NOT DESIGNATED FOR PUBLICATION

No. 95,641

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DONN C. PARKER,
Appellant,

and

CRUZE GERALD PARKER, a minor child,

v.

JOANNE T. BORZELLERI,
Appellee.

MEMORANDUM OPINION

Appeal from Elk District Court; CHARLES M. HART, judge. Opinion filed April 13, 2007. Reversed and remanded with directions.

Conrad E. Doudin, of El Dorado, for appellant.

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

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

Per Curiam: Donn C. Parker (Father), appeals the trial court's ruling regarding his motion to set aside an order increasing a child support obligation. We reverse and remand with directions.

Cruze Parker was born in Ohio in August 1992 and lived there with Father and Mother until Mother moved to Kansas with Cruze. In September 1997, Father filed a petition for determination of paternity and other child related orders. The Kansas Department of Social and Rehabilitation Services (SRS) intervened in the action because Mother had received assistance from the State.

In December 1997, the trial court ordered Father to pay $168 per month in child support. Each party was ordered to provide income tax information to the court. The journal entry states: "The parties each reserve the right to have child support recomputed at an appropriate future time with any supplemental considerations that may be proper at that time."

Father did not produce his tax returns pursuant to the trial court's order, so on November 27, 2000, SRS filed a motion seeking to modify Father's child support obligation.

SRS asked the trial court to impute an estimated average gross annual income of $100,000 to Father. Father did not attend or otherwise enter an appearance at the motion hearing. On January 26, 2001, the trial court modified Father's child support to $575 per month and made it effective as of January 1, 1996. The trial court later modified the effective date of the new child support order to January 1, 1998.

Father eventually provided his tax information and on February 2, 2004, the trial court found that there had been "a material change of circumstance," and ordered that Father's child support be $157 per month effective December 1, 2002.

In May 2005, Father filed a motion to set aside. In the motion, he asked the trial court to set aside his child support obligation on grounds that the trial court did not have jurisdiction to increase his child support payments. Father also claimed that SRS "grossly overstated" his total support obligation. SRS argued that the original paternity journal entry allowed the parties to, at any time, recompute child support obligations. Therefore, SRS argued that the trial court's journal entry of January 2001 was not void. The trial court agreed with SRS and refused to find that the prior order was void. Father appeals the trial court's decision.

Father argues that pursuant to statute, a modification of child support is to be

retroactive only to a date 1 month after the time that the motion to modify was filed. Therefore, he argues since SRS's motion was filed in October 2002, Father believes the trial court did not have jurisdiction to make its order effective any earlier than November 2002. We must note here that Father is incorrect; SRS's motion to modify Father's child support was filed on November 27, 2000.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006).

K.S.A. 2006 Supp. 38-1121(c) reads, in relevant part: "The court may make a modification of support retroactive to a date at least one month after the date that the motion to modify was filed with the court."

Child support may be modified at any time circumstances render such a change proper, but the modification operates prospectively only. *In re Marriage of Schoby*, 269 Kan. 114, 117, 4 P.3d 604 (2000). The language used in K.S.A. 2006 Supp. 38-1121(c) echoes that found at K.S.A. 60-1610(a)(1), which is in turn a codification of a longstanding common law rule. The Kansas appellate courts have rarely allowed a retroactive order for child support. *In re Marriage of Bunting*, 259 Kan. 404, 410, 912 P.2d 165 (1996).

Here, the trial court did clarify that it was entering its support order on an "interim basis." However, nothing in the balance of the order suggests that it is a true interlocutory order, which would bring it under the purview of K.S.A. 2006 Supp. 38-1131(c). Therefore, the trial court's ability to make the support order retroactive is limited by the plain language of K.S.A. 2006 Supp. 38-1121(c). When a statute is plain and unambiguous, the court must give effect to the legislature's intent as expressed rather than determining what the law should or should not be. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

The trial court only had the authority to modify Father's obligation as of December 27, 2000. Any other holding was erroneous. This case must be remanded for proceedings consistent with this finding.

Father also believes that the award entered by the trial court was excessive and designed to punish him. Father argues that the award should be set aside pursuant to K.S.A. 60-260(b)(6), which allows a party to be relieved from a judgment or order for "any other reason justifying relief from the operation of the judgment." Under K.S.A. 60-260(b)(6), relief must be requested within a "reasonable time." Under the unusual circumstances of this case, we consider the time to be reasonable.

The standard of review of a trial court's order determining the amount of child support

is whether the trial court abused its discretion, while interpretation and application of the Kansas Child Support Guidelines (Guidelines) is subject to unlimited review. *In re Marriage of Paul*, 32 Kan. App. 2d 1023, 1024, 93 P.3d 734 (2004), *aff'd* 278 Kan. 808, 103 P.3d 976 (2005).

K.S.A. 2006 Supp. 38-1121(f) states:

> "In determining the amount to be ordered in payment and duration of such payments, a court enforcing the obligation of support shall consider all relevant facts including, but not limited to, the following:
>
> (1) The needs of the child.
>
> (2) The standards of living and circumstances of the parents.
>
> (3) The relative financial means of the parents.
>
> (4) The earning ability of the parents.
>
> (5) The need and capacity of the child for education.
>
> (6) The age of the child.
>
> (7) The financial resources and the earning ability of the child.
>
> (8) The responsibility of the parents for the support of others.
>
> (9) The value of services contributed by both parents."

In issuing the modification order in January 2001, the trial court held:

> "Based upon relevant circumstances of the parties as set forth in the Child Support Worksheet and the financial information submitted by Petitioner and Respondent, the Kansas Child Support Guidelines recommend that Petitioner, effective January 1, 1996 pay the sum of $575.00 per month as and

for the support of Cruze G. Parker, and in the best interest of the child, the Court order shall be modified to require said sums to be paid by Petitioner."

Use of the Guidelines is mandatory and failure to follow the Guidelines is reversible error. Any deviation from the amount of child support determined by the use of the Guidelines must be justified by written findings in the journal entry. Failure to justify deviations by written findings is reversible error. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

The Guidelines allow that income may be imputed to the parent who does not have primary residential custody. It is generally to be assumed that a parent is able to earn at least the federal minimum wage and to work 40 hours per week. Kansas Child Support Guidelines, Administrative Order No. 180 (2006 Kan. Ct. R. Annot. 108). See *In re Marriage of McCollum*, 30 Kan. App. 2d 651, Syl. ¶ 3, 45 P.3d 398 (2002); *In re Marriage of Jones*, 23 Kan. App. 2d 858, 859, 936 P.2d 302 (1997).

In its motion to modify child support, SRS claimed only that Father is an "able-bodied employed person." The child support obligation was ordered by the trial court based on Father's "estimated average gross income of $100,000 per year." The question for this court is whether the trial court erred by imputing $100,000 in annual income to Father.

There is nothing in the record on appeal to suggest that Father made anywhere near $100,000 per year. There is also nothing in the record on appeal to suggest that Father was not working. It appears that the $100,000 figure was chosen by SRS without any basis in reality. The original child support worksheet showed Father claiming $1,284 in domestic gross income. If SRS was trying to be punitive for Father's failure to turn over tax documents, it could have filed a contempt citation or used other means to coerce Father's compliance.

We recognize that the trial court has a great deal of discretion when establishing child support obligations. However, that discretion must be based in evidentiary reality. In this case, it appears the trial court utilized SRS's figures without determining the truth about Father's earnings and did not consider any of the criteria set out in the statute. Therefore, we believe all of the trial court's modification orders were erroneous because of retroactive application and an abuse of discretion in setting the amount of support, and they are set aside pursuant to K.S.A. 60-260(b)(6).

Reversed and remanded with directions consistent with this opinion.