

## NOT DESIGNATED FOR PUBLICATION

No. 93,557

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CATHERINE A. DIMOND,  
*Appellee,*

and

ROBERT L. DIMOND, JR.,  
*Appellant.*

## MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE RUSSELL, judge. Opinion filed September 29, 2006. Affirmed in part, dismissed in part, and remanded with directions.

*R. Todd Wilhelmus*, of Kansas City, Missouri, for appellant.

*Michael W. Lucansky*, of The Law Offices of Michael W. Lucansky, P.A., and *Wanda M. Temm*, of Law Offices of Wanda M. Temm, of Overland Park, for appellee.

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

*Per Curiam:* Robert L. Dimond, Jr., appeals the district court's finding that he was in indirect civil contempt for being in arrears on his child support and maintenance to Catherine A. Dimond, imputing income, and refusing to modify his maintenance payments. We affirm in part, dismiss in part, and remand with directions.

Robert and Catherine were divorced on October 31, 2002. Robert, an architect, owns Dimond Architecture. The district court found that Catherine's annual income was \$27,500 and Robert's was \$125,000. Robert was ordered to pay \$1,625 per month maintenance for 73 months, and \$2,277 per month for support of his three children.

On May 20, 2003, the district court trustee filed a contempt motion against Robert for failure to pay child support and maintenance. On May 30, 2003, Robert filed a motion to modify his maintenance and child support payments. On October 21, 2003, the hearing officer found Robert in contempt and transferred Robert's motion to modify maintenance and child support to the district court. On November 5, 2003, Robert filed an appeal of the contempt finding to the district court.

On April 16, 2004, the district court heard Robert's motion to modify maintenance and

child support, as well as his appeal of the contempt finding. The district court found that Robert's income had been reduced; however, based on his past earnings, he would be able to increase his income in the future. Therefore, the district court reduced Robert's child support payments but did not reduce his maintenance payments. The district court stated:

"I'm not going to reduce the maintenance because if I reduce the maintenance now to take into account his temporary downswing in income, I can't pull it back up to where it ought to be when his income swings back up, and therefore I'm not going to reduce the maintenance."

The district court also determined that Robert's 2003 income was \$56,053 and stated:

"I have calculated it by adding together the salary that he showed on his tax returns as having paid himself, \$24,311. I'm also adding in the loans made by the company to him, \$24,861, because frankly the only reason that I can see that he might take those sums out as loans rather than salary is to avoid the effect of the garnishment. And I've also determined that it makes sense to add back in the salary that he paid to his second ex-wife Donna. \$6,881.12 is what I figured that at. So I find his total annual income is [\$56,053]. And, of course, at such time as he gets his business on a more successful footing, I most certainly will consider increasing the child support to fit with whatever his current income is."

The district court reduced Robert's child support payment to \$919 per month, effective

November 1, 2003, and to \$669 per month effective July 1, 2004, upon the emancipation of the couple's eldest child. The district court also refused to rule on Robert's appeal of his contempt order because Robert had not produced a file-stamped copy of his domestic relations affidavit.

After a hearing on May 13, 2004, the hearing officer determined that it did not have jurisdiction to rule on the contempt issue because the district court had not ruled on Robert's appeal. On July 20, 2004, Robert filed a "motion for new trial, to alter or amend judgment or relief from judgment."

On October 7, 2004, the district court held a hearing on Robert's motion. The evidence showed that Robert made the following payments on child support and maintenance:

August 25, 2003	\$281.75
September 25, 2003	\$500.00
September 29, 2003	\$500.00
October 30, 2003	\$281.75

In October 2003, the children's health insurance was cancelled due to Robert's

nonpayment of premiums.

For the first 10 months of 2003, Robert's child support obligation was \$2,277 per month and for the last 2 months it was \$919. Robert's maintenance obligation was \$1,625 per month for the entire calendar year of 2003. Robert's total child support and maintenance obligation for 2003 was \$44,108. According to Robert's 2003 income tax return, his 2003 gross income was \$54,809 and he owed \$2,300 in federal and state taxes.

Robert remarried in 2003. Robert testified that he failed to make his court-ordered child support and maintenance payments because he did not have the ability to pay.

In March 2004, Robert received \$15,000 from GLPM Architects, which was garnished and applied to his unpaid child support and maintenance. In March 2004, Robert took his children on a vacation to the gulf shores. During August 2004, Robert paid himself \$5,210 from his corporation and he paid \$600 toward his child support and maintenance arrearages.

After finding Robert in indirect civil contempt, the district court ordered Robert to serve every weekend in jail, but stayed the jail service as long as Robert paid \$2,494 per month support. Robert appeals.

### *Sufficiency of the Evidence*

An appellate court applies a de novo standard of review to determine whether the alleged conduct is contemptuous. *In re Marriage of Brotherton*, 30 Kan. App. 2d 1298, 1301, 59 P.3d 1025 (2002). The Kansas Supreme Court has defined civil contempt as "'the failure to do something ordered by the court for the benefit or advantage of another party to the proceeding.' [Citation omitted.]" *State v. Jenkins*, 263 Kan. 351, 358, 950 P.2d 1338 (1997). In Robert's case, the alleged contempt was indirect; *i.e.*, conduct outside the presence of a judge.

An appellate court reviewing the determination of civil contempt focuses on whether the facts of the case show conduct constituting contempt. *Brotherton*, 30 Kan. App. 2d at 1301. Whether a particular act or omission is contemptuous depends upon the nature of the act or omission as well as all surrounding circumstances, including the intent and good faith of the party charged with contempt. 30 Kan. App. 2d at 1302. However, this court does not reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003).

Robert admits that he failed to pay child support and maintenance as ordered by the

district court. However, Robert argues that the district court erred in finding him in contempt because his failure to pay child support and maintenance was not willful and was beyond his control.

The district court found that Robert's testimony regarding his inability to pay child support and maintenance was not credible, noting that up until the time of the divorce, Robert made a good income. The district court believed that Robert's declining income was attributable to his sudden realization that "he knew how much he was going to have to pay in child support and maintenance."

On appeal, Robert claims that the facts of the case show he was not in contempt. Robert acknowledges that his maintenance and child support payments after February 2003 were "minimal and sporadic." However, he claims this was entirely caused by a decrease in income over which he had no control. Robert notes that he was evicted from his apartment, he lived in his sister's basement, and his car was repossessed. Robert suggests that his failure to pay maintenance and child support was not willful and he should not have been found in contempt.

When reviewing a finding of contempt of court, we have a dual standard of review. We apply a de novo standard to determine whether the alleged conduct is contemptuous. We

apply an abuse of discretion standard in reviewing the sanctions imposed. *In re M.R.*, 272 Kan. 1335, 1342, 38 P.3d 694 (2002). The power to punish for contempt of court does not arise from legislative action, but is inherent in the court itself. *State v. Jenkins*, 263 Kan. at 355.

It is undisputed that Robert has not tendered a child support payment since April 2003. Robert also testified that beginning in January 2003, his business was in a steep decline. This was primarily caused by the loss of his biggest client, the Grandview School District, who provided approximately 70 percent of his business. The school district's cut in funding mandated that it scale back on construction projects.

At the end of 2003, Robert's business ledger reflected accounts receivable of \$10,624.40 and accounts payable of \$216,086.15. Robert testified that his accounts payable accumulated because he was paying his maintenance and child support obligations instead of paying business expenses. In 2003, Robert paid himself wages of \$24,311.16. Robert's testimony was that by the end of 2003, he was "out of money."

There were several factors relied upon by the district court when entering its contempt finding. One fact was that Robert employed his wife. Robert explained that he needed someone to perform office tasks so that his time would be free to develop business. Robert

testified that his wife was hired after one of his project architects, whose annual salary was \$65,000, resigned. While she was employed, Donna's wages were garnished for the child support she was to pay for her children. Donna only earned \$6,881.12 during her employment with Dimond Architecture. Robert eventually terminated all of his employees because he could not afford to pay them.

Robert testified that he looked for work and had discussions about the possibility of merging with other architecture firms. However, he said there were concerns about his pending court case which made those talks difficult.

The district court also believed that Robert's habit of taking loans instead of drawing a paycheck kept him in good stead with the IRS while evading a garnishment order from the district court trustee's office.

Robert testified that his business was an S corporation; therefore, he could take loans and defer paying the taxes. From July through November 2003, Robert took a number of loans from the corporation. Robert explained that the loans were for payment of his rent. Robert acknowledged that the IRS considers his loans as income. As a result of the loans, Robert owed the IRS over \$60,000 and approximately \$10,000 in state taxes.

Robert testified that for the calendar year 2003, he had between \$6,000 and \$7,000 to cover his personal living expenses. His rent alone for that period totaled over \$12,000. Starting in April 2003, Robert's child support and maintenance obligations totaled \$3,902 per month. Robert's income as of October 2004 was \$41,000. Robert also testified that he received a \$10,000 loan from a business associate.

The record on appeal discloses that Robert simply did not have adequate income to pay his child support and maintenance. The loans which Robert took from the corporation were designed to allow him to continue to meet daily living expenses. Clearly the loans were not sheltering income, as Robert still has sizable debts with both the IRS and the states of Kansas and Missouri. The record on appeal also shows that Robert made good faith attempts to secure new employment, or to otherwise grow his business back to the point that he could once again pay his support obligations.

The finding of contempt here is serious, as Robert is facing jail time. Given the facts in the record on appeal and our standard of review, we find that the district court erred by finding Robert in contempt of court and that ruling is reversed.

### ***Reopening the Case***

Robert argues that the district court erred when it "sua sponte reopened the case and continued it for another trial." Catherine argues that Robert did not properly preserve this issue for appeal because he never objected to the district court's decision to continue the contempt case.

Issues not raised before the district court cannot be raised on appeal. *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003). At the April 16, 2004, hearing when the district court announced it would not rule on the contempt issue, Robert did not explicitly object. Furthermore, at the October 7, 2004, hearing, Robert neither objected to the district court rehearing evidence nor its ruling on the contempt issue. Robert did not raise this issue in his motion for a new trial. Therefore, Robert did not preserve this issue for appeal and it is dismissed.

### ***Denial of Robert's Motion to Reduce Maintenance Payments***

Robert argues that the district court erred in denying his motion to reduce his maintenance payments. He argues that the district court erred in finding it did not have the power to temporarily reduce maintenance payments. Resolution of this issue requires

interpretation of K.S.A. 60-1610. The interpretation of a statute is a question of law over which this court has unlimited review. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 374, 130 P.3d 560 (2006).

K.S.A. 60-1610(b)(2) states:

"The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. . . . *At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due*, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance *beyond what was prescribed in the original decree.* (Emphasis added.)"

The plain language of K.S.A. 60-1610(b)(2) provides that a court has the power to modify maintenance without the payor's consent, as long as the court does not increase the amount of maintenance beyond the amount prescribed in the original divorce decree.

In *In re Marriage of Ehinger*, 34 Kan. App. 2d 583, 121 P.3d 467 (2005), a former

husband was ordered to pay his former wife maintenance in the amount of \$1,200 per month. Former husband subsequently became unemployed and filed a motion asking the district court to reduce his maintenance obligation. After a hearing, the district court temporarily reduced former husband's maintenance payments to \$170 per month for a 6-month period with the expectation that former husband's income would increase. This court held that court-decreed maintenance may be modified downward upon a showing of a material change in circumstances. 34 Kan. App. 2d 583, Syl. ¶ 5.

In this case, the district court erred in finding that it could not temporarily reduce Robert's maintenance payments. This case is remanded to the district court for a determination of Robert's maintenance obligation based on his decreased income.

### *Imputing Income to Robert*

Robert argues that the district court erred in imputing \$6,881.12 to him for payments Dimond Architecture paid Robert's wife Donna.

The Kansas Child Support Guidelines II.E.2. state: "In cases of self-employed persons, Reasonable Business expenses are those actual expenditures reasonably necessary for the production of income." (2005 Kan. Ct. R. Annot. 105). In this case, the district court

found that Dimond Architecture's payments to Donna were not reasonable business expenses and, therefore, it imputed those payments to Robert as income. The determination of whether something is reasonable is a question of fact. On review, this court determines whether the district court's findings of fact are supported by substantial competent evidence. Substantial competent 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). This court does not reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *State ex rel. Morrison*, 275 Kan. at 775.

There was substantial competent evidence to support the district court's finding that Donna's salary was not a reasonable business expense and should be imputed to Robert as income.

#### ***Judicial Reliance on Other Contacts with Self-Employed Litigants***

Robert argues that the district court violated his right to due process by improperly relying on its contacts with other self-employed individuals in finding him in contempt when the district court stated:

"Number one, up to the point of the divorce, Mr. Dimond was making

good money with his business as an architect. As soon as the divorce was finalized and he knew how much that he was going to have to pay in child support and maintenance, his income suddenly took a precipitous downward turn. That unfortunately is a pattern that we frequently see with self-employed people. As soon as they find out that they are going to have to actually pay child support and maintenance, they start trying to show that their business has tanked. That is certainly what Mr. Dimond is trying to do."

Robert raises this issue for the first time on appeal. Issues not raised before the district court cannot be raised on appeal. *Board of Lincoln County Comm'rs*, 275 Kan. at 268. Therefore, this issue is not properly preserved for appeal and is dismissed.

### *Judicial Prejudice*

Robert argues that the district judge was biased against him and should have recused herself. Robert raises this argument for the first time on appeal. Robert never filed a motion asking the district court judge to recuse herself. Issues not raised before the district court cannot be raised on appeal. *Board of Lincoln County Comm'rs*, 275 Kan. at 268. Robert did not preserve this issue for appeal and it is dismissed.

The citation in contempt is reversed. The maintenance issue is remanded to the district court to determine the amount of maintenance to be paid in light of Robert's financial

situation. The issues of judicial prejudice, judicial reliance on actions of other self-employed litigants, and the district court's "reopening of the case sua sponte" are dismissed. The issue of imputing Donna's salary to Robert is affirmed.

Affirmed in part, dismissed in part, and remanded with directions.