In the Matter of the Marriage of Dana L. LEEDY n/k/a Dana Wassar, Appellant/Cross-Appellee,
and
Robert D. LEEDY, Appellee/Cross-Appellant.
No. 90,378.
Court of Appeals of Kansas
July 2, 2004

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Review Granted Sept. 14, 2004.

Appeal from Sedgwick District Court; David Kaufman, judge. Opinion filed July 2, 2004. Affirmed in part, reversed in part, and remanded.

Robb W. Rumsey, of Rumsey and Cleary Law Offices, of Wichita, for the appellant/cross-appellee.

Charles F. Harris, of Kaplan, McMillian and Harris, of Wichita, for the appellee/cross-appellant.

Before RULON, C.J., PIERRON and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

Dana L. Leedy n/k/a Dana Wassar appeals the trial court's order to recalculate child support and arrearages. Robert D. Leedy cross-appeals the court's award of attorney fees to Dana.

Dana and Robert were married in 1990 and had three children--Kayla, born on January 7, 1993; Kyle, born on July 1, 1995; and Koby, born on January 20, 1997. Dana and Robert were divorced in 1999. Dana was given primary residential custody of the children and Robert had been ordered to pay a fixed amount of child support beginning January 1, 1999.

There were a number of posttrial hearings on child support. On October 29, 2002, Robert filed a motion requesting the trial court set aside an order concerning child support filed on February 25, 2002, because the order was not supported by the child support worksheet and there were significant errors in the arrearage calculation. He requested the court recalculate historical child support due to mathematical errors and material misstatements in calculating his alleged arrearage.

At the November 19, 2002 hearing, Robert argued that Dana had claimed significantly higher child care expenses than were actually expended and Dana admitted there were some errors. The trial court ordered both parties to recalculate the child support amount and the arrearage for Robert.

In the May 7, 2003, order, the trial court denied Dana's motion to reconsider the order of November 19, 2002, and found that Robert had overpaid his child support in the sum of $1,730.77 as a result of the overstatement of day care costs. The court found Dana's overstatements of the monthly day care costs constituted a significant mathematical error in the previous arrearage calculation and Dana should have disclosed the error as a matter of equity. The court found Dana had overstated the costs beginning January 1, 2000, and had ceased to have any day care expenses after August 1, 2002. Dana appeals the court's retroactive decrease in the child custody order.

The trial court denied Robert's motion to set aside an attorney fee order in Dana's favor.

Dana frames her issue as one of retroactive modification of child support which is prohibited by case law and the statute. On the other hand, Robert claims the trial court could recalculate the child support arrearage because there were mathematical errors and the previous order was not supported by the worksheet.

Dana fails to state the standard of review in her brief. Robert argues the issue is a question of law and, therefore, the standard of review is unlimited. Robert contends his motion to correct the child support obligation owed to him was made based on K.S.A. 60-260.

A ruling on a motion for relief from judgment, filed under K.S.A. 60-260(b), rests within the sound discretion of the trial court. *Midland Bank of Overland Park v. Rieke,* 18 Kan.App.2d 830, 835, 861 P.2d 129 (1993). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *Varney Business Services, Inc. v. Pottroff,* 275 Kan. 20, 44, 59 P.3d 1003 (2002).

The standard of review of a trial court's order determining the amount of child support is whether the trial court abused its discretion, while interpretation of the Kansas Child Support Guidelines is subject to unlimited review. *In re Marriage of Karst,* 29 Kan.App.2d. 1000, 1001, 34 P.3d 1131 (2001), *rev. denied* 273 Kan. 1035 (2002). With respect to Dana's argument that the trial court impermissibly imposed a retroactive decrease in the child support obligation for Robert, our review is unlimited. *In re Marriage of Steven,* 30 Kan.App.2d 794, 795, 48 P.3d 1284 (2002).

Although Robert claims the trial court corrected his child support obligation based on the clerical mistakes provision in K.S.A. 60-260(a), the trial court never mentioned the provision at the hearing or in the journal entry. Furthermore, the error in Dana's child care costs was not clerical or any other type which "may be corrected by the court at any time of its own initiative or on the motion of any party." K.S.A. 60-260(a).

According to the worksheet attached to the trial court's order filed on March 7, 2003, Dana's reported monthly child care costs were significantly higher than they actually were. Robert claims there was a $7,300 disparity in his favor in what he should have paid based on child care expenses. We believe his figures are probably correct.

At the November 2002 hearing, Dana's counsel stated: "We don't object to the 2001 being set aside, we admit there were some errors there." At a February 2003 hearing, the trial court stated that Dana knew there was an error and concluded the court had to correct the mistakes.

Dana argues the trial court impermissibly decreased the child support amount retroactively in violation of the case law and the statute. Child support payments become final judgments on the dates they become due and unpaid. *Gardner v. Gardner,* 22 Kan.App.2d 314, 315, 916 P.2d 43, *rev. denied* 260 Kan. 992 (1996). K.S.A.2003 Supp. 60-1610(a) provides: "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." A parent's child support obligation may be increased or decreased when a material change of circumstances has occurred, but such modification operates only prospectively. *Steven,* 30 Kan.App.2d at 795.

The Kansas Child Support Guidelines only require child care costs to be included in the child support calculations if the costs are (1) actual, reasonable, and necessary, and (2) are incurred to permit employment or job search. *In re Marriage of Scott,* 263 Kan. 638, 642, 952 P.2d 1318 (1998). In this case, propriety of the child care costs is not the issue. The issue is errors in reporting the actual amounts spent. We must decide whether the errors/misstatements could be corrected by the trial court at the point the trial court did so.

Robert argues the trial court could set aside the child support ordered on February 25, 2002, because the child support worksheet was not attached to the order. Robert claims the court had power to correct the child support obligation for him based on K.S.A. 60-260(b)(6).

K.S.A. 60-260(b)(6) provides the court power to relieve a party from an order based on "any other reason justifying relief from the operation of the judgment." The motion must be made within a reasonable time.

Robert never argued at trial or on appeal that other grounds in the statute were the basis for setting aside the trial court's order; mistakes under K.S.A. 60-260(b)(1), newly discovered evidence under (b)(2) or fraud or misrepresentation under (b)(3). For all these grounds, a party must file a motion within a year after the order. In this case the trial court recalculated the child support going back to January 1, 2000.

Robert argued at trial and on appeal that the trial court's failure to attach the child support worksheet with the order made it an invalid order which could be set aside. However, his complaint was not that the court's child support order was not supported by a worksheet. His complaint was that Dana's child care costs submitted to the court were overstated. Under the circumstances of this case, Robert's reliance on *In re Marriage of Schletzbaum,* 15 Kan.App.2d 504, 809 P.2d 1251 (1991), is misplaced. In *Schletzbaum,* this court reversed the trial court's child support order, holding the court had deviated from the guidelines without making required specific findings on the record. 15 Kan.App.2d at 507. *Schletzbaum* does not support Robert's assertion that the trial court may set aside an order of child support which is filed without a worksheet.

Robert also relies *In re Marriage of Thomas,* 16 Kan.App.2d 518, 825 P.2d 1163, *rev. denied* 250 Kan. 805 (1992), where the wife filed a motion for a new trial on the grounds of newly discovered evidence under K.S.A. 60-260(b) to modify the divorce decree. The *Thomas* court held that the newly discovered evidence provision did not apply to the facts, however, the relief could have appropriately been granted to the wife under K.S.A. 60-260(b)(6), affirming the trial court on the basis that it was right for the wrong reason. 16 Kan.App.2d at 524. The *Thomas* court held:

"The record in the instant matter indicates that the trial court was confused or unaware of the existence and amount of the second mortgage at the original hearing. The trial court concluded that, had it been aware of the existence and amount of the second mortgage, it would not have required [the wife] to pay that indebtedness. The trial court corrected this misunderstanding of the factual situation when it modified the decree. We hold that the trial court had the right to grant [the wife] a new trial and modify its decree based on the authority granted in 60-260(b)(6). To hold otherwise would be to perpetuate the existence of an inequitable division of property, which was based on a misunderstanding of the true facts. The trial court has the power under K.S.A. 60-260(b)(6) to achieve justice and equity in this fashion and, in doing so, it did not abuse its discretion." 16 Kan.App.2d at 526.

The difference between *Thomas* and this case is that here, the trial court corrected the misunderstanding of the factual situation by modifying the child support order. Considering the nature of the child support order which becomes final on every due date and the modification can be only be prospective, it is questionable the *Thomas* ruling would apply to the facts in this case. It seems none of the provisions in K.S.A. 60-260(b)(1) through (6) provided a vehicle for the trial court to modify the child support order as much as it did.

The result of this decision is not satisfying. It appears that the child care expenses were substantially overstated. This led to child support orders larger than they should have been. However, we believe we are bound by the rule set out in *In re Marriage of Schoby,* 269 Kan. 114, Syl. ¶ 1, 4 P.3d 604 (2000), that actual modification of the amount of child support can only be prospective. Giving these matters some finality is a legitimate aim. We must remand this matter to the trial court for further proceedings consistent with this opinion and the time limitations under K.S.A. 60-260(b) which apparently limits relief to a maximum of 1 year.

An independent action to relieve a party from a judgment for fraud upon the court is apparently not involved here. See K.S.A. 60-260(b).

On cross-appeal, Robert argues that the trial court abused its discretion in denying to set aside the award of attorney fees entered on February 25, 2002. Dana did not respond to this issue on cross-appeal.

In the February 25, 2002, order, the trial court ordered Robert to pay $857 in attorney fees to Dana, finding he was in contempt for failure to pay the full amount of child support and his portion of uninsured medical expenses of the minor children.

Robert did not appeal the award of attorney fees within the prescribed time after the decision was entered. When he filed a motion to set aside the order filed February 25, 2002, he alleged the order should be set aside because the child support calculation was not supported by the worksheet and there were significant errors in the arrearage calculation. However, he did not allege the award of attorney fees should be set aside.

At the hearing, Dana argued that in the February 25, 2002 order, the trial court did not state the attorney fees were awarded because of the contempt--they could have been awarded because of her financial situation or other reasons. The court agreed and refused to set aside the award of attorney fees.

The assessment of attorney fees lies within the sound discretion of the trial court, and its determination will not be reversed on appeal absent a showing of an abuse of discretion. If any reasonable person would agree with the trial court's decision appellate courts will not disturb the trial court's decision. *Fletcher v. Anderson,* 29 Kan.App.2d 784, 786, 31 P.3d 313 (2001).

Robert's sole argument is that the trial court would never have made the attorney fees award if it had been aware of the mathematical errors in the child support obligations. This is not supported by anything in the record.

Reversed and remanded on the issue of child support recalcuation. Affirmed on the issue of attorney fees.