NOT DESIGNATED FOR PUBLICATION

No. 91,080–A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Michelle L. JOHNSON,
Plaintiff-Appellee,

v.

Robert D. REIDT,
Defendant-Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court, Anthony Powell, judge. Opinion filed September 3, 2004. Affirmed.

Russell L. Mills, of Derby, for the appellant.

Jeffrey R. Emerson, of Foulston, Conlee, Schmidt & Emerson, LLP, of Wichita, for the appellee.

Before ELLIOTT, P.J., PIERRON and GREENE, JJ.

Per Curiam: Robert D. Reidt and Michelle L. Johnson entered into an agreed mutual final protection from abuse (PFA) order dividing property and restraining each party from having contact with the other. Reidt subsequently filed a motion in contempt, alleging that Johnson had failed to comply with the order, and also moved for relief from judgment pursuant to K.S.A. 60-260(b)(4). Reidt appeals from the district court's denial of these motions.

Johnson and Reidt, an unmarried couple, lived together at 1421 S. Hornecker in Wichita. Johnson and Reidt owned the residence as joint tenants with the right of survivorship.

On July 23, 2001, Johnson filed a petition for protective orders under the Kansas Protection from Abuse Act, K.S.A. 60-3101 et seq. In the petition, Johnson requested that the district court order Reidt to leave the residence and be prevented from returning. Johnson also sought possession of certain personal property and asked that police be present when Reidt picked up his belongings. In addition, Johnson requested attorney fees and costs.

Johnson was granted temporary possession of the residence, and a hearing on the motion was scheduled for August 2, 2001. At the hearing, the parties agreed to enter into a mutual final PFA order, which was put in place for 1 year until August 2, 2002. The order provides in relevant part:

> "10. That Defendant, Robert Reidt, shall be allowed to pick up the following personal property from the residence located at 1421 S. Hornecker on Sunday August 5, 2001 from 12:00 p.m. until 3:00 p.m. or until such as he is able to recover all items listed. That law enforcement personal [sic] shall be directed to assist and observe said recovery of the listed personal property. Should the parties have any dispute as to any item, they shall place that item on a list and specifically describe the dispute and each shall keep a copy and provide their counsel with said list and the Court shall retain jurisdiction to settle any item of personal property in dispute.
>
> "11. The residence of the parties located at 1421 S. Hornecker, Wichita, Sedgwick County, Kansas, shall be awarded to the Petitioner, Michelle Johnson free and clear of all right, title and interest of Defendant, Robert Reidt, provided that Michelle Johnson shall refinance or otherwise remove Robert Reidt from the mortgage currently held against the marital residence. Each party shall cooperate to have the Defendant removed from the mortgage as soon as possible and Petitioner shall hold Defendant free and harmless from the mortgage. Petitioner [and] Defendant shall sign all paperwork consistant [sic] with this order."

An agreement dividing the parties' personal property was attached to the order, and both parties signed the order and initialed the agreement.

In August 2001, a guard from the Sedgwick County District Courthouse supervised the physical distribution of the property between the parties. Johnson also apparently transferred ownership of the titles to a boat, a truck, and a car to Reidt, although these items were not referenced in the PFA agreement.

On August 31, 2001, Reidt executed and recorded a quitclaim deed transferring Johnson his interest in the residence, and Johnson subsequently refinanced the mortgage on the property to remove Reidt from the mortgage loan.

On November 19, 2001, the PFA order was filed. That same day, Reidt's counsel withdrew. Almost a year later, on November 15,2002, Reidt's new counsel filed a motion in contempt, alleging that Johnson had failed to deliver to Reidt the personal property he was to receive under the PFA order. A hearing on this motion was continued, and was ultimately denied on March 10, 2003, when Reidt failed to personally appear. The district court ordered Reidt to pay Johnson's attorney fees in the amount of $1,000

by the end of March. On April 9, 2003, Johnson filed a motion to compel Reidt to pay the attorney fees award.

On May 16, 2003, Reidt filed a second motion in contempt, again claiming that Johnson had failed to comply with the property division agreed to under the PFA order. On May 23, 2003, Reidt filed a motion for relief from judgment under K.S.A. 60-260(b)(4), alleging that the PFA order was void because it affected title to real. See K.S.A.2003 Supp. 60-3107(g). Although the timing is unclear from the record, at some point, Reidt also filed a separate civil action to determine ownership of the parties' personal property. The parties agreed to stay the action until the district court ruled on the motions that had been filed.

Following a hearing on the parties' motions, the district court determined that it lacked jurisdiction to hear Reidt's motions, since the PFA order had expired prior to their filing and, in any event, determined that Reidt should be estopped from arguing against the PFA order because he had voluntarily contracted for the arrangement. The court also declined to address Reidt's contempt arguments relating to his personal property, as these issues could be addressed in the civil case. Finally, the court ruled that Reidt had raised a controverted issue of material fact with respect to the attorney fees issue because Reidt's counsel alleged that Reidt did not have the financial means to pay the attorney fee sanction. This issue was set for an evidentiary hearing which has evidently not yet been heard.

Reidt first contends the district court erred in denying his motion for relief from judgment under K.S.A. 60-260(b)(4). He claims the transfer of real estate in the PFA order was void under KS.A.2003 Supp. 60-3107(g), which states: "No order or agreement under the protection from abuse act shall in any manner affect title to any real property." Reidt requests this court to place the parties back as joint owners of the residence.

K.S.A. 60-260(b) provides for instances in which a judgment may be modified. It reads in relevant part:

> "On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons: (I) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

> under KS.A. 60-259(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation."

The modification or amendment of a judgment under K.S.A. 60-260(b) is addressed to the sound discretion of the trial court and upon appeal is reviewable only for abuse of discretion. Subway Restaurants, Inc. v. Kessler, 273 Kan. 969, 977, 46 P.3d 1113 (2002). 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 district court correctly noted that Reidt should be estopped from challenging the PFA order because he acquiesced to the contract. A party who voluntarily complies with a judgment cannot thereafter adopt an inconsistent position and appeal that judgment. To find acquiescence in a judgment, appellate courts must be shown that the party either assumed burdens or accepted benefits of the judgment contested in the appeal. Layne Christensen Co. v. Zurich Canada, 30 Kan.App.2d 128, 137, 38 P.3d 757 (2002). Reidt was represented by counsel, signed the contract agreeing to give up title, and transferred the quitclaim deed. While a party cannot acquiesce in a void judgment, Sramek v. Sramek, 17 Kan.App.2d 573, 576-77, 840 P.2d 553 (1992), rev. denied 252 Kan. 1093 (1993), as discussed above, the order in the present case was not void. Reidt's conduct could also be considered invited error. "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" Butler County R. W.D. No. 8 v. Yates, 275 Kan. 291, 296, 64 P.3d 357 (2003).

Reidt apparently did not contest the provisions of the PFA order at the time they were entered. He received numerous benefits through the process, including titles to a boat, a truck, and a car although these items were not referenced in the PFA order. Also, his name was removed from the home mortgage under the agreement, and Johnson has henceforward made the mortgage payments and paid the taxes. Since Reidt accepted all the benefits of the process, never objected to the provisions during the effective

life of the PFA order, and now only requests that portions of the mutually agree upon order be voided-not the entire agreement-we believe that latches and estoppel bar his requested relief.

Changes in the title to real estate are not the proper subject of a PFA action. However, if the parties agree to such a disposition, do not challenge it until after the PFA order has expired, and the parties have drastically altered their positions in reliance on the agreement, a court may properly find the application of estoppel or latches. This may occur even if the underlying action might be void were it the only way the change was effected.

Had Reidt contested the matters he now complains of at the time the matter was being litigated, it is likely the issues could have been properly addressed. Having chosen to acquiesce in the agreement and obtaining substantial benefits, he created a situation which he cannot now challenge as having been void ad initio.

Reidt also contends the district court erred in refusing to address his personal property claims. He alleges that while possession of personal property may be transferred under the PFA Act, transfer of ownership of personal property is prohibited. The district court declined to address the merits of this issue, holding that any personal property disputes could be dealt with in the separate civil case filed by Reidt. According to Johnson, as of the date the briefs were filed, there had been no final ruling in the civil case. Accordingly, this issue is not properly before this court.

Additionally, Reidt should be estopped from raising this issue because he did not timely challenge the PFA order. The parties included a provision in the PFA agreement, incorporated as part of the order, which would have allowed the district court to resolve any personal property disputes. Reidt failed to invoke this provision during the time the PFA order was in effect, and he should not now be allowed to collaterally attack this issue.

Finally, Reidt contends the trial court erred in awarding Johnson attorney fees in the amount of $1,000 merely because he was unable to personally appear at the hearing on his contempt motion.

We do not believe this court has jurisdiction to hear this issue. "An appellate court has the duty to question jurisdiction on its own initiative. If the record shows a lack of jurisdiction for the appeal, the appeal must be dismissed. [Citation omitted.]" State v. Snodgrass, 267 Kan. 185, 196, 979 P.2d 664

(1999). Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. See State v. Hurla, 274 Kan. 725, 726, 56 P.3d 252 (2002).

Generally, this court's jurisdiction may be invoked by appeal as a matter of right from a final decision in any action. K.S.A. 60-2102(a)(4). A final decision is one which finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court. Plains Petroleum Co. v. First Nat'l Bank of Lamar, 274 Kan. 74, 82, 49 P.3d 432 (2002).

Reidt's motion in contempt was dismissed on March 10,2003, when he failed to personally appear at the hearing. The district court ordered Reidt to pay Johnson's attorney fees in the amount of $1,000 by the end of March. When Reidt failed to do so by March 31, 2003, Johnson filed a motion to compel Reidt to pay the fees. At the combined hearing on Reidt's motions and Johnson's motion to compel, Reidt alleged that he could not afford to pay the attorney fees because he was unemployed. In a memorandum opinion dated July 10, 2003, the court dismissed Reidt's motions but granted an evidentiary hearing on the issue of attorney fees.

Upon Reidt's appeal to this court on July 30, 2003, our motions panel issued an order to show cause why the case should not be dismissed for lack of jurisdiction, as the district court's memorandum opinion did not appear to be a final order. In response, Johnson alleged that Reidt had filed the appeal prematurely, as a hearing on her motion to compel payment of attorney fees had been scheduled for March 19, 2004. Conversely, Reidt argued that the district court's memorandum opinion was a final order because the only remaining issue to be decided by the district court was whether Reidt had the financial ability to pay the attorney fees judgment. Our motions panel retained the appeal.

Although the attorney fees issue still remained before the district court, it did not affect this court's jurisdiction over the entire appeal. "A decision on the merits is final for purposes of appeal even if a request or motion for attorney fees attributable to the case has not yet been determined. [Citation omitted.]" Snodgrass v. State Farm Mut. Auto. Ins. Co., 246 Kan. 371, 374, 789 P.2d 211 (1990). However, there is nothing in the record to confirm that the evidentiary hearing took place or that the

district court did, in fact, award attorney fees. Without a final order from the district court, this court IS without jurisdiction to hear this issue.

Affirmed.