NOT DESIGNATED FOR PUBLICATION

No. 92228

In the Matter of the MARRIAGE OF Rebecca A. HENSLEY n/k/a Dean,

Appellant,

and

Douglas D. HENSLEY,

Appellee.

Court of Appeals of Kansas

December 23, 2004

Appeal from Newton District Court; Marty Joe Dickinson, judge. Opinion filed December 23, 2004. Affirmed.

Randall E. Fisher, of the Law Office of Randall E. Fisher, of Newton, for appellant.

Marilyn M. Wilder, of Adrian & Pankratz, P.A., of Newton, for appellee.

Before GREENE, P.J., MARQUARDT, J., and BUKATY, S.J.

PER CURIAM.

Rebecca A. Hensley appeals the trial court's order reducing the child support

obligations of her ex-husband, Douglas Hensley, on his motion filed 4 years after the original settlement agreement and decree of divorce. She claims that the district court's reduction is contrary to the parties' original agreement and that the court's related retroactive reduction and overpayment adjustment are also improper. We disagree and affirm.

Factual and Procedural Overview

Rebecca and Douglas were divorced in 1999, with Rebecca granted sole residential custody of three children, aged 6, 12, and 14. The settlement agreement adopted by the court as fair, just, and equitable provided for child support as follows:

> "2. Child Support. Douglas shall pay child support to Rebecca in the sum of $1,750 plus the trustee's fee of $54 per month or $1,804 per month in equal bi-monthly installments of $902 commencing on or before the fifteenth day of September, 1999, with a payment of $902 with a like payment to be made on or before the first and fifteenth days of each month thereafter until further order of the court. The parties agree that child support should remain at this level until their youngest child reaches 18 years of age or is no longer entitled to support as provided by K.S.A. 60-610(a)(1) [sic-presumably 1610(a)(1)] unless the Court finds that a significant material change of circumstances has occurred. The parties agree that this child support may exceed the Kansas Child Support

Guidelines except for other financial considerations that increase such amount."

The agreement provided for spousal maintenance as follows:

"5.A. Rationale. The parties recognize and agree that it costs approximately $2,500 per month for Rebecca to maintain the home of the parties and to raise their children with the standard of living that the parties desire for them. The home must be maintained until the youngest child reaches the age of 18 or has graduated from high school. On the date of this agreement the parties concur that, unless unusual circumstances warrant a change, this minimum figure of $2,500 per month should be paid by Douglas. A portion of that is denominated as maintenance herein."

In his motion to modify filed in early 2004 and in argument to the district court, Douglas alleged that the parties had both moved out of state, that Rebecca had remarried, and that the children had aged, with the oldest being emancipated. In granting the motion, the district court held in part:

"2. Child support is modified, effective May 1, 2004, to $810.00 per month. This modification is based upon the material changes of circumstances of the parties moving out of state, the increase in ages of the children, and the emancipation of the parties' oldest child. The modification also is based upon the petitioner claiming both children as exemptions for federal and state income tax purposes. The Court specifically finds that the Separation Agreement filed with the Court on September 8, 1999, does not prohibit this or any further modification of child support. The Court also finds that an overpayment of child support and maintenance exists for 2004 in the amount of $1,439.23 and the Court authorizes a further reduction in child support in recognition of that overpayment so that the effective support to be paid by respondent to petitioner from May 1, 2004 through May, 2005, shall be $700.06 per month.

"3. The Court also approves the modification of child support from $1,785.00 to $1,190.00 from July, 2003 until May 1, 2004. This modification is based upon the fact that the oldest child turned 18 and completed her education and is based upon Brady v. Brady."

Rebecca appeals.

Standard of Review

Our standard of review is mixed. *In re Marriage of McCollum,* 30 Kan.App.2d 651, 652, 45 P.3d 398 (2002). To the extent that the issues before us require an interpretation of the Kansas Child Support Guidelines, Supreme Court Administrative Order No. 128 (2003 Kan. Ct. R. Annot. 99) (Guidelines), we review the district court's actions de novo. *In re Marriage of Kasper,* 29 Kan.App.2d 461, 463, 27 P.3d 948 (2001). To the extent that the Guidelines have not been erroneously interpreted, we review the amount of support determined by the district court for an abuse of discretion. See *In re Marriage of Schletzbaum,* 15 Kan.App.2d 504, 505, 809 P.2d 1251 (1991).

Did the District Court Err in Modifying the Child Support Obligations Specified in the Property Settlement Agreement Adopted by the Court in the Original Decree of Divorce?

Rebecca argues that it was improper for the district court to reduce child support obligations that were clearly specified and agreed upon at the time of the divorce. We view this argument as contrary both to K.S.A.2003 Supp. 60-1610(a)(1) and (b)(3) and to well-established case law. It is elementary that provisions of a settlement agreement regarding support of minor children "shall be subject to the control of the court." K.S.A.2003 Supp. 60-1610(b)(3). "A district court has continuing jurisdiction to change or modify an order made in a divorce action concerning the custody and support of minor children when the facts and circumstances make such modification proper. Such matters rest in the sound judicial discretion of the trial court.

[Citations omitted]" *Thompson v. Thompson,* 205 Kan. 630, 631, 470 P.2d 787 (1970).

Not only is Rebecca's argument contrary to law, her settlement agreement contains a specific provision permitting the court to modify child support upon a finding "that a significant material change of circumstances has occurred." So long as there existed a material change in circumstances, Rebecca's argument that the district court erred in ignoring the original settlement agreement must fail.

Did the District Court Err in Finding a Material Change of Circumstances to Support the Child Support Modification?

In finding a material change of circumstances, the district court enumerated (1) the parties' moving out of state, (2) the increase in ages of the children, and (3) the emancipation of the parties' oldest child. Rebecca argues that "the district court had no right to use either [factors (2) or (3)] in changing child support because the parties had previously agreed that child support was not subject to change as the children got older or when the two oldest children reached age 18."

If the only change in circumstances had been the aging of the minor children, Rebecca's argument might have some merit. Where a settlement agreement of the parties contemplates and specifically addresses the impact of the children's aging on the support obligations, the mere aging or emancipation of some of the children, standing alone, might not be a "material" change in circumstances. Here, however, the additional facts surrounding a move by both parties out of state coupled with the remarriage of Rebecca must also be considered as material changes in circumstances, especially because they resulted in a "change in financial circumstances of the parents,"

a specific example of material changes in circumstances set forth in the Guidelines. See Kansas Child Support Guidelines, § VI. A. (2003 Kan. Ct. R. Annot. 114-15).

The parties initially agreed that $2,500 ($1,750 child support and $750 maintenance) would be needed in order to keep the home of the parties for the children. When Rebecca remarried in May 2003 and moved to California with the children in August 2003, the rationale for the amount of maintenance no longer applied to the agreed-upon amount of $2,500 to keep the original home in Kansas. We reject Rebecca's argument that there were no material changes in circumstances.

We conclude that the district court did not err in finding a material change in circumstances sufficient to modify the child support obligations provided in the settlement agreement and original divorce decree.

Did the District Court Err in Reducing Child Support Retroactively?

In addition to the reduction of future child support obligations, the district court reduced child support for the period from July 2003 (when the oldest child was emancipated) until May 1, 2004, based upon *Brady v. Brady,* 225 Kan. 485, 592 P.2d 865 (1979).

Douglas argues that this issue is moot, since he waived on the record any claim to overpayments in child support occurring in 2003 and any overpayments resulting from a reduction in 2004 were not "retroactive" and therefore proper. Although K.S.A.2003 Supp. 60-1610(a)(1) allows the court to modify child support retroactive to a date at least one month after the date that the motion to modify was filed with the court, we note

that the reductions here predate this one month period by approximately 56 days. This discrepancy creates no reversible error, however, since any such overpayments created no claim for reimbursement but rather were applied by the court to Douglas' future child support and spousal maintenance obligations, and the parties have not disputed the amount of this adjustment. Accordingly, we need not address the merits of Rebecca's arguments since this issue is moot.

Did the District Court Err in Reducing Child Support For the First Year of Future Payments Due to the Overpayment of Past Obligations?

Finally, Rebecca argues that the court's finding of past overpayments and order of further reduction for 12 months into the future was error for the same reason that the retroactive reductions were error, *i.e.,* that reductions based solely upon the emancipation of the oldest child were improper. The problem with this argument is that the court expressly based this adjustment not solely on emancipation of a child, nor on overpayments of child support; instead, the court based this adjustment on "an overpayment of child support *and maintenance* for 2004 in the amount of $1439.23 and the Court authorizes a further reduction in child support in recognition of that overpayment...." (Emphasis added.)

The parties have not challenged the court's calculation of the amount of the overpayment, and there exists in the record no underlying basis for the calculation that would permit an examination of the extent to which the total amount might have been based solely upon child support overpaid due to the emancipation of the oldest child, if any, as opposed to overpayment of spousal maintenance. Absent such a record, we are

unable to conclude that the district court erred. *Unrau v. Kidron Bethel Retirement Services, Inc.,* 271 Kan. 743, 777, 27 P.3d 1 (2001).

Affirmed.