NOT DESIGNATED FOR PUBLICATION

No. 110,559

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CAROL EINSEL,
Appellee,

v.

RODNEY EINSEL,
Appellant.

MEMORANDUM OPINION

Appeal from Ellis District Court; EDWARD E. BOUKER, judge. Opinion filed January 2, 2015. Affirmed.

Caleb Boone, of Hays, for appellant.

John T. Bird and *Carol M. Park*, of Glassman, Bird, Schwartz & Park, L.L.P., of Hays, for appellee.

Before ATCHESON, P.J., POWELL, J., and JOHNSON, S.J.

Per Curiam: In 1994, Rodney and Carol Einsel were divorced in Ellis County, with Rodney ordered to pay spousal maintenance of $400 a month and Carol awarded a portion of Rodney's inherited property in Comanche County. In 2000, Carol moved for and was granted an extension of maintenance. Carol again moved for an extension of maintenance in 2010 and also filed a separate action in Comanche County for partition of the inherited property. The parties agreed not to proceed on the maintenance question until the partition action was completed. After the partition action was concluded in

November 2012, a hearing on Carol's motion for extension of maintenance was held in January 2013. At the maintenance hearing, Rodney argued Carol had waived her claim because of the 3-year delay between her motion being filed and the hearing being held. The district court rejected Rodney's arguments and again extended spousal maintenance. Rodney now appeals, contending the district court erred (1) in extending spousal maintenance for a period beginning 1 month after the motion was originally filed, (2) in failing to find that Carol waived or abandoned her claim to an extension of spousal maintenance, and (3) in refusing to admit evidence of the parties' settlement negotiations in the partition case. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 11, 1994, the Ellis County district court filed a journal entry divorcing Carol and Rodney. The journal entry awarded Carol maintenance in the amount of $400 per month for 6 years from the date of the first payment on January 1, 1994, subject to potential modification by the district court. Carol was also awarded 40% of the remainder interest of the inheritance received by Rodney during the marriage, with the condition that Rodney could opt to pay Carol the sum of $22,500 within 6 months of the date of the hearing, in which case Rodney would then receive all of the remainder interest. The district court also retained jurisdiction during the duration of the payment of the maintenance award.

On December 9, 1999, Carol filed for an extension of the maintenance awarded to her in the divorce. A journal entry was filed on May 22, 2000, reinstating the maintenance award to Carol for a period of time to not exceed 121 months beginning January 1, 2000. The district court also found Rodney had not made the cash payment to Carol for the remainder interest as provided for in the divorce decree.

In January 2010, Carol filed another motion to extend her maintenance payments and also filed a petition in Comanche County district court seeking a partition of the remainder interest awarded to her in the 1994 divorce.

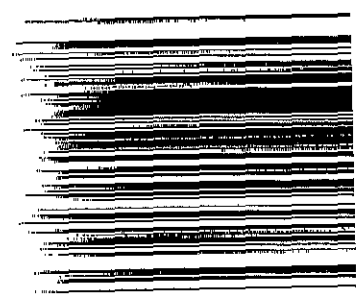
A hearing on the motion to extend the maintenance was originally set for February 25, 2010, but was twice rescheduled, resulting in a hearing set for March 31, 2010. However, on March 19, 2010, Carol's attorney faxed a letter to Rodney's divorce attorney, informing him that an agreement had been reached with Rodney's partition attorney to continue the hearing on the maintenance matter until the conclusion of the partition matter. Rodney's divorce attorney replied by e-mail stating:

> "I have your fax of this afternoon.
>
> "I am aware of the settlement negotiations, having discussed them with both you and Larry.
>
> "I agree that the most appropriate course is to continue all maintenance proceedings in the Ellis County Divorce Case, pending possible resolution of both the Comanche County Partition Case and the Ellis County Divorce Case by settlement.
>
> "By copy of this I am informing Judge Bouker [Ellis County divorce judge] and Larry of our agreement."

On January 28, 2013, the Comanche County district court entered its journal entry in the partition case, granting Carol a judgment for $27,521.18. While the journal entry was filed on January 28, 2013, the decision of the Comanche County district court was announced on November 13, 2012. On January 14, 2013, Carol filed a notice of hearing for her motion to extend maintenance.

At the maintenance hearing ultimately held on April 4, 2013, Carol presented evidence of her current income and liabilities, which showed a large deficit, and discussed the history of both the divorce case and the partition case. Rodney was called as a witness by Carol and, on direct, testified as to the assets produced from the oil and gas leases and revenues that were subject to the partition action. On cross-examination, Rodney's attorney attempted to elicit testimony regarding the partition settlement negotiations, to which Carol objected on the grounds of relevancy. Rodney attempted to argue the settlement negotiations were somehow relevant to prove Carol had waived her motion to reinstate the maintenance due to the 3-year delay while the partition case was being litigated. Carol's relevancy objection was sustained, though Rodney was allowed to present a written proffer of his evidence. Rodney based his entire argument opposing Carol's motion on waiver and laches and admitted that paying the maintenance would not be a financial hardship for him.

The district court filed its journal entry of judgment on April 5, 2013, noting Rodney admitted to being able to pay the maintenance and finding Carol's only source of income of social security was greatly outweighed by her expenses. The district court also noted Rodney's only defense was based upon Carol's supposed waiver, which the district court rejected. The district court found the letter sent by Carol's attorney to Rodney's attorney proposing the continuance of the maintenance proceedings, coupled with Rodney's attorney's failure to appear at the maintenance hearing originally scheduled for March 31, 2010, was indicative that an agreement had been reached to hold the maintenance motion in abeyance until the conclusion of the partition action. The district court noted it was under no obligation to hold a hearing when the parties agreed to the delay pending the partition action and also found Rodney was fully able to request an earlier hearing if one was desired. The district court then ordered an extension of the maintenance to Carol, retroactive to February 19, 2010.



On May 6, 2013, Rodney filed a "Motion for Alteration and/or Amendment of Judgment and/or New Trial or Hearing by Fax." He also filed a notice of appeal. In his motion, he argued the district court erroneously disallowed evidence of the partition settlement negotiations as it was necessary to show that Carol had waived her maintenance motion by negotiating in bad faith. He also argued the extension of the maintenance could not be retroactive to the time the motion was filed. Carol responded to Rodney's motion by rejecting his claims and further argued that Rodney was now acting in bad faith for labeling the negotiations a sham and requested attorney fees. At the hearing on Rodney's motion, Rodney raised an issue not contained his motion, claiming the district court did not have jurisdiction to "reinstate" maintenance. The district court denied Rodney's motion.

Rodney timely appeals.

DID THE DISTRICT COURT ERR IN ALLOWING THE EXTENSION OF MAINTENANCE RETROACTIVE TO FEBRUARY 19, 2010?

Rodney's first claim of error is the district court erred in allowing the reinstatement of maintenance retroactive to February 19, 2010, when the hearing was held in April 2013. He makes two arguments supporting this point: (1) the district court's failure to hold a hearing immediately after the motion for reinstatement of maintenance was filed caused it to lose jurisdiction to relate back the beginning of the new maintenance [illegible] and (2) the district court erred in not finding Carol's claim was waived, abandoned, or barred by laches. Rodney's reply brief also advances two additional arguments: First, he claims he must be relieved of the alleged binding and irrevocable effect of the purported stipulation to continue the maintenance matter until the conclusion of the partition matter and second, his due process rights were violated when the district court did not immediately hold a hearing on the motion to reinstate maintenance. We will examine these arguments in turn.

A. *The district court had jurisdiction to make the extension of maintenance retroactive.*

Rodney first claims the district court lost jurisdiction to order the retroactive reinstatement of maintenance because it did not immediately hold a hearing following the filing of Carol's motion. Whether jurisdiction exists is a question of law over which this court exercises unlimited review. *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 830, 104 P.3d 378 (2005).

K.S.A. 60-1610(b)(2), the statute concerning the retroactivity of any maintenance modification in effect at the time Carol filed her motion, states:

> "The court *may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court.* In any event, the court may not award maintenance for a period of time in excess of 121 months. *If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments.* Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. *The recipient may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made, but no single period . . . may exceed 121 months.*" (Emphasis added.)

Likewise, K.S.A. 2013 Supp. 23-2904, in effect at the time of the district court's ruling and order to reinstate the maintenance payments, contains almost identical language:

> *"The court may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court.* In any event, the court may not award maintenance for a period of time in excess of 121 months. *If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments.* Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. *The recipient may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months."* (Emphasis added.)

Here, the original divorce decree expressly reserved jurisdiction over spousal maintenance. Carol's most recent motion for reinstatement was filed on January 19, 2010. By the plain language of the statute, the district court had full jurisdiction and ability to order the reinstatement of the maintenance retroactive to at least 1 month after the motion was filed, which would be February 19, 2010. This is exactly what the district court did in this case, and it acted fully in accordance with the power granted to it by statute.

Rodney attempts to avoid the clear language of the statute, claiming the district court must immediately hold a hearing after a motion to reinstate is filed and asserting the failure to do so caused the district court to lose jurisdiction. In support, he cites a single sentence of *In re Estate of Dahlstrom*, 26 Kan. App. 2d 664, Syl. ¶ 4, 992 P.2d 1256 (1999), *rev. denied* 268 Kan. 887 (2000): "Upon movant's filing of a motion to reinstate maintenance, the district court must hold a hearing." However, *Dahlstrom* is not relevant to the issue of when a district court must hold a hearing on this motion; rather, *Dahlstrom* addressed whether the district court erred in awarding maintenance after the death of the paying spouse. Further, the word "immediately" does not appear anywhere in the text of

the statutes or *Dahlstrom*; therefore, it is unclear to us how either the statute or *Dahlstrom* supports his position. Rodney cites no other authority supporting his argument the district court loses jurisdiction if a hearing is not held within a certain period after a motion to reinstate maintenance is filed. We reject Rodney's claim the district court lacked jurisdiction to award spousal maintenance retroactive to 1 month after Carol filed her motion.

B. *Rodney's claims of abandonment, waiver, and laches fail because he invited the error.*

Rodney also claims Carol waived or abandoned her claim for an extension of spousal maintenance due to the long period of time between the filing of her motion and when the hearing was held. Rodney further argues the doctrine of laches bars her claim.

As an initial matter, we note Rodney has waived this argument by failing to provide any pertinent authority relating to abandonment, waiver, or laches. Rodney does cite *Oliver v. State*, No. 106,532, 2013 WL 2395273 (Kan. App. 2013) (unpublished opinion), to support his argument. However, *Oliver* addresses amendments to a K.S.A. 60-1507 motion and is not even remotely applicable to this case. Therefore, we deem this claim abandoned as failing to support a point with pertinent authority is akin to failing to brief the issue, waiving it for review. *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013).

But even if Rodney had properly raised these issues, he cannot prevail on them as he invited the error that he now complains prejudiced him. "A party may not invite error and then complain of that error on appeal. [Citations omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003).

Here, Rodney clearly invited the error of which he complains as he expressly agreed to the delay of the hearing on the maintenance motion until the conclusion of the

partition matter. The e-mail from his partition attorney sent to both Carol's attorney and the Ellis County district court stated:

> "I have your fax of this afternoon.
>
> "I am aware of the settlement negotiations having discussed them with both you and Larry.
>
> "I agree that the most appropriate course is to continue all maintenance proceedings in the Ellis County Divorce Case, pending possible resolution of both the Comanche County Partition Case and the Ellis County Divorce Case by settlement.
>
> "By copy of this I am informing Judge Bouker [Ellis County divorce judge] and Larry of our agreement."

Moreover, the district court found Rodney's actions were consistent with accepting delay in the matter as neither he nor his counsel appeared for maintenance hearing originally set for March 31, 2010. Further, the record does not reflect any attempt by Rodney to withdraw his consent to the delay of the maintenance hearing. It appears that Rodney now takes the position, without supporting authority, that the district court should have ordered a hearing *sua sponte* after Rodney and Carol agreed to delay the matter, despite no protest or request by Rodney to the contrary. We reject Rodney's contention that Carol's motion for an extension of maintenance was barred by abandonment, waiver, or laches.

C. *Rodney was bound by his agreement or stipulation.*

In his reply brief, Rodney claims he must be relieved of the "stipulation" he entered into regarding abeyance of the maintenance hearing. Assuming Rodney did stipulate to the delay, "parties are bound by stipulations made by them or their attorneys

unless those stipulations are withdrawn by the court." *C.M. Showroom, Inc. v. Boes*, 23 Kan. App. 2d 647, 649, 933 P.2d 793 (1997). Stated another way: "In the absence of withdrawal with consent of the court, stipulations made by parties or their attorneys . . . are binding upon those who made them." *Bourne v. Atchison, T. & S. F. Rly. Co.*, 209 Kan. 511, 517, 497 P.2d 110 (1972). Because Rodney did not attempt to withdraw his consent to the delay, much less obtain leave to withdraw his consent, he is bound by his stipulation.

D. *Rodney's due process rights were not violated.*

Rodney also claims, for the first time on appeal, his due process rights were violated by the delay in holding the maintenance hearing. Rodney did not raise or argue this point below, and as such it is not properly before this court as constitutional grounds for relief raised for the first time on appeal are not properly before us for review. See *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007). Moreover, as stated above, by agreeing to continue the maintenance hearing until the conclusion of the partition action, Rodney invited any alleged error and cannot now complain of the delay.

DID THE DISTRICT COURT ERR BY NOT ADMITTING THE EVIDENCE OF THE PARTITION ACTION SETTLEMENT NEGOTIATIONS?

As his second claim of error, Rodney claims that the district court erred in not allowing him to enter into evidence the partition settlement negotiations. Rodney claims this evidence was relevant to prove Carol had negotiated in bad faith for the only purpose of extending the time between the filing of the motion to reinstate maintenance and the eventual hearing.

When the admission or exclusion of evidence is challenged on appeal, there is a multistep standard of review. *State v. Bowen*, 299 Kan. 339, 348, 323 P.3d 853 (2014).

Generally, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence is defined as evidence "having any tendency in reason to prove any material fact." K.S.A. 60-401(b). Therefore, for evidence to be relevant it must be material and probative. *State v. Stafford*, 296 Kan. 25, 43, 290 P.3d 562 (2012). Materiality is determined by analyzing "whether the fact at issue has a legitimate and effective bearing on the decision of the case and is in dispute. Evidence is probative if it has any tendency to prove any material fact." 296 Kan. at 43. Review of materiality is conducted on a de novo basis while probative value is reviewed for an abuse of discretion. *State v. Ultreras*, 296 Kan. 828, 857, 295 P.3d 1020 (2013).

Again, we note Rodney may have failed to brief this issue. First, he cites to an incorrect standard of review. Second, the case he cites in support of his theory addressed a due process violation when a criminal defendant did not have access to a witness' mental health records, not an issue relating to the admission or exclusion of evidence. See *United States v. Robinson*, 583 F.3d 1265, 1272-1273 (10th Cir. 2009). In fact, Rodney fails to cite to any authority dealing with the admission of settlement negotiations in litigation.

This notwithstanding, even on the merits, Rodney's claim of error fails. First, even if the district court erred in refusing to admit the partition settlement evidence to show Carol abandoned her claim of maintenance, the district court correctly found that Rodney invited the error of the delay. If a district court reaches a correct result despite relying upon a wrong ground or erroneous reasons, the decision will be upheld. *Hockett v. The Trees Oil Co.*, 292 Kan. 213, 218, 251 P.3d 65 (2011). Because the district court found Rodney invited the delay of which he now complains, the settlement negotiations were irrelevant to the maintenance hearing and the district court was correct not to admit the evidence.

Second, in finding the partition settlement was irrelevant to the issue of whether Carol was entitled to an extension of maintenance, the district court correctly noted the issues to be addressed at the maintenance hearing were Carol's need for support and Rodney's ability to pay. Ultimately, the district court ruled the partition settlement evidence would not be probative on the issue of waiver. We agree. Even if the partition settlement evidence proved Carol negotiated in bad faith, it does not show Carol waived or abandoned her claim for maintenance. To the contrary, Carol filed for a hearing on the maintenance question within 60 days after the partition decision. The primary purpose of the maintenance hearing was to determine if Carol was eligible to continue to receive maintenance, and any evidence concerning the partition settlement negotiations was irrelevant in determining that question. Therefore, the district court did not abuse its discretion in finding the settlement negotiations to be irrelevant.

Affirmed.