NOT DESIGNATED FOR PUBLICATION

No. 109,429

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In re Marriage of

BETH CHIPPENDALE KATONA
and
FRANK T. KATONA.

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed April 18, 2014. Affirmed in part, reversed in part, and remanded with directions.

Robert F. Flynn, *Christopher B. Nelson*, and *Chad E. O'Neill*, of The Flynn Law Firm, P.A., of Kansas City, Missouri, for appellant.

Amberlynn M. Curry, of Short, Borth & Thilges, Attorneys at Law, L.L.C., of Overland Park, for appellee.

Before LEBEN, P.J., GREEN and HILL, JJ.

Per Curiam: Frank Katona appeals the child support modification order entered by the trial court. He contends that the trial court erred (1) by retroactively starting the new child support before statutorily allowed, (2) by granting a nonexercise of parenting time adjustment, (3) by imputing his stock option income for child support purposes, (4) by incorrectly applying the interstate pay differential, (5) by finding that his severance package qualified as a bonus or a commission under the parties' separation agreement, and (6) and by granting Beth Katona's request for attorney fees. Of these six issues, we find merit in Frank's first, fourth, and sixth contentions. Because we find these errors to be reversible, we affirm in part, reverse in part, and remand with directions.

Frank and Beth were married in October 1993 and divorced in October 2003. They have one child, Kara, who was born in 1996.

The issues before the court began on September 3, 2010, when Beth moved to enforce the separation and property settlement agreement and to obtain reimbursement of uninsured or unreimbursed medical expenses. A hearing was held, and the hearing officer granted Beth's motions.

Frank moved for de novo hearing and appealed the hearing officer's decision to the trial court. When the trial court conducted a hearing on Frank's motion, it granted Beth's motion for reimbursement of uninsured or unreimbursed medical expenses but continued consideration of Beth's motion to enforce the settlement agreement to allow additional discovery to be completed. On July 7, 2011, Beth filed a motion for child support modification. On July 22, 2011, Beth moved to compel discovery, and she filed an amended motion to compel discovery on August 2, 2011. The court ordered Frank to provide the requested discovery.

On August 18, 2011, the hearing officer denied Beth's motion for child support modification. Beth moved for de novo hearing and appealed the hearing officer's denial of her request for child support modification. On November 10, 2011, the trial court held a hearing on Beth's motion for child support modification. Frank did not appear but was represented by his counsel at the hearing. The trial court heard arguments from counsel, and both parties presented exhibits. Beth furnished the court with multiple exhibits, while Frank only submitted one exhibit which was a child support worksheet. After reviewing the evidence, and hearing arguments from counsel, the trial court ruled as follows: The trial court granted Beth's child support modification and retroactively started the child support on August 1, 2011; granted Frank a multiple family application adjustment; granted Frank an interstate pay differential adjustment of $3,910; and determined that Frank's stock option income would be imputed to him for the previous 3 years which set

his total annual income as $510,421. The trial court denied Beth's request for a financial condition adjustment on the child support worksheet for equestrian expenses she pays for the child, but it did grant Beth a $1,000 adjustment based on her nonexercise of parenting time request.

On December 9, 2011, the trial court ruled on Beth's motion to enforce the separation and property settlement agreement. The trial court held that the severance package of $69,183.92 fell within the provisions of the separation and property settlement agreement and, based on that finding, Frank owed Beth 8% or $5,534.71 of the severance pay as child support. The trial court further held that Frank's "sign on bonus" with Braun Medical, Inc., was actually for relocation purposes and therefore was not a bonus or commission within the terms of the separation and property settlement agreement. Finally, the trial court ordered that Frank pay $925 in attorney fees to Beth.

Frank moved to clarify and to reconsider the trial court rulings. Before hearing Frank's motion, the trial court clarified its ruling of December 9, 2011, and found that the severance package included two separate payments of $69,183.92 and awarded Beth 8% or $5,534.71 for each severance package of $69,183.92.

After conducting a hearing on Frank's motion to reconsider, the trial court upheld its ruling concerning the severance package, but it granted Frank's motion in part on the stock option income. The trial court ordered that the child support worksheets be recalculated to reduce the 3-year average of the stock option income. This resulted in Frank's annual income being reduced from $510,421 to $457,198. The trial court denied all of the remaining issues raised by Frank in his motion to reconsider.

Beth moved for attorney fees under one of the conditions of the property settlement agreement. The trial court granted Beth attorney fees because it determined that Beth had initiated several motions to enforce and had prevailed. Therefore, under the

separation and property settlement agreement, the trial court determined that Beth was entitled to attorney fees. The court awarded Beth $10,961.48 in attorney fees.

Did the Trial Court Err in Retroactively Applying the New Child Support Award 25 Days Rather Than 30 Days After the Date the Motion Was Filed?

Frank argues the court ordered child support modification order should become effective no earlier than August 7, 2011, rather than August 1, 2011. In support of his argument, Frank maintains that Beth filed her motion to modify child support on July 7, 2011, and that K.S.A. 2013 Supp. 23-3005(b) requires any later modification order to date back to 1 month after the motion to modify was filed.

Frank's argument requires us to interpret a statute relating to child support. Questions of statutory interpretation are issues of law over which this court exercises unlimited review. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013). The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. *In re Tax Appeal of Burch*, 296 Kan. 713, 722, 294 P.3d 1155 (2013).

K.S.A. 2013 Supp. 23-3005(b) states: "The court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed with the court."

The statutory language used here demonstrates that the legislature intended to give the trial court broad authority to set the effective date of the modification. The statute only restricts the trial court from setting the effective date earlier than 1 month after the motion was filed. The statute provides the trial court with discretion, however, to set the effective date at any time after that month.

> "Judicial discretion will vary depending upon the character of the question presented for determination. Generally, the trial court's decision is protected if reasonable persons could differ upon the propriety of the decision as long as the discretionary decision is made within and takes into account the applicable legal standards. However, an abuse of discretion may be found if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards. [Citation omitted.]" *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 (2007).

Beth moved to modify child support on July 7, 2011. The trial judge stated the following on the record:

> "[THE COURT:] I'll make the amended child support retroactive to one month after the mother's motion. . . .
>
> "[BETH'S COUNSEL:] It's July 7th, your Honor.
>
> . . . .
>
> "[THE COURT:] . . . That is so close I'm going to start it August 1."

Clearly, the trial court did not have the statutory authority to backdate the modification of the existing support order any earlier than August 7, 2011. Any argument against this interpretation is simply contrary to the plain language of K.S.A. 2013 Supp. 23-3005(b). Moreover, Beth's argument that this error was harmless is unavailing. First, there is no caselaw to support applying a harmless error analysis to this situation. Second, the statute is clear and unambiguous. The trial court lacked the authority to backdate the

modification order to any date earlier than August 7, 2011. As a result, we reverse the trial court and remand with directions to recalculate the child support based on the start date of August 7, 2011. If Frank is entitled to any credit for child support paid after the recalculation, the trial court is directed to apply that credit against any future child support that may become due.

Did the Trial Court Abuse Its Discretion in Granting an Adjustment on the Child Support Worksheet for Frank's Failure to Exercise His Allotted Parenting Time?

Next, Frank argues that the trial court abused its discretion when it granted an adjustment based on nonexercise of parenting time. Frank maintains that the adjustment amount was improperly based on extracurricular activity costs rather than the nonexercise of parenting time.

Section IV.E.2 of the Kansas Child Support Guidelines provides that the court "may allow a Non-Exercise of Parenting Time adjustment to the parent having primary residency pursuant to IV.E.2.d." 2013 Kan. Ct. R. Annot. 139. Section IV.E.2.d provides: "The court may make an adjustment based on the historical non-exercise of parenting time as set forth in the parenting plan." 2013 Kan. Ct. R. Annot. 140.

On November 10, 2011, the trial court granted a parenting time adjustment as follows:

> "[THE COURT:] If I recall the statements of counsel, dad had only seen the child twice. . . . Okay. So mom is paying everything? . . . Okay. Mom is carrying the ball, so I'm going to leave that adjustment in. Exhibit 3 is what I'm adopting. . . . The horse, in my view, is outside the definition of child support. But this is recognized in the Kansas Support Child Guidelines [parenting time adjustment], if a parent doesn't exercise parenting time, you can make an adjustment. And the statement that was made by Ms.

> Thilges and uncontested was he had only seen the girl twice, so it's provided for in the guidelines."

Frank's attorney then asked the court how it reached the $1,000 adjustment amount if it was not including the horse costs. The trial court responded by explaining that the horse costs were separate from the nonexercise of parenting time and that this adjustment was strictly for the nonexercise of parenting time. The trial judge and Frank's attorney had the following exchange:

> "[FRANK'S ATTORNEY:] I'm still unclear. That renders [moot], then, your ruling that mom's plea for reimbursement essentially are a factoring-in of the horse expenses.
>
> "[THE COURT:] I don't think that is true at all, Counsel. Exhibit 11 are the cost estimates for the horse. And under the current arrangement, they're estimating 23,618. This has nothing to do with having the house, putting groceries on the table, cooking meals, paying school expenses, all of those things, that they're not each remotely related.
>
> "[FRANK'S ATTORNEY:] My question is, Ms. Thilges a moment ago said the $1000 is because of the horse and because of the parenting time. And I'm confused because I thought your order carved out the horse issue.
>
> "[THE COURT:] If she said that, I don't agree with her. I think they're two very different things. Let me find the precise language, how would you get from 90,000 down to a thousand? . . . . Now, some of the expenses are going to be for school expenses, or going to the prom or those types of things all cost a lot of money. I think that is what that adjustment is for. The horse expenses are more."

"The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the Kansas Child Support Guidelines are subject to unlimited review." *In re Marriage of Leoni,* 39 Kan. App. 2d 312, 317, 180 P.3d 1060 (2007), *rev. denied* 286 Kan. 1178 (2008). A judicial action constitutes an abuse of discretion

> "if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

Although Frank argues that the adjustment is an underhanded way of forcing him to pay for horse costs, the trial court clearly refuted that argument on the record. The trial court explained that because Frank was not exercising his parenting time, Beth was responsible for 100% of the costs. The court further explained that this adjustment would help alleviate some of the financial burden for which Beth is responsible.

Based on the record, the trial court did not abuse its discretion in awarding the parenting time adjustment. The trial court clearly explained its finding, and the record supports that finding. Thus, the parenting time adjustment was not an abuse of discretion.

There Was Substantial Competent Evidence to Support the Nonexercise of Parenting Time

Frank further argues that the trial court's adjustment for nonexercise of parenting time was not supported by substantial competent evidence. Frank does not dispute that the trial court has the authority to make this adjustment; he simply argues that the trial court did not have enough evidence to support this adjustment.

> "An appellate court generally reviews a district court's findings of fact to determine if the findings are supported by substantial competent evidence . . . . Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as

> sufficient to support a conclusion." *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009).

The only evidence presented at the hearing regarding Frank's parenting time was that Frank had exercised his parenting time twice with his daughter during 2011. Beth's attorney stated:

> "[Frank] lives in Pennsylvania. He has exercised parenting time with Kara this past year twice. Once over spring break, once over the summer, I believe, for 10 days or so. So all responsibility for Kara has been provided [by Beth] to take care of. So getting her where she needs to go, to school, activities, doctors, everything falls on the shoulders of [Beth]."

Nevertheless, Frank argued in his brief that Beth's counsel's statement regarding Frank's parenting time was incorrect or a misstatement. Frank further argued that he had exercised double (10 days) parenting time with Kara. Yet, Frank explained in his motion for clarification and reconsideration the double parenting time mentioned in his brief actually occurred in 2010 (not in 2011). As stated earlier, Beth asserted that in 2011 (the year of the November hearing) Frank had exercised 10 days of parenting time, which was uncontroverted by Frank. Moreover, Frank was not present at the November 2011 hearing so he did not offer any testimony to contest these statements. He also failed to present any exhibits or arguments by his attorney to rebut Beth's attorney's statements that he had only exercised his parenting time twice with his daughter as of the November 2011 hearing.

The arguments presented by Beth's counsel were properly admitted and Frank's counsel had an opportunity to respond and to rebut the statements, but he failed to do so. Therefore, based on the evidence that was presented, and the fact that no evidence to the contrary was presented, the trial court's decision was supported by substantial competent evidence.

Did the Trial Court Abuse Its Discretion When It Imputed Stock Option Income to Frank for Child Support Purposes?

During the hearing on Beth's motion to modify child support, her attorney argued that Frank regularly received stock option income that should be imputed to his income on the child support worksheet. To support her argument, Beth presented exhibits which included documents showing Frank's stock option income he had received during the previous 3 years.

In response, Frank's attorney made the following argument:

> "There has been no evidence today presented on how to interpret what these stock options are of my client or whether they should be considered income. There is no indication of how much he has to pay when he cashes in the options, and why or how it is shown on his pay stubs.
>
> "Certainly, they show up on the pay stubs, but why and how much they'll actually be worth when he reaps them is an illusive [*sic*] fact and there has been no presentation of evidence and our position is it shouldn't be considered."

This is the only argument Frank's attorney made against the stock option income being included on the child support worksheet.

The trial court chose to impute the stock option income into Frank's income for purposes of child support. Frank then moved to clarify and to reconsider under K.S.A. 2013 Supp. 60-259(f), arguing that the court had erred in imputing his stock option income.

Appellate courts generally treat motions to reconsider as motions to alter or amend under K.S.A. 2013 Supp. 60-259(f). When reviewing the denial of a motion to alter or

amend the judgment, appellate courts apply the abuse of discretion standard of review. *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009).

Our Supreme Court has stated the purpose of K.S.A. 2013 Supp. 60-259(f) is to allow the trial judge the opportunity to correct previous errors. *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001) ("The trial court herein had the authority to reconsider its prior findings of fact and conclusions of law and make what it deemed to be appropriate amendments and alterations thereto pursuant to K.S.A. 60-259[f]."); see *Denno v. Denno*, 12 Kan. App. 2d 499, 501, 749 P.2d 46 (1988). In addition, this court has also found that on a motion to alter or amend, the trial court should limit its consideration to matters that were before the court when it entered the original judgment. *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan. App. 2d 932, 939-40, 159 P.3d 215 (2007) (finding trial court properly denied motion to alter or amend where issue raised in motion was not before trial court when it entered summary judgment).

After a hearing on Frank's motion, the trial court, in part, granted the motion. The trial court determined that only the gross amounts of the stock option income less certain offset amounts should be imputed, and it instructed the parties to recalculate the gross amount and use that amount on the child support worksheet.

On appeal, Frank is essentially arguing that the trial court erred in refusing to consider new evidence at his motion to reconsider. Frank presented evidence that he would no longer be receiving stock option income and that, therefore, it should not be imputed into his income for child support purposes. To support his argument, Frank relies on *In re Marriage of Blagg*, 13 Kan. App. 2d 530, 775 P.2d 190 (1989). In *Blagg*, the

trial court gave Father a $600 credit against unreimbursed medical expenses that he owed to Mother due to Mother not allowing Father to claim the minor child on his taxes as ordered. Father filed a motion to reconsider arguing that he should have been given a $781 credit not $600. Later, Father filed an affidavit prepared by a tax professional which showed he should have received a $938 credit. The court adjusted the credit to $781 but denied the second request to adjust it to $938. On appeal, our court held that because the trial court adjusted the credit based on its "faulty arithmetic," it should have considered the affidavit since it was based on exact income figures and exemption figures. *Blagg*, 13 Kan. App. 2d at 534-35. Thus, the new evidence in *Blagg* was simply more concrete or exact information regarding the arguments and information previously presented to the trial court and aided the court in making its calculation.

In this case, Frank presented evidence that showed the cost to him for cashing in each stock option he received. The trial court properly considered this evidence and ordered the parties to recalculate the stock option income to only include the gross amount of the stock option income less certain offset amounts. This is similar to what the court did in *Blagg* where the new evidence aided the court in properly calculating its judgment.

The other evidence that Frank attempted to present in his motion to reconsider was evidence that he would no longer be receiving a stock option income through his current employer. Based on this evidence, Frank argued that no stock option income should be imputed to him. Here, Frank was attempting to get the court to reverse its previous order rather than simply "correct prior errors." We are unwilling to endorse this procedure in a motion to reconsider. If Frank wanted to present new evidence, he should have moved for new trial under K.S.A. 60-259(a) or he could have later moved to modify child support to show that he no longer received the stock option income. As a result, we determine that the trial court did not abuse its discretion in refusing to consider this evidence because this evidence was not properly before the court.

The Child Support Guidelines state that "[i]ncome may be imputed to the parent not having primary residency in appropriate circumstances." Kansas Child Support Guidelines § II.F.1 (2013 Kan. Ct. R. Annot. 126). The guidelines provide a nonexhaustive list of appropriate circumstances for imputation, including when a parent is deliberately unemployed or underemployed, was fired from employment for misconduct, or receives significant in-kind payment that reduces personal living expenses as a result of employment. Kansas Child Support Guidelines § II.F.1.b, c, d, e (2013 Kan. Ct. R. Annot. 126). "Domestic gross income" is defined in the guidelines as "income from all sources, including that which is regularly or periodically received." Kansas Child Support Guidelines § II.D (2013 Kan. Ct. R. Annot. 124).

Significantly, both the Kansas statutes and the guidelines provide that all relevant factors and evidence must be considered in setting an amount of child support. See K.S.A. 2013 Supp. 23-3005(a); Kansas Child Support Guidelines § I (2013 Kan. Ct. R. Annot. 123). The guidelines define "domestic gross income" as "income from all sources." Kansas Child Support Guidelines § II.D (2013 Kan. Ct. R. Annot. 124). Moreover, the term "income" as it is used within the child support guidelines is broadly construed by Kansas courts and has been interpreted to mean "'every conceivable form of income, whether it be in the form of earnings, royalties, bonuses, dividends, interest, maintenance, rent, or whatever.'" *In re Marriage of Callaghan*, 19 Kan. App. 2d at 336 (quoting *In re Marriage of McPheter*, 15 Kan. App. 2d 47, 48, 803 P.2d 207 [1990]). For the reasons stated earlier, we conclude as a matter of law that any income that Frank had received as stock option income constituted income under the Kansas Child Support Guidelines; thus, the trial court properly imputed it to his income.

Did the Trial Court Abuse Its Discretion When It Determined the Amount of the Interstate Pay Differential?

Next, Frank maintains that the trial court abused its discretion when it applied an unreasonable interstate pay differential that the trial court admittedly did not understand. Frank does not challenge the court's authority to apply the interstate pay differential, but he maintains that the trial court "picked its own number with no reasoned connection to fact or logic."

We review a trial court's order determining the amount of child support for an abuse of discretion. *In re Marriage of Branch*, 37 Kan. App. 2d 334, 336, 152 P.3d 1265, *rev. denied* 284 Kan. 945 (2007). We have de novo review over the interpretation and application of the Kansas Child Support Guidelines (KCSG). *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466, *rev. denied* 288 Kan. 831 (2009).

The Kansas Child Support Guidelines make provisions for a cost of living adjustment based upon the difference in average earnings between individuals in different states. The Guidelines § III, B.9 (2013 Kan. Ct. R. Annot. 133), explicitly states that the application of the interstate pay differential is within the discretion of the court.

In this case, both parties proposed that the trial court apply the interstate pay differential. Neither party disputed that Beth lives in Kansas and Frank lives in Pennsylvania. According to Appendix IV, the presumed correct interstate pay differential is 0.862 (622 [Kansas] divided by 768 [Pennsylvania]). Kansas Child Support Guidelines, App. IV (2013 Kan. Ct. R. Annot. 178). That means $1 earned in Pennsylvania is equivalent to about $.86 earned in Kansas.

Applying that correct differential multiplier of .8620 to the trial court's *reconsidered* child support modification order ($457,198), we note that the amount would

be $63,093 annually ($457,198 x .8620 equals $394,105; $457,198 - $394,105 equals $63,093), or $5,258 monthly.

The trial court, in its discretion, chose to apply an interstate pay differential. The adjustment amount that Frank presented to the court was $3,910 per month, while the amount that Beth presented was $5,862 per month. The trial judge stated that "the 3910 looked high" and that the $5,862 "was really high." The trial judge then held that "I'm going to go [with] the 3910. I don't understand how a calculator normally comes up with the figure."

The journal entry states in relevant part:

> "The Court finds that the interstate pay differential calculated on the Bradley Software program attributable to [Frank] for living in Pennsylvania is excessive. Per the Kansas Child Support Guidelines Section III, B.9. the application of the interstate pay differential is discretionary. The Court finds that the appropriate amount that should be used in this case in order to apply an interstate pay differential is $3910 per month, which was derived from [Frank's] exhibit 101."

The interstate pay differential of $3,910 which the trial court selected is not supported by the record. The record seems to support an interstate pay differential of $5,258 per month. Here, the trial judge stated that he did not "understand how a calculator normally comes up with the figure." The Kansas Child Support Guidelines has furnished Appendix IV to be used in calculating the interstate pay differential between two states. Our Supreme Court ruled that "'[a]buse is found when the trial court has gone outside the framework of legal standards or statutory limitations.'" *Dragon v. Vanguard Industries, Inc.*, 277 Kan. 776, 789, 89 P.3d 908 (2004). Here, there were no facts or evidence in the record upon which the trial court could base its ruling: that the interstate pay differential should be $3,910 per month instead of $5,258 per month. As a result, we

reverse and remand with instructions for the trial court to reconsider the amount of the interstate pay differential.

Did the Trial Court Err in Finding that Frank's Severance Package Fell Within the Provisions of the Parties' Separation Agreement?

Next, Frank contends that the trial court erred in finding that his severance package from Tyco fell within the provisions of the parties' separation agreement. First, Frank maintains that the trial court erred in considering this issue because Beth failed to follow the rules of civil procedure by filing a motion. Next, Frank argues that under the language of their separation agreement, the severance package should not be considered a bonus or commission. Frank further maintains that the trial court erred in failing to consider new evidence at his hearing for reconsideration. And finally, Frank argues that the trial court's inconsistent treatment of his severance pay was unreasonable.

To the extent that this issue involves interpretation of the parties' settlement agreement, it is subject to normal rules regarding contract interpretation which require de novo review. See *Drummond v. Drummond*, 209 Kan. 86, 91, 495 P.2d 994 (1972); *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 961, 255 P.3d 34 (2011); *In re Marriage of Hudson*, 39 Kan. App. 2d 417, 426, 182 P.3d 25, *rev. denied* 286 Kan. 1178 (2008); *In re Marriage of Wessling*, 12 Kan. App. 2d 428, 430, 747 P.2d 187 (1987).

When interpreting written contracts, courts must first ascertain the parties' intent. If the terms of the contract are clear, the parties' intent must be determined from the contract language without applying the rules of construction. *Carrothers Constr. Co. v. City of South Hutchinson*, 288 Kan. 743, 751, 207 P.3d 231 (2009). When interpreting a contractual provision, it should not be done by isolating one particular sentence or provision. Courts must construe and consider the entire instrument from its four corners. *City of Arkansas City v. Bruton*, 284 Kan. 815, 832-33, 166 P.3d 992 (2007). "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.]' [Citation omitted.]" *Wichita Clinic v. Louis*, 39 Kan. App. 2d 848, 853, 185 P.3d 946, *rev. denied* 287 Kan. 769 (2008). 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).

The Severance Package Issue Was Properly before the Court

Frank first alleges that the trial court should not have considered whether the severance package was a bonus or a commission because Beth raised the issue in an affidavit, not a motion.

In making this argument, Frank is unwilling to acknowledge that he and his attorney agreed that Beth could submit an affidavit supporting her arguments and that Frank could present a reply affidavit providing his defenses. The trial court specifically asked the parties if they would agree to proceed on the submission of affidavits and Frank's counsel replied, "That will be fine with us, Your Honor."

As the record clearly shows, Frank agreed to proceed on the submission of affidavits; therefore, he cannot complain that Beth raised this issue in an affidavit rather than in a motion or an amended motion. As a result, this issue was properly before the trial court for consideration.

Under the Language of the Separation Agreement, the Severance Package Was Properly Considered a Bonus or a Commission

Next, Frank contends that the trial court erred in interpreting the parties' separation and property settlement agreement. Specifically, Frank alleges that the severance package

he received was spread out in bi-weekly payments for 6 months and was not a lump sum payment. Therefore, Frank argues that it could not be considered a bonus or a commission.

The parties' separation and property settlement agreement provides the following language:

> "Wife shall receive 8% of any bonus/commission that Husband may receive as and for child support. Husband shall notify Wife upon the receipt of any bonus/commission and he shall forward his payment to Wife within 10 days from the date he receives such bonus/commission."

To support his argument, Frank cites *In re Marriage of Branch*, 37 Kan. App. 2d 334, 152 P.3d 1265 (2007). In *Branch*, Mother requested a percentage of Father's lump sum severance package from his employer. The trial court ordered Father to pay Mother 20% of his severance package. On appeal, our court determined that the severance package was income for purposes of calculating child support but determined that the trial court did not abuse its discretion in awarding 20% of the severance package to the Mother. *Branch*, 37 Kan. App. 2d at 339-40.

Frank relies on *Branch* to support his argument that a severance package qualifies as income and not as a bonus. Nevertheless, the facts in *Branch* are distinguishable from the facts in this case. Here, unlike in *Branch*, the parties' separation agreement had specific language which entitled Beth to 8% of Frank's bonuses or commissions he received. The agreement does not define what a bonus or a commission is, and the trial court determined that Frank's severance package constituted a bonus.

Frank also maintains that because his severance package was not received in one lump sum that it cannot constitute a bonus or a commission. The problem with this

argument is that it is devoid of authority that a bonus or a commission must be paid in one lump sum rather than spread out over 6 months. Therefore, this argument fails.

The Trial Court Properly Refused to Consider New Evidence upon Reconsideration

As stated earlier, a motion filed under K.S.A. 60-259(f) provides the trial court the opportunity to correct prior errors, reconsider its findings of fact and conclusions of law, and to make appropriate amendments and alterations thereto. *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001). Consequently, a trial court may properly deny a motion for reconsideration "where the moving party could have, with reasonable diligence, presented the argument prior to the verdict." *Wenrich v. Employers Mut. Ins. Co.*, 35 Kan. App. 2d 582, 590, 132 P.3d 790 (2006).

At the hearing on Frank's motion to reconsider, Frank attempted to introduce as evidence a new child support worksheet that applied a different income formula which also imputed income to Beth. Beth objected to this new evidence arguing that it should not be allowed under a motion to reconsider. The trial court ruled as follows:

> "I'm going to sustain the objection on the grounds of relevancy in the sense that this is a Motion to Reconsider filed under KSA 602-59 [*sic*]. And the claim that you're really making is a claim that you should file a Motion to Modify. Set it up with the Hearing Officer, get a ruling. If you're dissatisfied bring it to the Court. . . .
>
> "[B]ut the point I am trying to make is the only motion before the Court right now is your motion to reconsider the prior rulings that I have made on two journal entries. And to offer new child support worksheets it sounds like you want to change the amount of monthly child support. I am focused on, and I am only going to focus on, eight percent bonus or commission."

Based on the record, it appears the trial court correctly refused to consider new evidence that was irrelevant to the motion to reconsider. Therefore, we find that Frank's argument fails.

The Trial Court's Treatment of the Severance Pay Was Proper and Reasonable

Finally, Frank maintains that the trial court's finding that his severance pay was a bonus was inconsistent with the court's finding in 2005 when it determined his severance pay to be income. Frank contends that if the 2005 lump sum severance pay was not considered a bonus or a commission, then this most recent severance pay should also not be considered as a bonus or a commission.

According to Frank's testimony on his motion to reconsider, Frank stated that he and Beth and their attorneys collaboratively discussed and agreed that his severance pay would be reflected as income. Based on this testimony, it seems that the parties reached an agreement on how to treat the severance pay and that the trial court did not make that determination like it did here. Therefore, Frank's argument that the trial court's decision is inconsistent with the trial court's finding in 2005 is erroneous in fact because the trial court did not make that decision in 2005, instead, the parties did.

All of Frank's arguments for why the trial court erred in finding that his severance pay was a bonus under the parties' separation agreement fail. As a result, we determine that the trial court correctly interpreted the language of the parties' separation and property settlement agreement in determining that Frank's severance pay was a bonus under the agreement.

Did the Trial Court Abuse Its Discretion When It Awarded Beth Attorney Fees Based on the Parties' Separation Agreement?

Frank maintains that the trial court abused its discretion when it awarded Beth attorney fees in the amount of $925, stemming from Beth's child support modification motion. Frank contends that this motion to modify does not qualify as an enforcement motion which is required under their separation agreement. Frank argues that "[f]or the district court to have awarded fees and costs for child-support *modification* under the *enforcement* provision of the separation agreement strains credulity."

As a general rule, Kansas courts may not award attorney fees unless a statute authorizes the award or there is an agreement between the parties allowing attorney fees. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 162, 298 P.3d 1120 (2013). The question of whether a court has the authority to award attorney fees is a question of law over which an appellate court has unlimited review. *Snider*, 297 Kan. at 162.

In this case, the trial court had authority to award attorney fees under the parties' separation and property settlement agreement. The Separation and Property Settlement Agreement contained the following language in Paragraph P of Section 7: "In the event either party initiates litigation to enforce the terms of this Agreement, the prevailing party shall be entitled to judgment for the costs of such litigation, including reasonable attorney fees."

The trial court determined that based on the separation and property settlement agreement, it was required to award attorney fees. The trial judge stated:

> "The Court does note that there have been a number of Motions filed by [Beth] to seek enforcement of the Decree. I find that the Decree and the Property Settlement Agreement incorporated into it applies to child support as well as division of assets and

liabilities. The Court believes that all of the Motions [Beth] filed or has filed have been ruled upon. [Beth] initiated these motions and [Beth] has been the prevailing party with the exception of one payment made by the employer to [Frank], in essence, to reimburse him for the expense of selling his home . . . I found that that was not bonus income. The other payments I found were bonus subject to the eight percent requirement. So I find that [Beth] has initiated several motions to enforce the agreement and she has prevailed. Again, I can't change the language of the contractual Settlement Agreement. I have to enforce it as it is written."

When the court has authority to grant attorney fees, its decision is reviewed under an abuse of discretion standard. *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 572, 215 P.3d 561 (2009); *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 972, 255 P.3d 34 (2011). Our Supreme Court explained that when an attorney fee award is supported by substantial competent evidence, the award will not be set aside on appeal:

"The district court is vested with wide discretion to determine the amount and the recipient of an allowance of attorney fees. When reviewing an award of attorney fees, the appellate court does not reweigh the testimony or evidence presented or reassess the credibility of witnesses. [Citation omitted.] An attorney fee award will not be set aside on appeal when supported by substantial competent evidence. [Citation omitted.]" *In re Marriage of Burton*, 29 Kan. App. 2d 449, 454, 28 P.3d 427, *rev. denied* 272 Kan. 1418 (2001).

In determining the reasonableness of attorney fees, Rule 1.5(a) (2013 Kan. Ct. R. Annot. 503) of the Kansas Rules of Professional Conduct (KRPC) sets forth the eight criteria that should be considered by the court:

"(1) [T]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) the fee customarily charged in the locality for similar legal services;

"(4) the amount involved and the results obtained;

"(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) whether the fee is fixed or contingent."

Our Supreme Court has urged consideration of these factors in determining the reasonableness of attorney fees. See *Davis v. Miller,* 269 Kan. 732, 751, 7 P.3d 1223 (2000).

In reviewing Beth's motion for attorney fees, the trial court considered Rule 1.5 and thoroughly went through the analysis required by the rule. The trial court determined that the case involved a difficult subject matter. The trial court explained that the case was difficult not only because of the pleadings filed by the parties, but also because of the numerous discovery requests. The court further determined that this case required a high level of skill, dealt with significant novelty, and involved significant time and labor. The trial court ruled that the hourly rate, which ranged from $112.50 to $210 per hour, was very reasonable considering the "Johnson County legal market" rates are often $250 to $300 per hour. And finally, the court determined that Beth's counsel specialized in the field of domestic relations and that she had substantial experience in those types of cases. The trial court also reviewed the billing statement and denied some of the requested fees.

The journal entry awarding attorney fees states: "[Beth] initiated this matter to attempt to enforce the terms of the Separation and Property Settlement Agreement. [Beth]

is the prevailing party on two of the three issues and therefore the Court awards [Beth] $925 in attorney fees (which is two-thirds of the attorney bill submitted)." A later journal entry, following Frank's motion to reconsider, states:

> "For purposes of attorneys' fees, the Court further finds that this provision of the Separation and Property Settlement Agreement controls because [Beth] initiated the action, she would be entitled to attorneys fees because she prevailed. . . . [Beth] is granted an attorney fees award judgment against [Frank] in the amount of $10,961.48."

In awarding attorney fees for the motion to modify child support, the record fails to show that the trial court exercised its discretion in making this award. It seems that the trial court believed it was required to award attorney fees to Beth: "[B]ecause [Beth] initiated the action, she would be entitled to attorney fees because she prevailed." As a result, we reverse the award of attorney fees and remand with directions to do the following: The trial court will reconsider the request for attorney fees; the trial court should keep in mind that the motion to modify child support was not a motion to enforce the separation agreement. In addition, the court should keep in mind that an attorney fee award was possible under K.S.A. 2013 Supp. 23-2715. Thus, an attorney fee award was not required under the terms of the parties' settlement agreement.

Affirmed in part, reversed in part, and remanded with directions.