

NOT DESIGNATED FOR PUBLICATION

No. 91,879

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

DONALD J. GOSSMAN,

*Appellee,*

and

CLAUDIA P. GOSSMAN,

*Appellant.*

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS SUTHERLAND, judge. Opinion filed December 23, 2004. Affirmed.

*Justin Palmer, Scott E. Wasserman, Trina A. Nudson, and Rachel A. Spaethe*, of Scott Wasserman & Associates, LLC, of Lenexa, for appellant.

*Joseph Booth and Ronald W. Nelson*, of Nelson & Booth, of Overland Park, and *Jean Wise*, of Shawnee Mission, for appellee.

Before HILL, P.J., GREEN and MALONE, JJ.

*Per Curiam:* In this case a divorced father asked the trial court to lower his child support because his children were now primarily residing with him and because of a downturn in his corporation's income. The trial court, deciding that there was a change of circumstances ordered a modification. Believing this to be an abuse of discretion, the mother of the children, who must now pay support to her former husband, appeals the ruling, arguing that father's salary has not changed and therefore their child support order should remain unchanged. While it is true that father's salary from his subchapter S corporation has remained the same, he has been forced by circumstances that he cannot control to return most of his compensation to the corporation to keep it solvent. Because the facts disclose that father was truly earning about half of what he used to make, we hold that there is no abuse of discretion by the trial court and we affirm.

### *Background*

Donald and Claudia Gossman were divorced in July 2003. They had two minor children, a boy and a girl. In the divorce decree they were granted joint custody with shared residential placement of the minors. For purposes of calculating child support, the trial court found that Donald's annual income was \$120,000 and Claudia's income was \$43,680. The court ordered Donald to pay child support according to the Kansas Child

Support Guidelines for shared custody. Based on a stipulated order, Donald was ordered to pay \$200 per month in child support. Donald is self-employed, but for purposes of completing the child support worksheet, Donald computed his income as a wage earner rather than self-employed.

For the past 25 years, Donald has been the president and acting manager of a subchapter S corporation, Gossman and Associates, Inc., an appraisal business. Donald was awarded the corporation and all other property was divided equally.

In December 2003, Donald filed a motion to modify child support, maintenance, and custody, alleging that his appraisal business suffered a decrease in income because he lost his largest client. In addition to the decrease in appraisals, Donald was making double house payments on his former and current residence. Donald noted that the former residence was off the market because Claudia wanted to purchase the residence but later changed her mind. Donald claimed his current income is half of his former income.

During the hearing on the motion, Donald testified that there was a business downturn in his corporation. Donald presented evidence of the corporation's losses

totaling \$75,741.38 and evidence of a second mortgage for \$25,000 on his home that was used to infuse cash for capital into the corporation to keep it solvent.

The corporation's income and number of appraisals for the listed years follows:

<u>Income</u>		<u>Appraisals</u>	
1997	\$99,650	1997	3,022
1998	\$116,452	1998	3,646
1999	\$119,664	1999	3,018
2000	\$131,590	2000	2,711
2001	\$132,616	2001	3,644

In 2003, the corporation only completed 1,700 appraisals. Claudia did not dispute the decrease in the number of appraisals.

Also, Donald testified that he laid off four employees and had to cut back on overtime. Although the corporation's revenues decreased and Donald laid off employees, Donald still paid himself \$120,000 but claimed he had to pay \$75,000 to the corporation for its losses. Donald testified that he continued to pay himself the same salary because

the judge "set [his] salary at \$120,000." Donald also claimed that he did not reduce his salary because he had to "provide for [his] children what they have been used to or accustomed to." Donald also admitted that the corporation owns his Lexus and pays for his cell phone and Chiefs football tickets.

Based on a 2004 budget and a loss to the corporation from a net rental, Donald determined he would make approximately \$60,000 in 2004. That amount was used on the modified child support worksheet. Also, Donald agreed to supply Claudia with quarterly reports, so if his income would increase above the amount on the modified child support worksheet, Claudia would have knowledge of the increase and support could be adjusted.

Donald also asked the court to modify child custody because the children primarily resided with him. The parties stipulated that the children were spending a majority of their time with Donald and Claudia should pay some support to Donald.

Ruling on the motion, the trial court indicated that Donald met his burden of proving a significant change in circumstances of "a substantial drop in the number of appraisals performed by his company." "Because the profitability . . . is driven by the number of appraisals, the result has been a substantial decrease in revenue, which has

continued for several months." Both parties agreed that the drop in appraisals was not through any fault of Donald.

Because the parties agreed that the children were spending a majority of time with Donald, the trial court ordered Claudia to pay child support in the amount of \$906 based on Donald's modified income of \$60,000. After adjusting the court-ordered maintenance, Claudia was ordered to pay Donald \$634 for child support. Finally, the court ordered Donald to submit financial records to Claudia on a quarterly basis, and if Donald's income exceeded \$5,000 per month, maintenance and child support will be recalculated.

### *Analysis*

Claudia argues to us that the trial court abused its discretion in this instance when it calculated the new child support figure. She also contends that there was no substantial competent evidence that there was a material change of circumstances here that would call for a change in child support.

## *Abuse of Discretion*

Our standard of review of such questions centers on the reasons for the court's actions:

"Judicial discretion is abused when action is arbitrary, fanciful, or unreasonable, which is another way of saying discretion is abused when no reasonable person would take the view adopted by the trial court. [Citation omitted.]" *In re Marriage of McPheter*, 15 Kan. App. 2d 47, 48, 803 P.2d 207 (1990).

Claudia argues that because Donald still paid himself a \$120,000 salary and received all the benefits prior to the downturn in the corporation business, his gross domestic income remained the same. The initial child support worksheet reflected that Donald had a salary of \$120,000, \$10,000 per month. The modified child support worksheet reflected an annual salary of \$60,000, \$5,000 per month. The trial court adopted the modified child support worksheet and ordered child support reflecting the \$60,000 salary when technically Donald's gross income was \$120,000.

Donald argues that the court did not abuse its discretion because modification was based on Claudia agreeing that their children were not actually spending equal time with the parties (as they had provided in the original divorce decree), but that the children were

spending the majority of their time with him. Claudia does not dispute this. She is disputing the amount used in determining child support.

A Kansas Supreme Court case, *In re Marriage of Brand*, 273 Kan. 346, 44 P.3d 321 (2002), is instructive. In *Brand*, the Supreme Court concluded that as a minority stockholder, the Respondent's distributions from a subchapter S corporation were not included as income for child support purposes because Respondent did not have the ability to control the distributions of the corporation, and the Respondent did not manipulate his income to avoid paying child support. 273 Kan. at 360.

In *Brand* the court held that "[i]n situations where the individual with the support obligation is able to control the retention and disbursement of funds by the corporation, he or she will bear the burden of proving that such actions were necessary to maintain or preserve the business." 273 Kan. at 354. The court elaborated and listed some factors that should be considered:

"[W]hen determining what amount of a Subchapter S corporation's income should be included as income for purposes of calculating support. Some of those factors include past earning history of the corporation, ownership share, and the shareholder's ability to control the . . . profits . . . ." 273 Kan. at 359-60.

This case, therefore, can be distinguished from *Brand* because Donald does have control over his salary. But even though Donald has control over his salary, the trial court was persuaded, based on evidence, that the number of appraisals decreased through no fault of Donald and because the appraisals decreased, income to the corporation decreased.

Here, the trial court considered factors similar to those listed in *Brand*. Within the last several months, the corporation's income has decreased as a result of a decrease in the number of appraisals. Donald provided testimony and financial records regarding his financial situation. Even though Donald paid himself the same salary, he was forced to return a significant portion of his salary to the corporation and took out a second mortgage and laid off employees to keep the company going. Donald also agreed to supply quarterly reports to Claudia, so his control will not be unmonitored.

In this case, the trial court reasonably considered the corporation's decrease in appraisals and revenues based on undisputed figures and financial records. Donald agreed to provide quarterly reports on the corporation's financial status to ensure that there would be scrutiny of the corporation's business called for in *Brand*. Furthermore, Donald agreed to increase support if his income increased. We find no abuse of discretion here.

### *Substantial Competent Evidence*

Claudia also argues there was no substantial competent evidence of a decrease in Donald's income to warrant material change in circumstances. The only change was Donald's downturn in his corporation, which is a separate legal entity. We disagree.

The function of an appellate court is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusion of law. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003).

The source of income for Donald was the corporation. The trial court took into consideration the financial situation of the corporation to determine there was a change in circumstances. Based on the undisputed evidence Donald provided, the trial court concluded there was material change in circumstances.

Furthermore, there is a material change in circumstances in this case because the children now reside primarily with Donald rather than in a truly shared custody situation.

The appellant stipulated to this during the hearing. Therefore, in considering the assets of the corporation and the children primarily residing with Donald, there was substantial competent evidence warranting the conclusion that there was a material change in circumstances.

Affirmed.

