In the Matter of the MARRIAGE OF Leslie ROHR, n/k/a Sublett Appellant,
and
Donald Wayne ROHR, Appellee.
No. 91372.
Court of Appeals of Kansas
October 29, 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.

Appeal from Sedgwick District Court; Anthony J. Powell, judge. Opinion filed October 29, 2004. Affirmed.

D. Heath Lampson, of Wichita, for appellant.

Mark Sevart, of Derby, for appellee.

Before RULON, C.J., MCANANY, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

Leslie Rohr, n/k/a Sublett, appeals the district court's decision that it had no jurisdiction to retroactively modify child support because no motion to file child support was ever filed. We affirm.

The journal entry of judgment decree of divorce for Leslie and Donald Rohr was filed on July 26, 1995. There were two children born in the marriage, Andrew Rohr d/o/b 04/09/86 and Alexander Rohr d/o/b 02/17/89. Leslie and Donald were granted joint legal custody of the children. Leslie was granted the primary responsibility for the children's care, custody, and control.

The court ordered

"that respondent [Donald] shall continue to pay the sum of $311 .00 per month to petitioner as and for the support of the parties' minor children pursuant to the provision of the order of this court dated July 12, 1994; provided, however, that the amount of respondent's future support obligation shall be determined by this court upon motion. A separate order shall be prepared journalizing the new amount of support to be paid once the same has been determined by the court. During any time respondent has visitation with the minor children for a two week or longer period, his child support obligation shall be reduced by one-half during such time."

On September 10, 1996, Leslie filed a motion to settle child support dispute. The district court heard the motion on October 1, 1996. The court ordered Donald to pay child support in the amount of $416 per month beginning September 1, 1996. The court also ordered the parties to attend mediation concerning visitation issues.

An order was filed on December 16, 1996, that adopted the mediation agreement concerning the care of the children. The mediation agreement did not address child support issues.

There are no motions or orders in the record during the time period between the order adopting the mediation agreement on December 16, 1996, and the journal entry of the hearing held on August 18, 2003. The August hearing is the subject of this appeal.

On August 18, 2003, the court held a hearing and (1) adopted the dispute resolution counseling recommendations of Trip Shaver and (2) denied Leslie's request to modify child support retroactively for lack of jurisdiction because no motion to modify child support was ever filed. The dispute resolution counseling recommendations are not included in the record. The transcript indicates the court stated that the dispute resolution counseling recommendation modified the amount of child support payments.

According to the transcript of the August 18, 2003, hearing, both parties agreed that Leslie filed a motion to compel for failure to answer discovery and a hearing was set for December 23, 2002. It appears that the parties came to an agreement and the hearing was not held. Leslie's attorney stated that he drew up an order in April 2003 saying the parents would go to mediation on issues of past and present child support as well as for other unresolved issues. Leslie's attorney stated he made a mistake and that the order should have said that the parents would go to dispute resolution counseling for both future and past child support. Donald's attorney stated the agreement was for the parents to go to mediation, not dispute resolution counseling concerning child support. There was no testimony at the hearing. The order sending the parents to either mediation or dispute resolution counseling is not in the record.

According to the attorneys' arguments, the mediator/dispute resolution counselor drew up a dispute resolution counseling recommendation. The court adopted the recommendation, and the transcript reflects that the effective date for increased child support of $439.43 was May 1, 2003.

Whether jurisdiction exists is a question of law over which an appellate court's scope of review is unlimited. *State v. James,* 276 Kan. 737, 744, 79 P.3d 169 (2003); *In Re Marriage of Ruth,* 32 Kan.App.2d 416, 418, 83 P.3d 1248 (2004).

The amount set for child support is not an issue on appeal.

"The court shall make provisions for the support and education of the minor children. The court may modify or change any prior order, including any order issued in a title IV-D case, within three years of the date of the original order or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstances need not be shown. *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."* (Emphasis added.) K.S .A.2003 Supp. 60-1610.

This statutory language gives the court continuing jurisdiction to modify child support and provides the court with the discretion to make a modification retroactive within 1 month after the motion is filed. See *In re Marriage of Schoby,* 269 Kan. 114, Syl. ¶ 4, 4 P.3d 604 (2000); *Barnett v. Cusimano,* 30 Kan.App.2d 680, 681, 46 P.3d 568 (2002) (language regarding retroactive modification contemplates the district court's exercise of discretion). Leslie does not claim to have filed a motion for modification of child support. Because there was no motion filed, there is no statutory basis under K.S.A.2003 Supp. 60-1610 to make the child support modification retroactive.

According to Kansas case law, child support modification operates prospectively. *In re Marriage of Schoby,* 269 Kan. 114, Syl. ¶ 1. The new support order cannot increase or decrease amounts past due. *In re Marriage of Blagg,* 13 Kan.App.2d 530, 531, 775 P.2d 190 (1989). A retroactive order for child support has rarely been allowed. *In re Marriage of Bunting,* 259 Kan. 404, 410, 912 P.2d 165 (1996) (citing one exception where the divorce decree was entered when the mother was pregnant). There is no statutory or case-law authority supporting Leslie's request for retroactive child support.

Leslie argues that the Kansas Child Support Guidelines (Guidelines) provide authority upon which the trial court should have relied upon as a basis for jurisdiction. Leslie argues that the Guidelines allow that a change in financial circumstances that would increase or decrease by 10% the amount shown on line D.9 of

the worksheet constitutes a material change in circumstances to warrant judicial review of existing support order. Kansas Child Support Guidelines, Section VI, A (2003 Kan. Ct. R. Annot. 114). This argument does not address the issue of retroactively modifying child support.

Leslie may be arguing that continuing jurisdiction means that upon an order to modify child support, the court can impose the beginning date at the time the change in circumstance occurred. If the argument is that child support modification occurs on the date of a material change in circumstance, Leslie provides no authority for this assertion. A review of the case law, the Guidelines, and K.S.A.2003 Supp. 60-1610 does not provide any support for an interpretation that continuing jurisdiction means modification is effective at the time of the material change in circumstance. Moreover, Leslie argues that the increase in child support should be dated back to July 2002 but neither provides a reason for this date nor cites to the record to support such a date.

Leslie's argument ignores the procedure provided by both the Guidelines and the Supreme Court Rules to request child support modification.

According to the Guidelines,

"[t]he party requesting a child support order or modification shall present to the court a completed worksheet, together with a completed Domestic Relations Affidavit.
Information provided by the parties pursuant to the Domestic Relations Affidavit shall assist the Court in confirming or adjusting the various amounts entered on the worksheet. The information required shall be attached to the application for support or motion to modify support." Kansas Child Support Guidelines, Section III (2003 Kan. Ct. R. Annot. 104).

Leslie does not claim to have followed this procedure nor is there a motion, child support worksheet, or domestic relations affidavit in the record on appeal that was filed during the relevant time frame.

Supreme Court Rule 139 (2003 Kan. Ct. R. Annot. 188) provides the procedure for filing motions to modify child support orders. "All motions to modify existing support orders shall be accompanied by a Domestic Relations Affidavit." Supreme Court Rule 139(a) (2003 Kan. Ct. R. Annot 188).

"A party filing a motion to modify an existing order of support shall serve a copy of the Domestic Relations Affidavit along with the motion on the adverse party. Any person challenging a motion to modify an existing support order or the facts contained in the movant's affidavit shall file and serve a similar affidavit prior to the hearing on the motion to modify." Supreme Court Rule 139(f) (2003 Kan. Ct. R. Annot. 188).

Again, Leslie does not claim to have followed Rule 139 and no such documents are found in the record.

Leslie argues that according to the Guidelines, Donald has a duty of good faith to disclose changes in circumstances which would justify a modification to the child support order. Kansas Child Support Guidelines, Section VI, A (2003 Kan. Ct. R. Annot. 114.) Leslie says that Donald concealed an increase in income for 1 year, but this assertion is not supported by the record that it cited to. Leslie also states that Donald admitted to his significant increase in income but does not cite to the record. There is nothing in the record to support this assertion. These factual assertions do not comply with the requirement that facts be keyed to the record to make verification convenient, and thus, these facts can be presumed to be without support in the record. Supreme Court Rule 6.02(d) (2003 Kan. Ct. R. Annot. 35). If Leslie is arguing that the child support should be retroactive because Donald violated a duty of good faith to report a change in circumstance, this argument is not supported by the record on appeal.

Leslie also argues that the parties had an agreement to address the issue of back child support. However, the brief references to the transcript of the attorney's argument before the court, not to the agreement. Leslie fails to include the agreement in the record on appeal. The appellant has the duty to designate a record sufficient to establish the claimed error. *Unrau v. Kidron Bethel Retirement Services, Inc.,* 271 Kan. 743, 777, 27 P.3d 1 (2001). If Leslie is arguing that the agreement was in effect a

substitution for a motion to modify child support, the argument fails. Without an adequate record, the claim of alleged error fails. 271 Kan. at 777.

Donald's motion for attorney fees will be addressed by separate order.

Affirmed.