

NOT DESIGNATED FOR PUBLICATION

No. 94,062

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

GUILLERMO (BILL) VIENTOS,
Appellant,

and

LAURA VIENTOS,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; WILLIAM O. ISENHOUR, JR., judge.

Opinion filed August 4, 2006. Reversed and remanded.

Ronald W. Nelson and Joseph W. Booth, of Nelson & Booth, of Overland Park, for
the appellant.

Allan E. Coon and D. Todd Arney, of North, Hubbard, Ruzicka & Creamer L.C.,
of Olathe, for the appellee.

Before MARQUARDT, P.J., ELLIOTT and PIERRON, JJ.

Per Curiam: Guillermo (Bill) Vientos appeals the district court's judgment for unpaid temporary support entered in favor of Laura Vientos at the couple's final divorce hearing. Bill argues the district erred in not recalculating the temporary support obligation based on the full evidence and in finding he was estopped from asking the court to recalculate the temporary support obligation. We reverse and remand.

Bill and Laura were married in 1987 and had two children, one born in 1987 and the other in 1993. On April 3, 2002, Bill filed for divorce. The district court entered temporary orders on April 19, 2002, allowing joint custody of the children, with Laura having residential custody and possession of the family residence pending final determination of the divorce. The court ordered Bill to pay the monthly mortgage and utilities, which were substantial.

The first hearing on financial issues occurred on May 8, 2002. The district court considered both domestic relations affidavits and testimony from Bill and Laura, but concluded there was not enough evidence regarding Bill's monthly income, due to the complexity of his small consulting business, to determine an appropriate amount of either temporary maintenance or child support. The court stated: "The law requires that those figures be made with some degree of certainty and reliability, and the evidence just isn't there at this stage for me to do that." The court denied Laura's motion for temporary

orders, but kept intact the previous orders concerning custody, possession of the family house, and mortgage and utility payments.

On October 29, 2002, the district court heard Laura's motion to modify the temporary orders and award maintenance and child support. Another judge was sitting in for the trial judge. The district court discussed the ongoing discovery into Bill's monthly income. Upon questioning by the court, Bill estimated his monthly income was \$8,000, plus an additional \$1,333 per month in connection with the sale of an interest in one of his companies. Laura estimated her monthly income was approximately \$1,300. The district court ordered computation of maintenance and child support based on Bill's monthly income of \$9,000 and Laura's monthly income of \$1,300. Beginning November 1, 2002, Bill was ordered to make monthly payments of \$1,364 in child support and \$1,540 in maintenance and on said date the mortgage and utility payments became Laura's responsibility. The court stated:

"But let's do this. Let's just do this for right now. You're worried about the next three months and you're worried about the next three months. I'm going to put your income at \$9,000 a month, and then when this is all settled up, you guys can back in what's right or wrong. If I figured way too high, you can make an adjustment. If I figured way too low, you can make an adjustment."

On January 8, 2003, the district court entered the decree of divorce, but reserved a determination on the contested financial matters. On September 25, 2003, the court approved the property settlement agreement and permanent parenting plan agreement. The journal entry stated that all temporary orders remained in full force until final determination. On February 24, 2004, the court heard Laura's motion to enforce the temporary orders because Bill had not made a maintenance or child support payment since December 15, 2003, and was \$7,260 in arrears. The district court determined the temporary orders were still in effect and that even though Bill was claiming a hardship based on equalization payments and tax liabilities, he had not filed a motion to modify the temporary payments.

The parties made various attempts to hold a hearing for final determination of child support and maintenance, but dates were continued or insufficient time was allowed for full consideration of the matter. On July 15, 2004, Bill filed a motion seeking modification of the temporary support orders and elimination of any arrearage.

On September 16, 2004, the district court held a final hearing for determination of remaining financial issues. The parties informed the court that they had reached an agreement on the issues of permanent prospective child support and maintenance. The parties agreed that Bill would pay \$750 in maintenance and \$916 in child support.

Consequently, the court indicated the sole remaining issue was whether Laura should be granted a judgment for the amount of arrearage in child support and maintenance awarded in the temporary order entered on October 29, 2002, effective November 1, 2002. The court heard testimony concerning the annual incomes of Bill and Laura during the relevant time period.

The district court granted a judgment of arrearage in favor of Laura for \$22,801. The court stated that the temporary orders entered in 2002 were based on income figures provided by Bill, that Bill complied or acquiesced in the orders for over a year, and he failed to take any action to modify the temporary order until July 2004. The court also stated that Bill's actions were not appropriate in allowing the arrearage to accumulate and then later arguing that in retrospect the amount of support and maintenance was too high. The court concluded Bill was estopped from asking for a recalculation, the orders in 2002 were appropriate based on evidence supplied by Bill, and modification at this late date was not appropriate.

Bill appeals.

Initially, Laura argues Bill's appeal should be dismissed based on his acquiescence in the judgment. We disagree.

The general rule is that voluntary compliance with a judgment of the trial court constitutes acquiescence and results in a lack of jurisdiction in the appellate courts. See *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 497-98, 866 P.2d 1044 (1994). However, the general rule is applied differently in domestic cases. Kansas case law is contrary to Laura's argument of acquiescence of judgment in domestic cases. Because of the nature of the decrees entered in domestic dissolution controversies and the dependence of at least some of the parties upon the receipt of the financial benefits awarded by those decrees, the rule of acquiescence has not been strictly applied to such controversies. In *Gordon v. Gordon*, 218 Kan. 686, 691-92, 545 P.2d 328 (1976), the Kansas Supreme Court addressed the reasons against a strict application:

"As pointed out by the Supreme Court of Florida in *Brackin* [*v. Brackin*, 182 So. 2d 19Flz. 1966)] the basis of a decree awarding alimony or support money, in the absence of an agreement between the parties, is an obligation imposed by law requiring the husband to do what in equity and good conscience he ought to do under the circumstances. Unlike judgments and decrees for money or property growing out of other actions, alimony and support money may have no foundation other than the public policy which requires the husband to pay what he ought to pay, and the wife's right to receive is not to be treated as waived except when the circumstances clearly require such a conclusion. In the absence of other intervening or controlling equities, when the husband is not injured or prejudiced in any way by the wife receiving the money, there is no waiver or estoppel or acquiescence by the mere payment or receipt of the alimony pursuant to order of

the court. While a divorce case is pending on appeal the duty to support arising from the marital relationship is still in effect. The wife should not be placed in a position where as a matter of law she is precluded from taking an appeal from a judgment of the district court in a divorce case if she accepts money which has been ordered for her support. Likewise the husband should not be precluded from appealing what he believes to be an excessive alimony judgment because he complies with the judgment under a threat of contempt if he fails to do so. Under these circumstances it cannot reasonably be said that a wife is voluntarily acquiescing in a judgment by accepting needed alimony payments which she contends are grossly inadequate; nor is it reasonable to say that a husband is voluntarily acquiescing in a judgment where he pays alimony payments under the threat of confinement in jail if he fails to do so."

Bill's payments toward the judgment will not result in a ruling that he acquiesced in the judgment and is now prohibited from appealing.

The majority of Bill's arguments on appeal involve negating the trial court's decision that he is estopped from obtaining a retroactive recalculation of the temporary maintenance order. Bill argues that he consistently and repeatedly asserted throughout the proceedings that he did not have the income used to determine the amount of temporary maintenance and support. He argues that he cannot now be estopped when he relied on "the Court's own statements that it would recalculate support at trial when the parties had presented testimony and evidence on which the court could make reasoned

and informed decisions." Bill contends the court improperly failed to carry through with its own assertion that the parties would be protected, and improperly failed to use its discretion, to his detriment.

Wide discretion is afforded to the trial court in adjusting the financial obligation of the parties in a divorce case. *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998). When reviewing a motion to modify maintenance, this court examines the record to determine if there is substantial competent evidence to support the ruling of the district court and whether the district court abused its discretion. *In re Marriage of Bowers*, 23 Kan. App. 2d 641, 643, 933 P.2d 176 (1997). The discharge or recalculation of arrearages of temporary support is similarly within the trial court's discretion concerning financial matters. See *Krogen v. Collins*, 21 Kan. App. 2d 723, 727, 907 P.2d 909 (1995). As it has been said so often, judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. See *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

Kansas jurisprudence on temporary maintenance is not extensive. Perhaps the lack of case law on the subject is due in part to the fact that issues of temporary maintenance during the pendency of a divorce action are matters clearly within the discretion of the

trial court. The court in *Dube v. Dube*, 15 Kan. App. 2d 511, 514-15, 809 P.2d 1245, *rev. denied* 24 Kan. 175 (1991), outlined the law on temporary maintenance:

"Temporary alimony or support is also referred to as alimony *pendente lite*, interim alimony, or interlocutory alimony and 'is an allowance by the court for the maintenance of a spouse during pendency of a matrimonial action.' 24 Am. Jur. 2d, Divorce and Separation § 558. "K.S.A. § 60-1607(c) allows a court to award maintenance *pendente lite*. . . . An award of temporary maintenance lies within the discretion of the court. The amount is subject to modification as the circumstances change. In any event, the temporary maintenance ceases when the divorce action terminates." 1 Elrod, Kansas Family Law Handbook § 10.064, p. 10-39 (rev. ed. 1990).

"In *Edwards v. Edwards*, 182 Kan. 737, Syl. ¶ 1, 324 P.2d 150 (1958), the court said: 'An allowance of support . . . *pendente lite* . . . does not become a final judgment on which execution can issue, but is merely a temporary or *ad interim* provision for their support until the final determination of the action.' Further, the court said:

'An order for support, such as [this] . . . , is interlocutory in character, and, like other interlocutory orders made during litigation, remains solely in the sound judicial discretion of the court . . . and may be modified as varying circumstances justify during the pendency of the action in any form in the district court, even to the extent of discharging accrued and unpaid installments.' 182 Kan. 737, Syl. ¶ 2.

"It is clear that in Kansas past due installments of permanent alimony and permanent child support "become a vested right and become final judgments, and may be collected as other judgments . . . in this state." *Ediger v. Ediger*, 206 Kan. 447, 455, 479 P.2d 823 (1971). When addressing the issue of past due installments of temporary support, however, the court in *Edwards* said: "[T]he rule that past-due installments for child support [or permanent alimony] ordered paid by the final decree become final judgments as of the dates due and may be collected in the same manner as other judgments, is clearly inapplicable to past-due installments of support allowed *pendente lite*.' 182 Kan. at 744. Further, the court said:

'[A]n order allowing temporary alimony is not in the nature of a final judgment on which execution can issue, nor is it a decree in equity for the payment of money. [Citations omitted.] No vested rights are acquired in the amount allowed. [Citation omitted.] Like other interlocutory orders, an order for support money *pendente lite* . . . remains solely in the sound judicial discretion of the court which made it [citations omitted], and may be modified as varying circumstances justify during the time the action is pending in any form in the district court, even to the extent of discharging accrued and unpaid installments. [Citations omitted.]

'[T]he past due installments . . . did not become final judgments . . . which could be collected by execution. . . . [T]hose installments, when due, were subject to enforcement by attachment . . . or by contempt proceedings.' 182 Kan. at 744-45."

We agree with Laura's characterization that the issue of temporary orders would remain open until final determination and Bill would be able to present arguments for reduction.

We find that the issue of the finality of the amount owed under the temporary orders was subject to review at trial. As we read the record, the district court essentially ruled that the amounts ordered would not be reviewed as Bill had not moved strongly enough to modify them. Even if this was the case, the court had the discretion to review the temporary orders as to their suitability, considering all the evidence. It does not appear that this was done.

We, therefore, reverse and remand for a consideration of this issue by another member of the family court in Johnson County District Court. A fresh analysis, we believe, will be to everyone's benefit.

Reversed and remanded with directions.