NOT DESIGNATED FOR PUBLICATION

No. 93,696

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

PATRICIA A. AMES,
Appellee,

and

RANDALL D. AMES,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed January 13, 2006. Affirmed in part and reversed in part.

Joan Hawkins, of Hawkins & Singleton, LC, of Lawrence, for appellant.

Allan E. Coon and Christopher M. Reecht, of Norton, Hubbard, Ruzicka & Kreamer L.C., of Olathe, for appellee.

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

Per Curiam: Randall Ames seeks relief from the district court's order awarding Patricia Solar (formerly Ames), a lump sum payment for medical expenses incurred by Patricia on behalf of the couple's minor children. Randall argues the award impermissibly modified the property settlement agreement incorporated into the couple's 1989 divorce decree. In the alternative, he asserts it was an impermissible award of retroactive child support. Randall also asserts the district court abused its discretion when it refused to impute full-time income to Patricia in calculating a modified child support award. Finally, he argues the district court erred in denying him reimbursement for overpayment of child support.

We hold that although the trial court had continuing jurisdiction pursuant to K.S.A. 2004 Supp. 60-1610(b)(3) to modify the parties' agreement as to child support, the trial court erred in awarding retroactive child support in the form of a lump sum payment for prior medical expenses. We thus reverse the trial court's award of past medical expenses. However, we conclude the district court did not abuse its discretion in refusing to impute income to Patricia in calculating a modified support amount, or in denying Randall's reimbursement request, and we affirm those aspects of the trial court's order.

Background

The court dissolved Randall and Patricia Ames' 7-year marriage in 1989 and granted Patricia residential custody of their two minor daughters, Elizabeth and Ashley. Patricia waived spousal support, but the court ordered Randall to pay $525 in monthly child support payments and permitted him to claim the girls as tax exemptions. The divorce decree stated:

> "That the parties have reached an oral agreement, the terms of which are set out below, regarding custody, child support, visitation and property division. That the Court finds that it is fair, just and equitable and should be the Order of the Court."

In May 2003, Elizabeth was emancipated and the district court trustee's office reduced Randall's monthly payment to $262.50. In January 2004, Patricia moved to modify the child support order based upon a material change in circumstances. She further sought reimbursement for additional "out-of-pocket medical expenses" she had incurred on behalf of the children. Randall responded with a counterclaim requesting a further reduction in payments to compensate for overpayments made to Patricia after Elizabeth turned 18 years old and moved out of her mother's home. The hearing officer's

judgment form is not included in the record, but the hearing officer apparently found in Randall's favor because Patricia moved for de novo review in the district court.

The district court did not order a particular modification of the child support award, but rather found that the parties' "current income figures" should be used to determine the appropriate level of child support effective 1 month from the date the motion to modify was filed. The court further ordered Randall to reimburse Patricia $3,414, which represented one-half the cost of certain medical expenses Patricia paid on behalf of the minor children in previous years. The court also allowed Randall to continue to claim Ashley as a tax exemption, but denied his counterclaim for reimbursement of overpaid child support.

On appeal, Randall does not challenge the district court's decision to modify child support as such. Rather, he challenges the court's determination requiring him to reimburse Patricia for medical expenses previously incurred. He claims this was an impermissible modification of the couple's separation agreement or, in the alternative, an impermissible award of retroactive child support. Randall also asserts the district court abused its discretion when it refused to impute full-time income to Patricia, who worked part-time, in calculating the modified child support award. Finally, he argues the district court erred in denying him reimbursement for overpayment of child support after the couple's oldest daughter turned 18.

Reimbursement for past medical expenses

Randall argues the district court's lump sum award for medical expenses incurred by Patricia on behalf of the minor children over a 12-year period of time was an impermissible modification of the property settlement agreement previously accepted by the court and incorporated into the couple's 1989 divorce decree. In the alternative, he asserts it was an impermissible award of retroactive child support.

For support, Randall points to K.S.A. 2004 Supp. 60-1610(b)(3), which sets forth in pertinent part:

> "Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties."

Randall points out that the agreement, as incorporated in the divorce decree, contained no provision permitting modification of the agreement. Further, the parties do not contend that they consented to subsequent modification of the agreement. Randall argues that the award for prior medical expenses was a modification of the property

agreement as incorporated in the divorce decree, which may not be modified pursuant to 60-1610(a)(3).

Patricia does not suggest that the terms of the agreement permitted subsequent modification or that the parties consented to modification. Rather, she argues that because the divorce decree recited only an oral agreement, Randall cannot "substantiate" the terms of the agreement. Thus, she urges us to find as a matter of law that the court did not modify "matters settled by an agreement incorporated into the decree."

The language of the divorce decree refers to the parties' oral agreement concerning "custody, child support, visitation and property division," and finds those terms to be "equitable" as "set out" in the decree. The decree then sets out the agreements regarding custody, residency, visitation, parenting time, support, and education of the minor children.

Although we find that the matters settled by the parties' agreement were incorporated and stated in the decree, we do not agree with Randall's assertion that the court did not have jurisdiction to consider Patricia's request for reimbursement of medical expenses in this case. As Patricia points out in her brief, the allocation of medical expenses "most certainly falls within the general heading of 'support and education of [the] minor children'" pursuant to K.S.A. 2004 Supp. 60-1610(b)(3), and thus the trial

court had continuing jurisdiction to modify the parties' agreement as incorporated in the decree.

Retroactive modification of child support

Having found the court had jurisdiction to modify the parties' agreement concerning support of the minor children pursuant to 60-1610(b)(3), we must next consider Randall's argument that the district court's award of past medical expenses was impermissible as a retroactive modification of child support. Randall points out that a modification of a child support order operates *prospectively* only. See K.S.A. 2004 Supp. 60-1610(a)(1).

Interestingly, in response to Randall's argument, Patricia switches gears, and urges us to find that medical expenses are *not* "technically" child support after all. Not only does this argument contradict Patricia's suggestion that the court had the power to modify the parties' agreement *because* the court modified child support, it also is contrary to the basis for jurisdiction relied upon by the district court for its award of medical expenses. The court stated: "The Court believes it has jurisdiction under K.S.A. 60-1610 as guided by the child support guidelines in IV-D-4 to make the [award of medical expenses]."

The Child Support Guidelines define and explain child support as

> "[providing] for the needs of the child. The needs of the child are not limited to direct expenses for food, clothing, school, and entertainment. Child support is also to be used to provide for housing, utilities, transportation, and other indirect expenses related to the day-to-day care and well-being of the child." Child Support Guidelines, Section II, A (2005 Kan. Ct. R. Annot. 103).

While medical expenses would seem to clearly fall within this broad definition of child support, Patricia points out that under the current guidelines, the district court must determine child support by including dental and orthodontic insurance premiums and expenses in the support worksheet calculations. However, the costs of future unreimbursed medical expenses do not factor directly into that computation. Rather, "all necessary medical expenses (including but not limited to, health, dental, orthodontic, or optometric) not covered by insurance" are to be shared by the parties in accordance with their proportionate share of combined child support income." Child Support Guidelines, Section IV, D. 4(b) (2004 Kan. Ct. R. Annot. 109).

Because nonreimbursed medical expenses are not currently included when calculating the basic child support amount, Patricia concludes that they cannot be considered "child support" and thus the court's award was not a retroactive modification of child support.

In addition to the fact that Patricia's argument with respect to the retroactivity issue contradicts her argument concerning the jurisdictional issue discussed above, it is problematic for other reasons. First, the original support order in this case was not calculated under the current guidelines and thus we cannot assume it was not intended to compensate for future unreimbursed medical expenses. Further, if the award of past medical expenses *cannot* be characterized as child support, as Patricia now suggests, the trial court did not have continuing jurisdiction to modify the parties' settlement agreement, unless the award concerned another matter under which the court had continuing jurisdiction pursuant to K.S.A. 2004 Supp. 60-1610(a)(3), *i.e.*, custody, residency, visitation, support, or education of the minor children. Significantly, Patricia does not suggest that the award was encompassed within any of these categories. Moreover, if the award was for a debt of either of the parties not related to child support, the property agreement would control, and the court was without jurisdiction to modify the agreement.

We believe Patricia's initial characterization of the award, as well as the trial court's stated basis for jurisdiction, are correct–*i.e.*, the award of medical expenses accrued over a 12-year period prior to the request for reimbursement constituted a modification of child support under 60-1610(b)(3). As such, the trial court was precluded from retroactively awarding support under 60-1610(a)(1).

Our decision is supported by *In re Marriage of Blagg*, 13 Kan. App. 2d 530, 775 P.2d 190 (1989). There, the trial court ordered the father to reimburse the mother for one-half of medical expenses incurred since their divorce because the expenses were extraordinary medical expenses not included in child support. 13 Kan. App. 2d at 530-31. The medical expenses consisted of payments for doctor's visits, prescription medicine, X-rays and treatment for a broken arm, and two hospital stays. 13 Kan. App. 2d at 532.

This court disagreed with the trial court and noted that the divorce decree did not provide for the child's medical costs, the bills had accrued over a period of 4 years, and the treatments did not represent emergency care. 13 Kan. App. 2d at 531-33. Additionally, the court reasoned that orthodontic care expenses are more representative of a material change in circumstances and the custodial parent could have moved the court for an increase in support before incurring the expense. 13 Kan. App. 2d at 533. In concluding the trial court's order for reimbursement constituted an improper retroactive increase in child support, the *Blagg* court held that "a child support order sets the 'limit' of liability for the person ordered to pay support until that decree is modified." 13 Kan. App. 2d at 533.

The court's reasoning in *Blagg* applies equally here, where the divorce decree did not specifically provide for unreimbursed medical expenses, the medical expenses had

accrued over a period of more than 12 years, and the treatment did not represent emergency care. Moreover, as in *Blagg*, Patricia failed to seek a modification of support either before or as the expenses were incurred.

We thus hold that although the trial court had continuing jurisdiction pursuant to 60-1610(b)(3) to modify the parties' agreement as to child support, the trial court erred in awarding a lump sum payment for prior medical expenses, as such award constituted an impermissible retroactive award of child support pursuant to 60-1610(a)(1).

Imputation of income

Randall further contends the district court erred when it refused to impute full time income to Patricia, who worked part-time as a bookkeeper, in determining Patricia's annual income for purposes of calculating the child support award.

The court heard testimony that Patricia was capable of working full-time and did so prior to the divorce, but did not work outside the home for a period of time as she has a minor son from her current marriage. However, at some point Patricia returned to work part-time, but did not work full-time because she provided daycare for her emancipated daughter's child (*i.e.*, Patricia and Randall's grandchild) after Elizabeth moved back in with Patricia after the child was born in November 2003.

The Child Support Guidelines provide that imputing income is a discretionary act of the court: "Income may be imputed to the parent having primary residency in appropriate circumstances but should not result in a higher support obligation for the other parent." Section II, F. 2 (2005 Kan. Ct. R. Annot. 106).

We conclude that under these circumstances, it was well within the court's discretion to refuse to impute income to Patricia.

Overpayment of child support

Randall also contends the court erred in denying his request for reimbursement of overpayment of child support because the law permitted him to discontinue payments for Elizabeth after she turned 18 years old and was no longer a high school student.

> "[T]he court, may order the child support . . . to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless . . . the child reaches 18 years of age before completing the child's high school education in which case the support shall not terminate automatically, unless otherwise ordered by the court, until June 30 of the school year during which the child became 18 years of age if the child is still attending high school . . . ." K.S.A. 2004 Supp. 60-1610(a)(1)(B).

This court recently determined that under K.S.A. 2004 Supp. 60-1610(a)(1)(B), "[t]he June 30 termination date is only applicable if the district court has not provided otherwise and the adult child has no inviolable right to support if he or she has ceased attending high school, *i.e.*, has graduated." *In re Marriage of VanBuren*, 33 Kan. App. 2d 178, 182, 102 P.3d 486 (2004) .

Elizabeth turned 18 years old on August 20, 2002, and completed high school courses in December 2002. However, she did not graduate until May 2003. The record is devoid of any evidence the court ordered her child support to terminate prior to June 30, or that Randall moved for such an order. Accordingly, we hold the district court did not abuse its discretion in denying Randall's reimbursement request.

Income tax deduction

Although the district court permitted Randall to continue to claim Ashley for income tax purposes because of his higher income, Randall nevertheless argues Patricia's claim should have been denied because the court lacked jurisdiction.

"'The general rule is that an appellate court does not decide moot questions or render advisory opinions.'" *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005). The court does not have authority under statutes or the constitution to render advisory

opinions in most cases. A case is moot where the controversy between the parties no longer exists and any judgment of the court would be ineffective. *Rodarte v. Kansas Dept. of Transportation*, 30 Kan. App. 2d 172, 183, 39 P.3d 675, *rev. denied* 274 Kan. 1113 (2002).

Because the trial court resolved this issue in Randall's favor, the controversy between the parties no longer exists, and we find the issue moot.

In summary, we hold that although the trial court had continuing jurisdiction pursuant to 60-1610(b)(3) to modify the parties' agreement as to child support, the trial court erroneously ordered a retroactive adjustment of support when it required Randall to reimburse Patricia for medical expenses incurred over a 12-year period preceding Patricia's request for reimbursement. We thus reverse the trial court's award for past medical expenses. However, we conclude the district court did not abuse its discretion in refusing to impute income to Patricia in calculating a modified support amount or in denying Randall's reimbursement request, and we affirm those aspects of the trial court's order. Finally, because the trial court found in favor of Randall as to Patricia's claim seeking a tax deduction for the minor child, we find Randall's assertions as to the court's lack of jurisdiction with respect to this issue to be moot.

Affirmed in part and reversed in part.