NOT DESIGNATED FOR PUBLICATION

No. 92,256
No. 92,774
No. 93,098

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RACHEL VICTORIA HAGEN,
by and through her mother and next friend
LINDA HAGEN, and
LINDA HAGEN,
Appellees,

v.

STUART PERRY,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed December 9, 2005. Affirmed.

David K. Martin, of Payne & Jones, Chartered, of Overland Park, for appellant.

Joseph W. Booth and *Ronald W. Nelson*, of Nelson & Booth, of Overland Park, for appellees.

Before BUSER, P.J., CAPLINGER, J., and KNUDSON, S.J.

Per Curiam: Stuart Perry contends he has been denied fair opportunity to contest Linda Hagen's claim of child support arrearages. He further contends the amount he is required to pay under an income withholding order is unreasonable. The issues arise after denial of Perry's motion to set aside the support judgment under K.S.A. 60-260(b)(1) and (6). Both parties agree our review is limited to whether the district court abused its judicial discretion and that abuse is demonstrated only when no reasonable person would take the view adopted by the district court.

This litigation has taken an inordinate amount of time to wind its way through the judicial system. On February 29, 1996, a petition was filed to establish paternity and enforce an agreement entitled, "Acknowledgment of Paternity and Support Obligation." On June 12, 1996, the district court entered an uncontested order regarding paternity. At the request of the parties, issues of support, visitation, and custody were continued for hearing to give the parties an opportunity to reach a mutually satisfactory agreement. That opportunity was apparently squandered.

On January 29, 1998, a hearing was held before the district court and the district court entered temporary orders.

On July 9, 1998, a hearing was held before the district court, and the mother was awarded legal custody of Rachel. The court further stated: "Matters other than child custody, visitation and restraining orders are to be included in another supplementary order prepared by counsel." The parties were given 30 days to request reconsideration. No motion was filed by either party requesting reconsideration.

On October 20, 1999, Perry's counsel filed a motion to withdraw as his attorney of record. However, she did not obtain an order permitting withdrawal.

On January 17, 2000, counsel for Rachel's mother sent a notice of hearing to Perry's counsel that stated, "the above-captioned action will come on for hearing on all outstanding matters on Thursday, the 17th day of February, 2000."

At the February 17 hearing, Perry and his attorney did not appear. The district court held that the terms and provisions of the "Acknowledgment of Paternity and Support Obligation" signed by Perry should be enforced. The district court found the total amount of support due as of the date of hearing was $81,000 with an unpaid balance of $38,957. The court's journal entry was filed on November 17, 2000, and was mailed to the attorneys of record on November 20, 2000. No notice of appeal was filed by Perry.

On December 14, 2000, an income withholding order was issued. Apparently, the issuance of this order prompted Perry to retain a new attorney who filed a motion to set aside the judgment of November 17, 2000. A hearing on the motion, originally scheduled for March 1, 2001, was twice cancelled and rescheduled at Perry's request.

On February 18, 2004, 3 years after Perry filed his motion to set aside the judgment, a hearing was held. Perry asserted the judgment should be set aside pursuant to K.S.A. 60-260(b)(1) and (6). At the conclusion of the hearing, the district court explained why Perry's motion should be denied, stating:

> "In reviewing this difficult question of what constitutes excusable neglect, the Court is influenced by the fact that it must balance the needs for finality in litigation with what is fair and just. In this case, I would note that there has been a three year lapse between the time the motion was filed and the time it was actually heard.
>
> "The Court isn't aware of any clear or precise definition of excusable neglect, but to the Court it appears that excusable neglect must have some meritorious basis upon which a party should be excused from a judgment. In this case, the parties had been litigating for some time. They were represented by attorneys. The defendant was clearly aware of it in December of 2000 based upon the notice from his employer of the withholding order.

"The Court simply finds that there is not an adequate showing under the facts of this case of excusable neglect. The Court feels that the defendant should have acted quicker, within a matter of days or weeks, from the notice of the withholding to get this matter heard by the Court. So I find that the defendant has not met its burden of proof to show excusable neglect. I don't see it in the court file or in the statements of counsel or in the pleadings.

"In other words, I feel that the excusable neglect factor was somewhat lost by the inaction in the case. Further, I find under the balancing test that at this late date to set aside the judgment, particularly given the fact that Judge Sheppard entered a detailed judgment and heard evidence, would somewhat undermine the finality of judgments."

The court subsequently concluded Perry's current arrearage of support was $41,231.13.

On May 17, 2004, the court established Perry's current child support at $557 per month. The court also ordered that an additional $1,020 per month in arrearage payments be withheld from Perry's income.

Perry has filed a timely appeal from the district court's child support judgment and the income withholding order.

Denial of Perry's K.S.A. 60-260 Motion

Perry argues the district court erred in denying his motion to set aside the judgment of November 17, 2000, pursuant to K.S.A. 60-260, which provides in part:

> "(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* 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: (1) 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 K.S.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 district 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 district court. *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

"'[E]xcusable neglect' is a nebulous term, not susceptible to a clear and exact definition. Whether or not excusable neglect exists must be determined by the trial court on a case-by-case basis." *Bank of Whitewater v. Decker Investments, Inc.*, 238 Kan. 308, 315, 710 P.2d 1258 (1985).

Perry alleges that his attorney was in the hospital and did not notify him of the February 17, 2000, hearing, and that no notice was provided to him or his attorney that the district court entered a judgment against him for alleged past due child support. Perry contends that he filed the Motion to Set Aside Judgment immediately upon receiving the Income Withholding Order from his employer, but the hearing on the motion was delayed because he was required to travel out of the country in order to obtain employment.

Perry's allegation that his attorney was in the hospital and did not inform him of the hearing does not constitute excusable neglect. As the district court noted, the parties were involved in litigation for several years, and Perry should have been aware that there were additional matters, including the child support issue, that needed to be resolved. Additionally, Perry fails to provide a reasonable explanation for his failure to pursue a hearing until more than 3 years after he filed the motion. K.S.A. 60-260(b) gives a district court ample power to vacate judgments when necessary or appropriate to accomplish justice. But that """power is not provided in order to relieve a party from free, calculated and deliberate choices he has made. The party remains under a duty to take legal steps to protect his interests.""" *Overland Park Savings & Loan Ass'n v. Braden*, 6 Kan. App. 2d 876, 880, 636 P.2d 797 (1981) (quoting *Chowning, Inc. v. Dupree*, 6 Kan. App. 2d 140, 143, 626 P.2d 1240 [1981]).

It is also apparent from a fair reading of the district court's findings and conclusions that the court applied the equitable doctrine of laches to deny Perry's motion. The doctrine has been held applicable in child support litigation. *In re Marriage of Jones*, 22 Kan. App. 2d 753, 757, 921 P.2d 839, *rev. denied* 260 Kan. 993 (1996). In *Jones*, the court held:

"The doctrine of laches is an equitable principle designed to bar stale claims. When a party neglects to assert a right or claim for an unreasonable and unexplainable length of time and the lapse of time and other circumstances cause prejudice to the adverse party, relief is denied on the grounds of laches." 22 Kan. App. 2d 753, Syl. ¶ 1.

Ordinarily, laches is an affirmative defense that must be pled. K.S.A. 2004 Sup. 60-208(c). However, that is a pleading requirement of doubtful significance in opposing a 60-260(b) motion that does not require a responsive pleading. In any event, it is readily apparent from the record on appeal and the respective appellate briefs that the parties litigated the issue of laches without the use of a label. This is not a circumstance that precludes appellate review of whether the doctrine was appropriately applied. *Cf. Turon State Bank v. Bozarth*, 235 Kan. 786, 788, 684 P.2d 419 (1984) (failure to use word "estoppel" in affirmative defenses does not defeat plain language giving notice thereof).

Here, the district court recognized it was not merely the passage of 3 years that caused Perry's claim to be stale. The court also understood that allowing Perry to reopen child support litigation 3 years after an ongoing support judgment was entered would unfairly work to the disadvantage of Linda Hagen and the minor child for whom the support was to be paid.

In summary, Perry did not appeal the judgment against him. Instead, he filed a motion to set aside the district court's child support judgment and then made the free, calculated, and deliberate choice not to act on his motion until 3 years after it was filed. K.S.A. 60-260(b) should not be construed to permit a litigant to sit on his legal rights for 3 years or more, circumvent the time limits for a direct appeal, and then cry "foul" to the obvious prejudice of a minor child to whom there was a duty to pay support. We conclude the district court did not abuse its discretion in denying Perry's motion to set aside judgment pursuant to K.S.A. 60-260(b)(6).

The Wage Withholding Order

The district court ordered Perry to pay current child support in the amount of $557 per month. Additionally, the court imposed monthly arrearage payments in the amount of $1,020. Perry contends that the court's arrearage order is arbitrary and capricious when considering his monthly income in light of the fact that he pays $1,200 per month in child support to his other two children.

This court's standard of review on this issue is whether the district court abused its discretion. See *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000).

Judicial discretion is abused only when no reasonable person would take the view adopted by the district court. *Varney Business Services, Inc.*, 275 Kan. at 44.

Perry's argument is not supported by the record. At the hearing to determine the amount of child support arrearage, Perry did not provide the district court any records or orders to support his argument that he paid $1,200 per month to his other two children. In calculating the amount of arrearage under the guidelines, the district court did not consider the alleged payments, but allowed Perry the opportunity to provide proof of the child support payments, and noted that it would allow the adjustment in the event that Perry provided proof of payment. Thereafter, Perry provided adequate support to prove that he was, in fact, paying $1,200 per month to the other children. The district court calculated this amount into the child support worksheet and adjusted the arrearage amount accordingly.

In addition, it should be noted that the district court first considered imposing a 24-month time period for repayment, based on the age of the child. However, due to the high monthly payment such a schedule would require, the court instead imposed a 40-month repayment schedule. We will not say that under the totality of circumstances the district court's order providing how Perry should pay the outstanding arrearage of child support constitutes an abuse of discretion. Indeed, it is apparent the district court conscientiously

struggled with the needs of the child and the financial ability of Perry to pay the substantial arrearage.

For all of the foregoing reasons, we will not disturb the judgments of the district court.

Affirmed.