

NOT DESIGNATED FOR PUBLICATION

No. 112,233

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:
SHERRY BEHNKE, f/k/a SHERRY INGRAM,
Appellant,

and

MICHAEL WADE INGRAM,
Appellee.

MEMORANDUM OPINION

Appeal from Linn District Court; RICHARD M. SMITH, judge. Opinion filed March 13, 2015.
Affirmed.

Jeffrey C. Leiker, of Leiker Law Office, P.A., of Overland Park, for appellant, and *Sherry Behnke*,
appellate pro se.

Ronald P. Wood, of Clyde & Wood, L.L.C., of Overland Park, for appellee.

Before MALONE, C.J., MCANANY and SCHROEDER, JJ.

Per Curiam: Sherry Behnke (formerly known as Sherry Ingram) and Michael Ingram entered into a property settlement agreement (PSA) to divide the property accumulated during their 6-year marriage. After the PSA was approved by the district court and incorporated into the divorce decree, the district court found the parties modified the terms of the PSA when Behnke agreed to accept a \$70,000 assignment from one of Ingram's retirement accounts through a qualified domestic relations order (QDRO). A QDRO is the approved method for transferring retirement accounts among

parties involved in divorce proceedings. We find the district court's decision was supported by sufficient evidence and affirm.

FACTS

Behnke and Ingram were married on August 28, 2008. On April 15, 2013, Behnke filed a petition for divorce. The parties entered into a PSA dated October 31, 2013, and filed November 4, 2013. In relevant part, the PSA contemplated each party would retain certain personal property and Ingram would take possession of the marital residence "60 days after delivering the \$70,000.00 to [Behnke] to allow her time to make arrangements for a new home." In the agreement, the parties agreed Behnke would "keep as her personal property . . . \$70,000.00 cash."

The district court approved the PSA and incorporated it into the decree of divorce granted on November 12, 2013. On December 9, 2013, the district court approved a QDRO to transfer \$70,000 from one of Ingram's retirement accounts to Behnke. Shortly thereafter, Behnke liquidated the account and, after withholding for taxes, early withdrawal penalties, and other expenses, received proceeds of \$54,149.06.

After liquidating the retirement account, Behnke filed a motion to enforce the PSA claiming she should have received \$70,000 cash pursuant to the PSA and she should be allowed to stay in the marital residence until Ingram gave her "\$70,000.00 cash." Behnke wanted the difference of \$15,850.94 paid to her by Ingram and to remain in possession of the marital residence until the full \$70,000 cash payment was made.

At the hearing on Behnke's motion, Behnke's previous attorney, Burton Harding, was called to testify about the PSA and the QDRO. He testified the parties negotiated for months and ultimately agreed upon the PSA and its terms. Harding then testified the parties agreed to the following after the PSA was signed and approved:

- Behnke approved of the retirement account transfer through a QDRO and authorized Harding to sign the QDRO.
- Based on Harding's discussions with Behnke, Behnke understood the QDRO and how the retirement account transfer worked through a QDRO; and
- Harding would not have signed the QDRO without Behnke's authorization.

Behnke testified she did not know what a QDRO was and when she asked the company managing the retirement account, she received three different stories from the representatives before she liquidated the account. Behnke also denied she understood the tax consequences of liquidating the retirement account or that she authorized Harding to sign the QDRO. On cross-examination, Behnke confirmed she originally wanted \$60,000 and knew there might be taxes on any amount she received from Ingram. On redirect examination, Behnke again confirmed she knew money would be taken out of the retirement account distribution prior to receiving it.

The district court found the PSA was clear on its face, but the existence of a QDRO necessitated evidence of the parties' activities and agreement after the PSA was signed by the parties and approved by the district court. After "balancing the equities," the district court denied Behnke's motion to enforce the PSA. The district court found:

- Harding's testimony credible that Behnke agreed to the retirement account transfer;
- Behnke gave Harding authority to sign the QDRO to authorize the retirement account transfer;
- Behnke converted the retirement asset into cash, even though she knew doing so would incur income tax penalties and other expenses to reduce its net cash value to her;

- Ingram had satisfied the PSA payment of \$70,000 through Behnke's acceptance of the retirement account transfer through a QDRO; and
- Behnke also had to move out of the marital residence.

Behnke timely appealed.

ANALYSIS

Modification of PSA

Behnke makes three arguments in support of her overall contention the district court abused its discretion in denying her motion to enforce the PSA: (1) The district court lacked jurisdiction to alter the terms of the PSA; (2) the district court should not have accepted parol evidence at the hearing; and (3) there was insufficient evidence to conclude Behnke acquiesced or agreed to accept the QDRO. Ingram argues Behnke acquiesced in the judgment by liquidating the retirement account and accepting the proceeds of \$54,149.06.

"A property settlement agreement incorporated into a divorce decree is 'a hybrid in the law having the characteristics of a judgment and retaining the contractual rights of the parties.'" *In re Marriage of Wessling*, 12 Kan. App. 2d 428, 430, 747 P.2d 187 (1987) (quoting *In re Estate of Sweeney*, 210 Kan. 216, 224, 500 P.2d 56 [1972]).

Jurisdiction

Whether jurisdiction exists is a question of law upon which appellate review is unlimited. *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 830, 104 P.3d 378 (2005).

The general rule is that a district court loses jurisdiction to modify a PSA after it has been incorporated into a divorce decree unless the terms of the agreement contemplate otherwise or the parties consent to the district court's subsequent modification. K.S.A. 2013 Supp. 23-2712(a) and (b); *Lewis v. Lewis*, 4 Kan. App. 2d 165, 166, 603 P.2d 650 (1979) (As a general rule, a court has no continuing jurisdiction or power of modification over a division of property after entering an original divorce decree.).

Our issue, however, appears to be whether the *parties* can modify the PSA after its execution and approval by subsequent action. In *Libel v. Libel*, 5 Kan. App. 2d 367, 368-70, 616 P.2d 306 (1980), a panel of this court affirmed a district court's order enforcing a post-divorce agreement by the parties extending the husband's alimony payments for an additional 9 months beyond the period contemplated in the PSA. Although the positions of the parties in *Libel* were more clearly drawn, the underlying rule appears to be that parties may consent to modification of a PSA and the district court can approve the modification.

Here, the district court considered the PSA and what the parties did after its execution to satisfy it. Behnke argues the district court also considered their actions in negotiating the PSA; however, Behnke is incorrect. The district court looked at the actions of Behnke and Harding in accepting the retirement account transfer through a QDRO *after* the PSA was approved and incorporated into the divorce decree to determine whether the parties consented to a modification of the PSA.

The district court had jurisdiction to consider whether the parties modified the PSA by a subsequent agreement to change the reference of "\$70,000" or "\$70,000 cash" in the PSA to an assignment of a retirement account through a QDRO.

Parol Evidence

Behnke's second point is that the district court improperly admitted parol evidence to modify the terms of the PSA that were not ambiguous. On this point, Behnke misses the district court's findings. Here, the district court looked at the actions of the parties *after* the PSA's approval, not what their various negotiations were in reaching the PSA. Although there was testimony about the negotiations that went into creating the PSA, ultimately the district court ruled based upon the actions of the parties *after* the PSA was signed, filed, and approved by the district court. Thus, parol evidence, by its very definition, does not apply: "The common-law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing." Black's Law Dictionary 1292 (10th ed. 2014). Since no parol evidence was used to modify the terms of the PSA, Behnke's argument fails.

Sufficiency of the Evidence

Behnke is correct in her brief that we must look to see if the findings by the district court are supported by the evidence. When a decision is challenged for insufficiency of the evidence or as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the decision, the decision will not be disturbed on appeal. See *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

At the hearing on Behnke's motion to enforce the PSA, the district court heard the testimony of all the parties involved. The district court found:

- Harding's testimony to be more credible than Behnke's;
- Behnke had authorized Harding to sign the QDRO to transfer the retirement account to her to satisfy Ingram's obligation to pay her \$70,000;
- Behnke knew she would have to pay some expenses and taxes on the \$70,000 if she liquidated it; and
- Behnke made the decision to liquidate the retirement account anyway.

Additionally, the district court acknowledged that had Behnke made the transfer of funds from a retirement account an issue *before* she liquidated the retirement account and accepted the benefits, the results might have been different. "A party with full knowledge of the facts [who] accepts the benefits of a transaction or contract may not subsequently take an inconsistent position to avoid corresponding obligations or effects." *Deutsche Bank Nat'l Trust Co. v. Sumner*, 44 Kan. App. 2d 851, Syl. ¶ 5, 245 P.3d 1057 (2010), *rev. denied* 292 Kan. 964 (2011). Thus, the district court was correct in finding Behnke acquiesced to the retirement account transfer when she authorized the transfer by giving Harding the authority to execute the QDRO and thereafter she liquidated the retirement account. Interestingly, no one disputed the fact \$70,000 was transferred to Behnke in the retirement account and the same \$70,000 would still be there if she had not immediately liquidated the account incurring liquidation and tax-related expenses.

CONCLUSION

The district court had jurisdiction to address the effects of the *post*-PSA activities of the parties to determine if the retirement account transfer was intended to satisfy the \$70,000 payment required by the PSA. There was sufficient evidence Behnke agreed to and acquiesced to the retirement account assignment of \$70,000 through a QDRO to satisfy the \$70,000 allocation to her required by the PSA.

Affirmed.