hearing on the divorce petition.

Randy asserts that the domestic relations affidavit is deficient because "it fails to provide [Lori's] income, deductions from [Randy's] income, monthly expenses for either party, valuation of liquid assets, a complete list of debts, a list or value of personal property, a list or value of real property, [and the] value of [Lori's] business or health insurance coverage information." However, Randy fails to provide any authority that would indicate that such deficiencies would render the divorce decree void as a matter of law. Moreover, it is the parties' duty to provide the district court with all of the information it needs; hence, Rule 139's requirement that the parties submit domestic relations affidavits. Randy's failure to supply his own domestic relations affidavit or to question Lori's domestic relations affidavit lies with him. Randy cannot sit back and do nothing at the time of the divorce hearing and then complain of possible insufficiencies 6 years later.

Finally, Randy argues that district court did not comply with the Kansas Child Support Guidelines because it did not have a child support worksheet to review before incorporating the Agreement into the divorce decree and because the child support worksheet was deficient in the information it provided. Again, merely because the child support worksheet was filed after the divorce decree was filed provides no indication that it was not available to the district court at the time of the hearing on the divorce petition. Moreover, there has been no caselaw provided by Randy to suggest that the deficient information in a child support worksheet would render a divorce decree void as a matter of law. Furthermore, Randy's focus on the child support worksheet as deficient would be more appropriate in a timely direct appeal of the divorce decree, not 6 years after the divorce decree was filed.

There is nothing in the record, other than Randy's affidavit, to undermine the fact that the district court, at the divorce hearing, was presented with the Agreement, Lori's domestic relations affidavit, the child support worksheet, and Randy's discussion about his income when the district court granted the divorce petition and incorporated the Agreement into the divorce decree. The domestic relations affidavit presented the following: Lori had a home business with an unknown monthly income; Randy's monthly income was $10,237.50; the parties' two mortgages and their amounts; the two debts with Kansas State Bank and their amounts; and the health insurance coverage. The Agreement listed the division of property, who would be responsible for which debts, and life insurance policies. The child support worksheet listed Lori's monthly income and Randy's monthly income and how much monthly child support Randy would be obligated to pay under the Kansas Child Support Guidelines.

Based on the above, even if we were to find that due process was implicated here, the district court had substantial competent evidence to find that the Agreement was fair, just, and equitable. Therefore, the divorce decree was not void as a matter of law.

The district court did not err when it denied Randy's motion to modify maintenance.

Randy asserts that the district court erred when it denied his motion to modify maintenance. Randy argues that modification is appropriate because Lori failed to abide by the duty of good faith and fair dealing implied in every contract to continue her employment with Livinity Network Marketing. Because she was fired from her position with the company, the condition required to trigger the modification of maintenance will not be achievable, as it depended on the amount of income she earned through the company.

A separation agreement is subject to the normal rules of contract law, so when the issue on appeal involves its interpretation, review is de novo. *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 961, 255 P.3d 34 (2011).

The Agreement sets out the following maintenance provision:

> "As maintenance, [Randy] agrees to pay [Lori] $4,750.00 a month commencing with the execution of this Agreement. [Randy] agrees to continue paying this amount to be used for the maintenance of [Lori] and the parties' minor children to continue as long hereafter until the development of [Lori's] business of Livinity Network Marketing reaches the level where [Lori's] income equals or surpasses the amount [Randy] has agreed to pay for maintenance at which time this Agreement may be amended to reflect said change of circumstances.
>
> "If for any reason when said condition is met, either party or both of them object to said amendment, then in that event said matter will be submitted to the district court of Ellsworth County within the State of Kansas. . . . Resort to [Lori's] 1040 Income Tax Return when her income reaches the level equal to or surpassing that which [Randy] agrees to pay for maintenance will be the criteria invoking the right of amendment as before herein set out.

> "If the amendment hereinbefore mentioned to the property settlement is reached before the expiration of 121 months pursuant to K.S.A. 60-1610(a)(2), then, and in that event, maintenance will be awarded as provided by the Johnson County guidelines for any months yet to be paid."

Randy relies on the contract principles of a condition subsequent intertwined with the duty of good faith and fair dealing, as well as the prevention doctrine. Randy argues that Lori's actions hindered the occurrence of her income reaching equal to or more than what he was paying in maintenance by being fired from her position with Livinity Network Marketing.

What Randy fails to recognize is that the Agreement requires the parties to "[r]esort to [Lori's] 1040 Income Tax Return when her income reaches the level equal to or surpassing that which [Randy] agrees to pay for maintenance will be the criteria invoking the right of amendment as before herein set out." This phrase of the Agreement suggests that it is only Lori's income that is of importance, not the particular place she is employed. In that same vein, there was no agreement that Lori would maintain her position with Livinity Network Marketing and there certainly was no agreement that Lori would find and maintain employment or attempt to gain more income throughout the time maintenance was paid.

The only agreement between the parties was that the parties could modify the maintenance amount if Lori's income equaled or surpassed the amount Randy was currently paying. Because that event has not occurred, then the modification clause could not be triggered.

Even if the principles of condition subsequent, good faith and fair dealing, and the prevention doctrine applied, Lori is correct when she states that Randy must show that she intended to lose her job so as to prevent the modification clause from being triggered.

"'[T]he principle of prevention is based on the implied agreement of the parties to a contract to proceed in good faith and cooperate in performing the contract in accordance with its expressed intent and, therefore, to refrain from committing any willful act or omission that would interfere with the other party or prevent or make it impossible for the other party to perform.' [Citation omitted.]" *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 54, 234 P.3d 833 (2010).

While Lori may have been dismissed from her position with Livinity Network Marketing for misconduct, there is no indication in the record that she willfully lost her position in order to prevent the maintenance modification clause from being triggered so that Randy's payments might be lowered. Moreover, the prevention doctrine would not apply in this situation because even if Lori did willfully lose her job, it did not prevent Randy from performing his portion of the Agreement.

Therefore, the district court did not err when it refused to modify the maintenance amount because Lori was dismissed from her position with Livinity Network Marketing.

The district court erred when it denied Randy's motion to modify child support.

Randy argues that the district court erred when it denied his motion to modify child support.

In sum, Randy made four arguments in his motion to modify child support. First, he sought credit on his arrearage for amounts paid directly to the children, which is discussed and rejected separately below. Second, he contended that the maintenance modification provision should be deemed triggered under the Agreement because Lori acted in bad faith in leaving her job at Livinity. We have already discussed and rejected this argument above. Next, he argued that his support should be decreased because Lori claims both children as tax deductions. Which spouse would claim the children as tax deductions was not addressed in the Agreement. Randy abandoned this allegation in his

memorandum in support of respondent's motion to modify maintenance and support. Likewise, he did not discuss it at the hearing on his motions, nor does he discuss it in his appellate brief. Accordingly, Randy abandoned this third allegation, and we will not address it. And finally, he asked the district court to make a determination of the amount of child support after the children reach the age of majority. This final argument will be discussed further here.

We first examine whether the district court had jurisdiction to modify the child support award. K.S.A. 2012 Supp. 23-2712(b) (formerly K.S.A. 60-1610[b][3]) provides that matters settled by agreement incorporated in the decree are not subject to modification by the court except as provided in the agreement or as consented to by the parties. But the statute excepts from this rule matters pertaining to child support. Accordingly, Randy is correct in that a court typically retains jurisdiction to modify child support even when there is an agreement. So the finding by the district court that it had no jurisdiction to modify child support because the Agreement, by its terms, could only be modified "'in writing, signed by both parties'" was in error.

The problem in this case arises from the fact that the Agreement lumped the child support and the maintenance payments together as one payment called "Maintenance," and a maintenance agreement is not subject to modification under K.S.A. 2012 Supp. 23-2712(b). Unfortunately, the Agreement does not apportion the amount of the maintenance award designated as maintenance and the amount designated as child support.

Kansas caselaw indicates that the court cannot modify the child support portion of an unallocated lump sum award unless there is some clear indicator of how the child support and maintenance are separately apportioned. In *Carey v. Carey*, 9 Kan. App. 2d 779, 781, 689 P.2d 917 (1984), the father attempted to reduce his total support upon one of the children turning 18, but this court held that if there is "no indication of anticipated allocation between alimony and child support," the amount of support cannot be reduced

or terminated pro rata as the children reached the age of 18 except as provided by the separation agreement, the consent of the parties, or certain changes in the Internal Revenue Code. We pause here to note that at the time of the *Carey* decision the statute also provided, as it did at the time of this action, that child support terminates automatically at age 18 or in June following the children's graduation from high school, whichever is later, unless there is an agreement to the contrary. See K.S.A. 60-1610(a)(1); K.S.A. 2012 Supp. 23-3001(b). But the *Carey* court emphasized that the allocation could be revealed either directly or indirectly. "We express no opinion on the result in a case in which the agreement contains internal indicators that apportionment of alimony and child support within a family support agreement was intended." 9 Kan. App. 2d at 781; see *Beard v. Beard*, 12 Kan. App. 2d 540, 543-44, 750 P.2d 1059 (1988) (the agreement that stated lump sum award would be reduced by 25% upon the children reaching majority was an indication that child support was 25% of the total award).

But after *Carey* and *Beard*, the Supreme Court adopted child support guidelines. At the time of the Agreement in this case, the 2003 Kansas Child Support Guidelines (Guidelines) were in effect. See Guidelines § I (2005 Kan. Ct. R. Annot. 103). The Guidelines provide that they are the basis for establishing child support "including cases settled by agreement of the parties." Guidelines § I (2005 Kan. Ct. R. Annot. 103). It further provides that the guideline amounts are mandatory and that judges "must follow the guidelines." Guidelines § I (2005 Kan. Ct. R. Annot. 103); see also *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998) ("Use of the guidelines is mandatory, and failure to follow the guidelines is reversible error.").

A parent's net child support obligation is calculated by completing a child support worksheet (worksheet). The Guidelines further provide:

> "The calculation of the respective parental child support obligations on Line D.9 of the worksheet is a rebuttable presumption of a reasonable child support order. If a

> party alleges that the Line D.9 support amount is unjust or inappropriate in a particular case, the party seeking the adjustment has the burden of proof to show that an adjustment should apply. If the court finds from relevant that it is in the best interest of the child to make an adjustment, the court shall complete Section E of the Child Support Worksheet. The completion of Section E of the worksheet shall constitute the written findings for deviating from the rebuttable presumption." Guidelines § I (2005 Kan. Ct. R. Annot. 103).

There is no requirement that the worksheet show the actual calculation of child support. The Guidelines simply state that the worksheet "should" contain this information. Guidelines § II.B (2005 Kan. Ct. R. Annot 103). In this case, Lori did summit a worksheet that listed Randy's child support income of $10, 237 per month and later calculated his child support obligation on line D.9 as $1,903 per month, although no further calculation was provided. These amounts were listed by Lori and not challenged by Randy. This amount appears to comply with the 2003 Two Child Families Child Support Schedule based on a combined parental income of $11,130 per month and children who were both 11 years old at the time. Guidelines, Appendix II (2005 Kan. Ct. R. Annot. 135).

Because the mandatory Guidelines were adopted after *Carey*, Randy argues that the mandatory nature of the Guidelines necessarily provide a basis for determining the allocation of child support and maintenance in this case, regardless of the fact that they were not separately noted in the Agreement. We agree. Absent some specific adjustment by the court, the child support amount was required to comply with the Guidelines and a review of the child support worksheet submitted to the court verifies that the Guidelines were followed. Neither party filed any objection to the worksheet, nor did the court complete Section E of the worksheet. There is also some support for this interpretation in the Agreement itself. The Agreement sets forth that if the condition precedent occurs and Lori's salary equals or exceeds Randy's, a modification may be made and child support will be adjusted "in conformity with the Child Support Guidelines" indicating a

recognition of the application of the Guidelines. Likewise, counsel for Lori indicated during the hearing on Randy's motion that the amount *over* the $1,903 provided in the Agreement "could have been considered maintenance."

In sum, because the amount on line D.9 of the child support worksheet presents a rebuttable presumption that neither party has attempted to rebut, we find that of the $4,750 designated as maintenance, $1,903 was actually child support. Consequently, the district court retained its statutorily granted jurisdiction to modify child support even though child support and maintenance were lumped together.

Randy argues that effective June 2013, when the children had reached majority and graduated from high school, his child support should have terminated. He is correct that absent a written agreement to the contrary, child support *shall* terminate at age 18. See K.S.A. 2012 Supp. 23-3001(b)(2) (formerly K.S.A. 60-1610[a][1]). Accordingly, the district court should have had a hearing to consider Randy's motion to modify child support and whether the child support should have terminated effective June 2013 or if the Agreement provides to the contrary. We remand for such a hearing.

The district court did not err when it denied Randy credit toward maintenance payments.

There is no dispute that Randy paid $34,074.40 for the children's vehicle expenses, $4,696 for the children's dental work, and $4,202.50 for home repairs. In addition, Randy made several direct payments to the children amounting to $29,300. Randy argues that those amounts should have been credited toward his maintenance payments.

As the district court found, the Agreement mentions nothing about direct payments made to the children or payments made for home repairs. In addition, Randy does not appeal the district court's finding that the maintenance arrearage amount was $23,200. Randy solely contests that the payments he made directly to the children, as well as the

amount he paid for the children's vehicles, should be credited toward the maintenance arrearage for equitable reasons.

Both parties agree that this court's standard of review is for abuse of discretion. There does not appear to be any particular standard of review for this issue; however, a district court's determination of the amount of child support is reviewed for an abuse of discretion. *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 259, 223 P.3d 815 (2010).

"A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact." *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

The district court held that

> "[t]he settlement agreement is silent on [Randy] paying monies to the parties' children, and although [Randy] has made substantial payments to his children directly and indirectly, [Randy] should not be given credit for these amounts against the amount of maintenance owed, otherwise [Randy] would be permitted to unilaterally decide how [Lori] should spend her maintenance."

Both parties cite to *Ediger v. Ediger*, 206 Kan. 447, 479 P.2d 823 (1971), to support their arguments for and against granting a credit toward an arrearage. In *Ediger*, our Supreme Court held that

> "[g]enerally speaking, a divorced father is required to make child support payments as directed by the district court in the divorce decree, and he should not be permitted to vary the terms of the decree or the manner of payment of child support to his convenience, or otherwise disregard the court's order." 206 Kan. 447, Syl. ¶ 3.

In addition, our Supreme Court found that the equities of a situation could be considered, and a direct payment to the child could be applied to due and unpaid child support payments, when the mother consents to such direct payments. *Ediger*, 206 Kan. at 450-53. The court did distinguish child support from alimony, and the overpayment of child support could not be applied to due and unpaid alimony payments. 206 Kan. at 454-55.

The situation in this case is somewhat different as both child support and maintenance were lumped into one monthly payment of $4,750. However, even if the payments were separate, there is no indication in the record that Lori consented to Randy's direct payments to the children and the payments he made for the children's vehicles. Moreover, our Supreme Court has found that payments made in excess of amounts required to be made for child support are considered gratuitous. *Andler v. Andler*, 217 Kan. 538, 541, 538 P.2d 649 (1975).

While Randy mentions the payments for dental services and for the new roof on the marital home, he solely focuses on the payments he made directly to the children and the payments for the children's vehicles. Therefore, Randy has failed to properly preserve those other issues for appeal. A point raised incidentally in a brief and not argued therein is deemed abandoned or waived. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013).

The district court's refusal to grant a credit towards Randy's maintenance arrearage does not appear to be an error of law, fanciful or unreasonable, or an error of fact. Therefore, the district court did not abuse it discretion when it denied Randy's request to apply those payments as a credit toward the maintenance arrearage.

The district court did not err when it granted Lori's summary judgment motion regarding the marital debt.

Randy argues that the district court erred when it granted Lori's summary judgment motion and ordered Randy to pay the marital debt pertaining to the Harley-Davidson and the Denali. Randy relies on his assertion that the parties *orally* agreed that Lori would pay the debt in order to keep the Denali. Randy also raises three doctrines of equity to argue that he should not have been ordered to pay the marital debt.

The Agreement provides: "[Randy] shall be solely responsible for and hold [Lori] harmless therefrom from any debts now due and owing . . . ."

The debt on the Harley-Davidson and the Denali began at $38,231.34 and was taken out on December 2, 2005. As of April 11, 2006, the remaining debt would have been $34,958.98.

In Lori's domestic relations affidavit there are four debts listed. The first two are the first and second mortgages on the house. The third debt is a $20,000 debt with a payment of $692 per month. The fourth debt is a $1,000 debt with no specific monthly payment. At the hearing on the parties' motions, Lori asserted that the $20,000 debt and the $1,000 debt were mistakenly split up, but together they constituted the debt on the Harley-Davidson motorcycle and the Denali. Randy disagreed with Lori's assertion and argued that the $20,000 debt was really taken out by Randy in order to pay off marital debt owed to various businesses. In essence, Randy argued that the debt for the Harley-Davidson and the Denali was not in the domestic relations affidavit.

It is uncontested that Lori made all of the payments on the Harley-Davidson and Denali loan except for the final $2,843.46 payment made by Randy. Randy asserts that, at

the time of the divorce, he and Lori orally agreed that she would pay for the debt on the Harley-Davidson and the Denali in order to keep the Denali as her vehicle.

However, what Randy fails to acknowledge is that, according to the Agreement, "[n]o modification or waiver of any of the terms of this Agreement shall be valid unless made in writing, signed by both parties, and formally acknowledged." The Agreement makes Randy responsible for all debts incurred during the marriage. Therefore, under the terms of the Agreement, the parties' attempt to orally modify Randy's obligation to pay the marital debt was inadequate as it would have needed to be made in writing, signed by both parties, and formally acknowledged.

Randy has failed to argue why the clause requiring written modification of the Agreement does not apply in this particular situation. In the absence of any argument against applying the requirement in the Agreement that any modification must be in writing, signed by the parties, and formally acknowledged, Randy's argument that the Agreement was orally modified fails.

Randy also contends that estoppel, waiver, and laches prevent the district court from ordering him to pay the debt.

The interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. *McGinley v. Bank of America, N.A.*, 279 Kan. 426, 431, 109 P.3d 1146 (2005). 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 contract language without applying rules of construction. *Anderson v. Dillard's, Inc.*, 283 Kan. 432, 436, 153 P.3d 550 (2007). In addition, this court's review of the equitable doctrines of estoppel and laches is for an abuse of discretion. See *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 388, 22 P.3d 124

(2001); *Fleetwood Enterprises v. Coleman Co.*, 37 Kan. App. 2d 850, 864, 161 P.3d 765 (2007); *Shaffer v. City of Topeka*, 30 Kan. App. 2d 1232, 1236, 57 P.3d 35 (2002).

First, as Lori points out, Randy's argument pertaining to the waiver doctrine fails because the Agreement requires that "no . . . waiver of any of the terms of this Agreement shall be valid unless made in writing, signed by both parties, and formally acknowledged." Thus, in order for Lori to waive the Agreement that Randy pay for all marital debt, she would have had to do so in a writing that was signed by both parties and formally acknowledged. Again, Randy fails to address this provision in the Agreement and to denounce its applicability to these facts. Accordingly, the parties are bound by the clear and unambiguous terms of the Agreement.

Randy's attempt to rely on the equitable doctrine of estoppel is also inadequate. He sets forth a limited description of the estoppel doctrine but fails to apply the facts of this case to the doctrine itself. Again, a point raised incidentally in a brief and not argued therein is deemed abandoned or waived. *Friedman*, 296 Kan. at 645.

Randy's final equitable argument pertains to the doctrine of laches.

> "'The doctrine of laches is an equitable principle designed to bar stale claims. When a party neglects to assert a right or claim for an unreasonable and unexplained length of time and the lapse of time and other circumstances cause prejudice to the adverse party, relief is denied on the grounds of laches. The mere passage of time is not enough to invoke the doctrine. For laches to apply, the court must consider the circumstances surrounding the delay and any disadvantage to the other party caused by that delay.' [Citation omitted.]" *In re Marriage of Jones*, 22 Kan. App. 2d 753, 755-56, 921 P.2d 839, *rev. denied* 260 Kan. 993 (1996).

In this case, Lori appears to have paid each of the monthly payments on the vehicles except for the final payment made by Randy in 2009. There is no indication in

the record that Lori requested money from Randy for the previous payments on the vehicles. In addition, after the final payment was made, Lori failed to raise this issue until May 2012—roughly 3 years after the final payment on the vehicles. This delay was unreasonable, and it was also unexplained by Lori. However, the delay is not the only consideration for this court. We must also determine if the delay prejudiced Randy. Randy states that he

> "is greatly prejudiced by this delay because he relied on the [Lori's] agreement to pay the debt for six years. In 2006 [Randy] obtained a loan for $18,000 to pay off the marital debt. . . . He proceeded to pay off the loan in full. . . . But for [Lori's] promise to pay the debt, [Randy] could have taken care of the debt when he obtained the loan. [Randy] could have and would have negotiated for a change in the Property Settlement Agreement if he had known that [Lori] was not going to fulfill her promise to pay for her vehicle."

Randy's reasons surrounding prejudice appear to be focused mainly on the invalid oral agreement between him and Lori. Moreover, the reasons do not appear to be prejudicial in nature, but merely inconvenient. Therefore, the district court did not abuse its discretion when it failed to rely on the doctrine of laches when it granted Lori's summary judgment motion.

For all of the reasons stated herein, the decision of the district court is affirmed in part and reversed in part. The case is remanded to the district court for consideration of Randy's motion to modify child support in light of the children reaching the age of majority.