NOT DESIGNATED FOR PUBLICATION

No. 95,272

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MOLLY A. KALLENBACH, f/k/a
MOLLY A. HEDENKAMP,
Appellant,

and

BRET A. HEDENKAMP,
Appellee,

KANSAS DEPARTMENT OF SRS,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed March 2, 2007. Reversed and remanded.

Randy M. Barker, of Kansas Department of Social and Rehabilitation Services, for appellant.

No appearance by appellee.

Before GREEN, P.J., MARQUARDT, J., and BRAZIL, S.J.

Per Curiam: The Kansas Department of Social and Rehabilitation Services (SRS) appeals the trial court's decision granting Bret A. Hedenkamp relief from his child support judgments under K.S.A. 60-260(b), which resulted in a reduction of Hedenkamp's child support arrears in the amount of $158 per month for a period of 12 months.

We conclude that under the facts of the case, unlike *In re Marriage of Leedy*, 279 Kan. 311, 109 P.3d 1130 (2005), relied upon by the trial court, Hedenkamp was not entitled to relief from his child support judgments under K.S.A. 60-260(b). We reverse and remand.

Hedenkamp and Molly A. Kallenbach had two children together, Oliver, dob 05/26/85, and Julia, dob 09/24/86. In August 1988, the trial court filed a journal entry of divorce for Hedenkamp and Kallenbach, and Kallenbach was awarded residential custody of Oliver and Julia. The court ordered Hedenkamp to pay child support to Kallenbach. In April 2001, SRS became involved in the enforcement of Hedenkamp's child support obligation.

During the years following the divorce, Hedenkamp filed numerous motions

relating to visitation and support of Oliver and Julia. Then in June 2002, Hedenkamp and Kallenbach agreed to a divided custody arrangement in which Oliver would reside with Hedenkamp and Julia would continue to reside with Kallenbach. Hedenkamp requested that the court adopt the custody agreement and modify his child support obligation.

As requested, the trial court adopted the custody agreement in October 2002. Based on the Kansas Child Support Guidelines, the court determined that Kallenbach could not use the multiple family application. Finding that it was appropriate to enter a separate support order for each child, the court entered a support obligation for Hedenkamp in the amount of $560 per month for the support of Julia effective July 1, 2002, and entered a support obligation for Kallenbach in the amount of $307 per month for the support of Oliver effective July 1, 2002. The court ordered the support obligations to continue until further order of the court or until the obligations ended by operation of law. The court also ordered an offset of the two amounts until the obligation of either party terminated by further order of the court or by operation of law. This offset resulted in Hedenkamp owing Kallenbach $253 per month.

On June 30, 2003, Oliver became emancipated. The next month in July 2003, Hedenkamp and his current wife had a son together. Then in August 2004, Hedenkamp filed a motion to modify the court's October 2002 child support order. However,

Hedenkamp later withdrew his motion before it was heard by the court.

Shortly after withdrawing his motion to modify, Hedenkamp filed a motion to terminate his child support obligation, stating that Julia had reached the age of majority, was no longer attending high school on a full-time basis, and was no longer residing with either Hedenkamp or Kallenbach. Hedenkamp also requested that the court determine the amount of arrears, if any.

In October 2004, the trial court entered an order suspending Hedenkamp's support obligation. The court further stated that if SRS and Hedenkamp could not agree on the amount of arrears, then the matter would need to be set for an evidentiary hearing. Because they could not agree on the amount of arrears, SRS and Hedenkamp filed proposed findings of fact and law on the issue.

SRS argued that when Oliver became emancipated in June 2003, Kallenbach's obligation ended by operation of law, but Hedenkamp's obligation of $560 per month for the support of Julia continued until the court suspended the obligation in October 2004. SRS further contended that Hedenkamp could not seek retroactive modification of his support obligation. SRS requested that the court enter a judgment against Hedenkamp for past due child support in the amount of $3,409.85.

Hedenkamp argued that the court's order in October 2002 included a provision that automatically increased his support obligation to $560 per month in July 2003 after Oliver became emancipated and that this automatic modification was not based on his family situation in July 2003. Hedenkamp asserted that because his current wife was pregnant when the automatic increase became effective, his support obligation should have been calculated using the multiple family application. According to Hedenkamp, this calculation would have resulted in a $158 reduction per month in his support obligation starting August 1, 2003. Based on the multiple family application and his income in October 2002, Hedenkamp argued his arrears should be reduced by $158 per month for a period of 14 months, resulting in an arrearage of $1,197.85. Hedenkamp also argued that he had been laid off by his employer between July 2002 and July 2003, resulting in a decrease in his income. Hedenkamp requested that the court retroactively modify his support obligation using both the multiple family application and his income in June 2003.

In its opinion, the trial court noted that child support cannot be modified retroactively. Citing 279 Kan. 311, the court explained the following: "The Court is authorized to provide relief from judgment. Where relief is sought because of facts existing at the time of a decree, which, if known to the court, would have brought about a different result, relief from a child support judgment is available under K.S.A. 60-

260(b)." The court continued: "The Respondent submits a multi-family schedule would have been appropriate at the entering of the last order for child support. The use of a multi-family schedule would have resulted in a reduction in child support of $158.00 a month." Based on this reasoning, the trial court exercised its discretion and granted Hedenkamp relief from his child support judgments in the amount of $158 per month for a period of 12 months. After the reduction, Hedenkamp's arrears were $1,513.85.

SRS timely appeals.

SRS contends that the trial court's decision granting Hedenkamp relief from his child support judgments was a retroactive modification of final judgments of child support, which is not permissible under Kansas law. SRS further argues that the facts of this case did not qualify Hedenkamp for relief from his child support judgments under K.S.A. 60-260(b). Hedenkamp failed to file a brief in this appeal.

"A ruling on a motion for relief from judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the trial court. The trial court's ruling will not be reversed in the absence of a showing of abuse of discretion. [Citations omitted.]" *Leedy*, 279 Kan. at 314. "'Discretion is abused when no reasonable person would take the view adopted by the trial court. [Citation omitted.]" *In re Marriage of Whipp*, 265 Kan. 500,

505, 962 P.2d 1058 (1998).

Before analyzing whether the court abused its discretion by granting relief under K.S.A. 60-260(b), it is helpful to examine whether the trial court increased Hedenkamp's support obligation after Oliver became emancipated. SRS asserts that *In re Marriage of Steven*, 30 Kan. App. 2d 794, 48 P.3d 1284 (2002), is controlling precedent under the facts of this case. *Steven* involved a mother and father who agreed to divide custody of their four children. 30 Kan. App. 2d 794. The father owed support of the amount of $1,346 per month and the mother owed support in the amount of $824 per month. The trial court ordered the father's amount to be offset by the mother's account, resulting in the father owing $532 per month to the mother. After the two older children, who were residing with their father, reached the age of majority, the father continued to pay only $532 per month. The mother moved to determine child support arrearage because the offset for the two older children had expired. The father argued that the court could not order him to pay back child support because it would amount to an illegal retroactive increase in his child support obligation.

On appeal, this court explained that the father should have filed a motion to modify under K.S.A. 60-1610(a), alleging a change in circumstances if he believed his support obligation should have been different when each child became emancipated. This

court continued by stating as follows: "Because no such motion was filed here, the only fact that changed on the emancipation of the two older children was [the mother's] obligation to support those two older children automatically terminated and there was a lesser amount of child support to offset." 30 Kan. App. 2d at 797. As a result, this court determined that the father's child support obligation had not changed and the trial court had not ordered a retroactive increase in his support guidelines. 30 Kan. App. 2d at 797.

In the present case, the trial court entered separate support orders for Oliver and Julia and ordered Hedenkamp's and Kallenbach's obligations to continue until further order of the court or until their obligations ended by operation of law. The trial court also ordered an offset of the two amounts until the obligation of either party terminated by further order of the court or by operation of law. Because Hedenkamp failed to file a motion to modify under K.S.A. 60-1610(a), alleging a material change in circumstances, the only fact that changed when Oliver became emancipated was that Kallenbach's obligation to support Oliver automatically terminated, resulting in a lesser amount of child support to offset. As a result, Hedenkamp's child support obligation did not change and was not automatically increased when Oliver became emancipated. Rather, Hedenkamp's support obligation for Julia remained $560 per month, but it was no longer offset by the amount Kallenbach previously owed for the support of Oliver.

In its opinion, the trial court correctly recognized that child support obligations cannot be modified retroactively. Instead, a modification of a parent's child support obligation may only operate prospectively because child support payments become final judgments on the dates that they are due and remain unpaid. *Leedy*, 279 Kan. at 319.

After determining that Hedenkamp's child support obligation could not be retroactively modified, the court granted Hedenkamp relief from his child support judgments under K.S.A.6 0-260(b).

K.S.A. 60-260(b) provides the following:

> "On motion and upon such terms as are just, the court may relieve a party . . . 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."

The trial court did not specify under which subsection of K.S.A. 60-260(b) it was granting Hedenkamp relief. Rather, the court explained that it may grant relief when relief is sought based on facts existing at the time of the decree that would have brought about a different result if known by the court. The court then stated that the use of a multiple family application at the time it modified Hedenkamp's support obligation in October 2002, would have resulted in Hedenkamp owing $158 less per month for the support of Julia after Oliver became emancipated. Therefore, the court exercised its discretion and granted Hedenkamp relief from judgment in the amount of $158 per month for a 12-month period under K.S.A. 60-260(b).

The trial court relied on language from *Leedy* for support of its ruling. *Leedy* involved a mother who claimed significantly higher child care expenses than she actually expended which led to the father owing over $5,000 in back child support. 279 Kan. at 312. The father requested that the trial court revise the arrearage calculation under K.S.A. 60-260(b) and the trial court retroactively adjusted the father's child support payments to reflect the corrected child care figures. 279 Kan. at 312-13.

On review, our Supreme Court considered whether the trial court's decision could

be upheld under K.S.A. 60-260(b). The court quoted language from this court providing that "'where relief is sought because of facts existing at the time of the decree which, if known to the court, would have brought about a different result, relief is available under K.S.A. 60-260(b).' [Citation omitted.]" 279 Kan. at 321. The court then determined that the mother's failure to disclose the error in the child care figures constituted misconduct that would support relief from judgment under K.S.A. 60-260(b)(3). 279 Kan. at 322-23. The court explained that the trial court's order setting aside its prior judgment could be upheld under K.S.A. 60-260(b)(3) even though neither the father nor the trial court had specified that particular section as the basis for relief from judgment. 279 Kan. at 323.

In the present case, the trial court relied on Hedenkamp's assertion that a multiple family application should have been used when the court last modified his support obligation. Administrative Order No. 180, Kansas Child Support Guidelines, III.B.6. discusses when it is appropriate to use a multiple-family application for the purpose of calculating a parent's child support obligation under the Kansas Child Support Guidelines. Under the guidelines, "[t]he Multiple-Family Application only may be used by a parent not having primary residency when establishing an original order of child support or an increase in support is sought by the parent having primary residency." (2006 Kan. Ct. R. Annot. 110). Administrative Order No. 180, III.B.6 further provides that "[i]n the instance of shared residency or divided residency, the Multiple-Family Application is available to

either party *in defense of a requested child support increase*." (Emphasis added.)

The record on appeal reflects that the trial court modified Hedenkamp's support obligation in September 2001 and ordered him to pay $590 per month for the support of Oliver and Julia. Then in June 2002, Hedenkamp requested modification of his support obligation in accordance with the parties' divided custody agreement. The trial court accepted the parties' agreement concerning custody of Oliver and Julia and ordered Hedenkamp to pay $560 per month in child support, subject to an offset for Kallenbach's support obligation. Under these facts, the multiple-family application would not have been available to Hedenkamp because the trial court was not establishing an original order of support, nor was Kallenbach requesting an increase in Hedenkamp's support obligation. In fact, the court's October 2002 order resulted in a $30 per month decrease in Hedenkamp's support obligation.

In his proposed findings of fact and law, Hedenkamp argued that the trial court should have completed two child support worksheets before automatically increasing his support obligation in July 2003 because his current wife was pregnant: one worksheet based on a multiple-family application including the unborn child and one worksheet without the unborn child. Administrative Order No. 180, III.B.6. provides that two worksheets are needed when "the wife of the parent not having primary residence . . . is

pregnant at the time of the *motion to increase* child support." Here, this provision was not applicable because, as explained above, the trial court's order in October 2002 was not a ruling on a motion to increase Hedenkamp's support obligation. In addition, although Hedenkamp argued that the court's October 22 order contained a provision for an automatic increase in his support obligation to $560 per month when Oliver became emancipated, the order provided for no such increase. Rather, the court ordered Hedenkamp to pay $560 per month starting July 1, 2002, but ordered an offset based on Kallenbach's support obligation to Oliver. Once Oliver became emancipated, Kallenbach's support obligation automatically terminated and so did the offset. See *Steven*, 30 Kan. App. 2d at 797.

Although the trial court did not specify which subsection of K.S.A. 60-260(b) it was relying on to grant Hedenkamp relief, *Leedy* instructs that an order setting aside a judgment under K.S.A. 60-260(b) may be upheld on appeal even when neither the moving party nor the trial court specified the applicable subsection. 279 Kan. at 323. A review of the facts in this case, however, reveals that Hedenkamp was not entitled to relief under any subsection of K.S.A. 60-260(b). The trial court made no finding of mistake, inadvertence, surprise, or excusable neglect. K.S.A. 60-260(b)(1). No newly discovered evidence existed. K.S.A. 60-260(b)(2). The trial court made no finding of fraud, misrepresentations, or misconduct by Kallenbach. K.S.A. 60-260(b)(3). The child support

judgments were not void. K.S.A. 60-260(b)(4). The judgments had not been satisfied, released, or discharged, nor had a prior judgment upon which the child support judgments were based been reversed or vacated. K.S.A. 60-260(b)(5). K.S.A. 60-260(b)(6) is a catchall provision that arguably could have supported the trial court's ruling if Hedenkamp had been entitled to use the multiple family application. Because Hedenkamp was not entitled to use the multiple family application, however, K.S.A. 60-260(b)(6) also did not entitle Hedenkamp to relief from his child support judgments.

Under the present facts, the trial court abused its discretion in granting Hedenkamp relief from his child support judgments under K.S.A. 60-260(b).

Reversed and remanded.