NOT DESIGNATED FOR PUBLICATION

No. 96,256

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

TERRY LYNN SUMPTER,
Appellant,

and

DAVID MICHAEL SUMPTER,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC R. YOST and JAMES R. FLEETWOOD, judges. Opinion filed March 2, 2007. Affirmed.

Tad D. Wagner, of Wagner Law Office, of Wichita, for appellant.

Gerald J. Domitrovic, of Wichita, for appellee.

Before RULON, C.J., GREENE and HILL, JJ.

Per Curiam: In this appeal, we must sort out conflicting orders issued by four different judges in the same case. Initially, a child support order, directing payment of child support past the age of majority for a child was made by the court without the required supporting financial information. Some 5 years after its approval, a second judge said the first judge had not made an independent examination of the order, as required by law, and set it aside. Then, a third judge said that the second judge had no authority to set aside the initial order. Finally, a fourth judge said the third judge had no authority to say the second judge had no authority. With such a tortured history, the case has come to this court. Because the initial child support order failed to take into account financial information and the divorce judge failed to make any inquiry, it was a violation of Father's due process rights and void. Since a void judgment can be set aside at any time, we affirm.

Background Facts and Prior Proceedings

On November 12, 1997, Terry Lynn Sumpter (Mother) submitted a domestic relations affidavit to the court in her divorce case. In that affidavit, Mother failed to provide her or David Michael Sumpter's (Father) financial information. However, Mother did complete the rest of the form, listing the real property she owned as well as

Mother and Father's places of employment. Based on that information, the district court issued a temporary order, directing Father to pay $250 per week in child support.

The divorce trial was held on December 17, 1997. Only Mother and her counsel were present, even though the divorce decree noted that Father appeared pro se. Father had signed the proposed divorce decree. During the hearing, the district court failed to review any financial information. Instead, the district court accepted Mother's testimony that the divorce decree was fair, just, and equitable. As a result, the district court ordered Father to pay "$250 per week *according to the child support worksheet*" until the child reached the age of 25 years. (Emphasis added.) There was no child support worksheet filed at this time. Mother also possessed the sole right to deduct the child on her income taxes.

Over the years, Father had difficulty complying with his child support obligation and was in contempt numerous times for his failure to pay. On April 2, 2002, Father filed a motion to set aside the divorce decree in order to recalculate the child support. In the 2002 motion, Father argued that the divorce decree was "void ab initio voidable as a matter of law" because (1) no child support worksheet was filed or given to Father, and (2) the agreement lacked consideration because Father had to pay child support for 7 years beyond what was judicially required.

Judge David Dewey conducted a hearing on Father's motion. Judge Dewey noted that no child support worksheet was prepared or submitted to the divorce judge and that the domestic relations affidavit was lacking important information. Consequently, he ruled for Father, holding that Judge Beasley had failed to make an independent determination of the fairness of the support order:

> "[U]nder [*In re Marriage of Kirk*, 24 Kan. App. 2d 31, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997)], when a judge signs an order, he is supposed to have made an independent determination that the order is fair, just and equitable. I think that Judge Beasley, when he signed this order, failed to meet the requirements of the *Kirk* case. I think his signing of it was a mistake on the part of the judge. I think he should have had a domestic relations affidavit that had the form filled out. He should have had the child support worksheet. He could not make an independent decision that this was fair, just and equitable just because the two parties had approved it. I'm going to set aside the portion on child support and order that child support be at either guideline–. I want you to prepare a child support worksheet as of 1997 and so–so child support will be either at guidelines or at the amount this gentleman has paid, which ever is more. [Mother] has relied on this. I don't want her to have to refund any child support to him."

After finding that there was no evidence or basis for the divorce judge to find the divorce decree fair, just, and equitable, on August 26, 2002, Judge Dewey set aside the divorce decree in its entirety, except for the order dissolving the parties' marriage, and ordered an

evidentiary hearing be scheduled to establish Father's child support payments. Mother attempted to appeal the Dewey Order, but her action was dismissed for being interlocutory.

On May 23, 2003, Father filed a domestic relations affidavit, detailing his financial information. On the same day, Judge Mark Vining conducted the evidentiary hearing to determine the amount Father owed in child support. At the commencement of that hearing, however, Judge Vining took notice *sua sponte* that the district court lacked jurisdiction over this matter because Father's motion to set aside the divorce decree was untimely. Consequently, Judge Vining vacated the Dewey Order.

Father then filed a motion for reconsideration, requesting the Vining Order to be vacated. Judge Vining summarily denied his motion. Therefore, Father appealed the Vining Order, which the district court later dismissed for failing to docket the appeal in compliance with Supreme Court Rule 2.04 (2006 Kan. Ct. R. Annot. 11).

After the dismissal, Father filed a motion to modify support because (1) the child was 22 years old, (2) the child was employed, (3) the child had his own car, (4) the child had his own financial accounts, and (5) the child was fully emancipated. Father also filed another domestic relations affidavit and a child support worksheet. In reviewing the

motion to modify, the district court overruled the motion. To support its ruling, the district court held that it lacked jurisdiction since an agreement existed in the divorce decree to pay support payments of child support beyond the age of majority, and the child was over the age of 18.

As a result, on May 11, 2004, Father filed a motion to set aside the Vining Order. In response, both parties filed memorandums. The parties also stipulated to numerous facts:

> "¶ 2. That, [the divorce decree] referenced supporting documents for its findings and orders, including child support, to-wit: a child support worksheet (Schedule A) and a Domestic Relations Affidavit. There was, actually, no supporting child support worksheet and the Domestic Relations Affidavit contains no relevant financial information that the Court could have relied on.
>
> . . . .
>
> "¶ 4. That, at the time of the journal entry and decree of divorce . . per the relevant child support guidelines in effect at the time, [Father's] child support obligation would have been about $385.00 per month, assuming an alternation of the tax deduction and no other adjustments.
>
> . . . .

"¶ 7. That, [Father] filed a timely motion to set aside [the Vining Order] and reinstate [the Dewey Order]."

The next judge to review this matter – Judge Eric Yost – issued a letter to the parties, setting aside the Vining Order and reinstating the Dewey Order. In Judge Yost/Fleetwood's final order, he held that the divorce decree was "void as a denial of due process, a deviation from the facts existing at that time and not fair, just and equitable as required by case law and statute." Judge Yost/Fleetwood also determined Father's child support obligation to be $350 per month effective January 1998. Mother timely appealed the Yost/Fleetwood Order.

Fundamental Issue

The issue before this court is whether Judge Dewey had jurisdiction to entertain the 2002 motion. If this court finds that the district court had jurisdiction, then the Dewey Order controls according to the Yost Order and Father is ordered to make child support payments of $350 per month, which he has already satisfied. On the other hand, if this court finds that the district court lacked jurisdiction, then the divorce decree remains controlling and Father is bound to pay child support payments of $250 per week, which must be paid until the child reaches the age of 25. We must also decide if Father has acquiesced in the order, thereby making it binding upon him.

Jurisdiction

Although the 2002 motion was not expressly filed under K.S.A. 60-260(b) and Judge Dewey did not mention the statute in his summation, its application was argued by Father's attorney and is key to the solution of this problem.

The express purpose of K.S.A. 60-260 is to provide relief from a judgment. *In re Marriage of Leedy*, 279 Kan. 311, 321, 109 P.3d 1130 (2005). K.S.A. 60-260(b) states:

> "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 . . .; (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 (6) any other reason justifying relief from the operation of the judgment. . . . This section does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court."

Furthermore, "[t]he motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after judgment, order, or proceeding was entered or taken." K.S.A. 60-260(b).

Here, since Father filed the 2002 motion 5 years after the divorce decree was entered, he is precluded from asserting the reasons found in K.S.A. 60-260(b)(1), (2), and (3). See *Leedy*, 279 Kan. at 321 (holding that subsections [1], [2], and [3] are subject to a 1-year limitation).

In this case, the divorce judge relied solely upon Mother's testimony and the parties' signed agreement as his basis for deeming the divorce decree fair, just, and equitable. In ruling in favor of the 2002 motion, Judge Dewey held that this reliance was in error since the divorce judge did not independently review the information prior to its approval. Utilizing *Kirk* for authority, Judge Dewey set aside the divorce decree.

Kirk stated that a "'mere agreement by the parties does not vitiate the court's duty to scrutinize the settlement agreement, and if the agreement is not valid, just, and equitable, the court should reject or alter it.'" 24 Kan. App. 2d at 34. Under K.S.A. 60-1610(b)(3), "[s]uch scrutiny includes a requirement that the district court review evidence in the record sufficient to support the finding that the separation agreement is valid, just, and equitable." 24 Kan. App. 2d at 36. Because the district judge failed to follow the guidance of K.S.A. 60-1610(b)(3), *Kirk* held that the district court's denial of her motion to set aside was improper. 24 Kan. App. 2d at 37.

In this case, the divorce decree judge should have independently scrutinized the decree instead of relying upon the agreed order. If the judge had complied with the requirements under K.S.A. 60-1610(b)(3), it would have found the evidence insufficient to support the finding that the divorce decree was fair, just, and equitable.

The evidence reveals that under the divorce decree, Father was obligated to pay $1000 per month ($250/week x 4 weeks) in child support. But the parties stipulated that had the financial information been present before the district court, Father's child support obligation would have been $385 per month. In addition, the Yost/Fleetwood Order further decreased Father's child support obligation to $350 per month. Furthermore, the stipulated-to and the Yost/Fleetwood figure were both dependent upon the Father's rights to the tax deduction/benefits. Once again, the divorce decree awarded Mother sole right to deduct the child in her tax income.

"[T]he absence of evidence in the record to support a finding that the separation agreement is just and equitable is more than a technical defect." 24 Kan. App. 2d at 35. In this case, the divorce judge's failure to scrutinize the divorce decree under K.S.A. 60-1610(b)(3) constituted a denial of Father's due process rights. This violation of due process rights rendered the divorce decree void, and under K.S.A. 60-260(b)(4), Judge Dewey had jurisdiction to set aside the divorce decree.

A finding that the judgment is void removes the need for this court to determine if the motion was filed within a reasonable time:

> "'[W]hen a judgment is attacked under K.S.A. 60-260(b)(4) as being void, there is no question of discretion on the part of the trial court. "Either a judgment is valid or it is void, and the court must act accordingly once the issue is resolved." [Citation omitted.] "A judgment is void if the court acted in a manner inconsistent with due process. *A void judgment is a nullity and may be vacated at any time.*" [Citation omitted.]'" (Emphasis added.) *Board of Jefferson County Comm'rs v. Adcox*, 35 Kan. App. 2d 628, 635-36, 132 P.3d 1004 (2006).

We hold that Judge Dewey had jurisdiction under K.S.A. 60-260(b)(4) to set aside the divorce decree.

Mother contends that if this court finds jurisdiction, then its authority to set aside the divorce decree is limited to the time the child was a minor, which would have been until November 11, 1999. Their child was born on November 11, 1981. Consequently, Mother argues that the district court lacked jurisdiction to vacate Father's agreement to pay the $250 per week from November 11, 1999, to the end of November 2006 when the child turned the age of 25

The divorce decree provision states: "That the child support shall terminate at the time the child reaches age twenty-five (25). The parties specifically agree that child support shall continue for the child through and including the month during which the child reaches twenty-five (25)." Notably, Father initialed the provision before signing the agreement, and Father did not respond to Mother's contention on appeal.

We are unmoved by this argument because we think this is a matter of invited error. The transcript demonstrates that after Judge Dewey set aside the child support portion of the divorce decree, Mother's counsel stated the following:

> "[Mother's counsel]: Your Honor, if you're going to make that argument shouldn't you set aside the whole thing. I don't understand where you come up with only one part and set it aside.
>
> "[COURT]: That's all [Father's] asking me to set aside.
>
> "[Mother's counsel]: I think if you set that aside you have to set aside the whole thing.
>
> "[COURT]: Are you asking me to do that?

"[Mother's counsel]: I am, Your Honor. I think we need to set it for an evidentiary hearing to go back to 1997. I want to clarify, I understand what you're doing Judge, I have no objection to it. . . .

. . . .

"[Mother's counsel]: . . . But if you're going to do that I think you need to cut the entire knot. If you're ruling, and that's what *Kirk* held, if the court does not hear the hearing, the court perhaps, adding a little bit of frosting on the cake, should not be able to decide anything. (INAUDIBLE) disconcerting about this, and in all fairness of [Father's counsel] and myself, is notice we extended child support passed the age of eighteen. That alone made this case, I think, one of those candidates that someone should have told the judge what they were doing. I'll tell you from my personal experience when I grasp something like that I do spend the time to tell you what we're doing because the consequences are so great.

"[Father's counsel]: So you're asking that the divorce be set aside.

"[Mother's counsel]: Not the divorce itself, the division of property, Your Honor.

"[Father's counsel]: I don't object . . . .

. . . .

"[COURT]: I am going to set aside *everything* then, except the divorce." (Emphasis added.)

Our courts have held that "[a] party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003). In this case, the reason that the district court vacated the entire decree except the divorce, including the agreement to extend the length of child support, stemmed from Mother's request at trial. Therefore, Mother's request on appeal that the district court's jurisdiction be limited to when the child was a minor is in error.

Did Father Acquiesce?

There can be no issue over acquiescence here. If the judgment itself is found to be void, a party's voluntary payments to that judgment cannot amount to acquiescence under the law because a void judgment has no legal force or validity. *Sramek v. Sramek*, 17 Kan. App. 2d 573, ¶ 1, 577, 840 P.2d 553 (1992), *rev. denied* 252 Kan. 1093 (1993). Consequently, Father's child support payments on a void child support order cannot constitute acquiescence.

Affirmed.