NOT DESIGNATED FOR PUBLICATION

No. 95,773

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

SUSAN ELLEN HOLIFIELD,
Appellee,

and

LARRY HEBER HOLIFIELD,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RICHARD T. BALLINGER, TERRY L. PULLMAN, and PAUL BUCHANAN, judges. Opinion filed April 20, 2007. Affirmed.

William J. Fields, of Law Office of William J. Fields, of Wichita, for appellant.

Genine L. Ware, deputy court trustee, for appellee.

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

Per Curiam: Larry Heber Holifield appeals a district court order to pay child support arrearages. We affirm.

Factual and Procedural Background

The district court trustee has brought six accusations in contempt against Larry since 1992. Though Susan Ellen Holifield assigned her support rights to the Secretary of Social and Rehabilitation Services (SRS) in 1990, she also filed a motion for a "Judgment on Medical Bills and to Determine Arrears" in 1998. Susan then filed a motion to change custody in 1999, regarding a child who wished to reside with Larry.

Of the various orders resulting from the first five accusations in contempt and Susan's motions, three are at issue here. The first of these, filed June 23, 1998, settled Susan's motion for "Judgment on Medical Bills and to Determine Arrears." The journal entry shows the parties "reached an agreement" which the district court "adopt[ed] . . . as its order herein." Larry was ordered to pay "$2,526.90 for uninsured medical on behalf of the minor children" and $15,824.53 in arrearages "on child support." The agreed calculations were attached to the journal entry as an exhibit and showed back child support of $14,128 and $1,696.53 in interest, for the total of $15,824.53. Both Larry and his counsel signed the journal entry.

The second order, filed September 15, 1999, concerned Susan's motion to change custody. The journal entry shows Susan appeared in person with counsel, but no other appearances are shown. The district court granted Susan judgment of $2,800 for "unreimbursed medical bills" and $15,000 for "past due child support." Other than the judge's signature, only Susan's counsel signed this journal entry.

The third order, filed January 13, 2000, resulted from one of the accusations in contempt. Larry appeared pro se and signed an acknowledgment of rights and waiver of attorney which stated his risk of "being sentenced to a period of confinement in the Sedgwick County Jail" if held in contempt. The district court found Larry owed arrearages of $2,800 in medical expenses and "$15,000 plus interest" in child support. Larry was found in contempt, and his sentence was suspended on the condition he pay current support and the arrearages. Larry was placed under the supervision of the court trustee for 3 years and was warned that a failure to comply with the court orders would result in a bench warrant for his arrest. Larry personally signed this journal entry, and he also acknowledged receiving a copy of it.

Larry and Susan's youngest child turned 18 and dropped out of school in the fall of 2002. Larry stopped making payments in December 2002.

The sixth accusation in contempt was filed on March 31, 2004. The court trustee attached an affidavit showing $12,550 was still due. This calculation was based on the January 13, 2000, order.

On September 21, 2004, Larry's current counsel, William J. Fields, filed a motion seeking an order

> "setting-aside any and all prior orders of the court dealing with child support arrearages; ordering that [Larry] has paid all child support due and that no arrearage exists; directing [Susan] to sign a satisfaction of judgment as to all child support; . . . granting [Larry] an award of attorney fees from [Susan] for frivolously claiming that [Larry] has not paid child support."

Fields argued "prior court orders regarding arrearage were wrong; the parties just reached agreement on August 9, 2004 of when the children lived with which parent from 8/15/1989 forward." This agreement was memorialized as a hand-written chart signed by Larry and Fields, and by Susan and her counsel. Larry claimed that he had "over-paid $4,602.00 more than he was ordered to pay in child support."

A hearing was held on December 14, 2004, by the Hon. Paul Buchanan, a retired judge. The court trustee proffered a new calculation of arrearages based in part on the

figures from the January 13, 2000, order. The balance had decreased to $11,800 because Larry began paying again on May 5, 2004, submitting a total of $750 through his last payment on September 13, 2004.

Fields objected to the proffer, claiming the January 13, 2000, order was void because the children were living with Larry during part of the time in question: "These calculations from the Trustee are based on untruths. If they're fraudulent I'm not sure, but they're definitely--they ought to be void because they're based on untruths. This case law is clear that you can't make him pay child support when the kids weren't with [Susan]."

Larry testified that he had signed the January 13, 2000, journal entry because "if I did not sign it then I would go to jail. That's exactly what I was told." Larry attributed the statement to someone in the court trustee's office. On cross-examination, however, Larry admitted he knew "what the contempt process is about."

> "Q. Okay. You also know that with the contempt process there is a possibility of jail time, is that correct?
> "A. Yes ma'am, I do.
> "Q. And we would be remiss in our duties if we did not advise you that with a contempt process there is a possibility of jail, is that correct?
> "A. Yes ma'am."

There were no other witnesses. Judge Buchanan took the matter under advisement.

On January 14, 2005, the court trustee moved to dismiss Larry's motion of September 21, 2004. The court trustee contended Larry's motion was not proper under K.S.A. 60-260. At a hearing on January 24, 2005, before the Hon. Terry L. Pullman, Fields protested that his motion was currently before Judge Buchanan.

Judge Pullman found the issues in Larry's motion were similar to those he had raised in defense of contempt before Judge Buchanan. To this extent Judge Pullman held the issues were "in front of Judge Buchanan and should be subject to Judge Buchanan's decision." Judge Pullman nevertheless agreed with the court trustee that the motion itself was "not filed in conformity with K.S.A. 60-260." Judge Pullman therefore dismissed the motion, clarifying "[i]t can be refiled if it's done so in conformity with the provisions of K.S.A. 60-260." These rulings were entered by minute order on the day of the hearing.

Judge Buchanan filed his memorandum and order on February 23, 2005. The judge suggested the issue was one of arithmetic: "When the Court in a decision adds two and two the answer must be four. If the court should [add] two and two with a result of five, the arithmetical error can always be corrected and a plea of *res judicata* or finality of order does not apply."

Judge Buchanan next considered the orders of both September 15, 1999, and January 13, 2000. The judge noted the first ruling was prompted by a motion to change custody, that the certificate of service for this motion did not give the date of service, and that the order did "not setout [*sic*] findings of facts or evidence by which the order for $15,000.00 child support could have been entered and notwithstanding no motion being or file [*sic*] for such a determination." With regard to the January 13, 2000, order, the judge found only that "[t]his determination is apparently based on the [September 15, 1999] order which was made without notice."

Judge Buchanan then found the court trustee had not contested Larry's computation, but had instead relied "upon the Court determinations of the balance due which may include interest which would result in compound interest which is not permissible." Stating again that "an error in mathematical calculation can be corrected at any time," the judge concluded "[s]ince Court Trustee has not chosen to go back to the beginning on a computation, the Court must accept [Larry's] calculation." Given this conclusion, the judge held Larry was "not indebted under the orders of this case." The judge held the overpayments were "volunteered payments," however. The judge finally decided that Larry was "not guilty on indirect contempt of court."

The court trustee filed a "Motion For Reconsideration" under K.S.A. 60-259 on March 7, 2005. A hearing was held before the Hon. Richard T. Ballinger on March 22, 2005. Judge Ballinger opened the hearing by stating "Judge Buchanan was helping us out with some overflow and we had more cases than we had judges so being the retired judge, Judge Buchanan came down and assisted."

Fields contested Judge Ballinger's involvement, arguing it was

> "inappropriate because if [the court trustee] wants a trial judge to reconsider the trial judge needs to hear that not some other district court judge that didn't hear the witnesses, didn't review the trial exhibits, didn't review the trial brief I filed or probably hasn't even read Judge Buchanan's ruling."

Judge Ballinger responded that "[t]he practical problem is this, Judge Buchanan is retired and he's unavailable." Judge Ballinger therefore overruled Fields' "motion that I'm not the appropriate person to reconsider the trial decision because Judge Buchanan is not available period." Judge Ballinger then scheduled a further "evidentiary hearing on the motion to reconsider." Judge Ballinger ordered the court trustee "to prepare as specific as you can the issue you want me to review and why legally they should be modified and or reversed and or changed in whatever fashion."

On April 15, 2005, the court trustee filed an "Amended Motion to Alter and/or Amend Judgment" under K.S.A. 60-259 specifying the contested issues. For his part, Fields moved to deny the court trustee's motions, to deny the evidentiary hearing already set, to set aside all prior judgements against Larry for arrearages, to grant attorney fees on the claim that he owed arrearages, to grant judgment against Susan and the court trustee "jointly and severally, for overpayment of child support in the amount of $16,711.12," and to grant attorney fees on any matter raised after the trial before Judge Buchanan. Fields also argued that the motions "must be heard by Judge Buchanan . . . unless there is a finding he is deceased or incompetent to hear the matter."

When the parties appeared again before Judge Ballinger on May 3, 2005, all counsel agreed that an evidentiary hearing or further oral argument were not required. Judge Ballinger explicitly discussed obtaining a transcript of the trial conducted by Judge Buchanan.

Judge Ballinger issued his rulings in a memorandum opinion and in an order, both filed November 2, 2005. In the memorandum opinion Judge Ballinger stated he "can not and should not reverse the decision of Judge Buchanan in finding [Larry] is not in contempt. Due to argument and findings, this Court will not act as an Appellate Court and reverse that decision." Judge Ballinger nevertheless held "[t]his Court and Judge

Buchanan are not legally able to set [aside] any of those prior Orders setting arrearages by using evidence of miscalculation prior to 2000. Miscalculation is not fraud. If there were mistakes or problems, the time for correcting them . . . has past." Therefore, concluded Judge Ballinger, "the amount due and owning is the amount reflected in the 2000 Order, plus whatever interest and adjustments are required to date."

Larry appeals.

Dismissal of Larry's Motion for Failure to Comply with K.S.A. 60-260

We first consider Larry's argument that Judge Pullman erroneously dismissed his motion of September 21, 2004, for failure to comply with K.S.A. 60-260. At oral arguments Fields represented to this court that he cited the statute in his motion. The record does not support this claim, however, as he admitted to Judge Buchanan below:

"THE COURT: Well now, where is your motion where you're invoking relief under 60-260?
" MR. FIELDS: I didn't cite 60-260, but I'm citing it right now on the record."

Moreover, Larry's motion did not detail the grounds for relief or the time limitations set out in K.S.A. 60-260. With regard to prejudice, Judge Pullman permitted Larry to refile the motion under the appropriate statute, but he failed to do so. The issues raised in the motion were considered by Judge Buchanan and Judge Ballinger. "The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining." K.S.A. 60-2105.

Assignment of Judge Ballinger

Larry also contests Judge Ballinger's assignment to hear the court trustee's motions to reconsider and alter or amend the judgment. The authority of district court judges is a question of law subject to unlimited review. *Krogen v. Collins*, 21 Kan. App. 2d 723, 725, 907 P.2d 909 (1995).

Kansas statutes provide that district judges "shall have and exercise the full judicial power and authority of a district court." K.S.A. 20-302. Each district judge has "all the rights, powers and authority . . . as if each judge was the sole judge of such district." K.S.A. 20-330. This is limited by the "general control over the assignment of cases within the district" which is granted to an administrative or chief judge "subject to

supervision by the supreme court." K.S.A. 2006 Supp. 20-329. Taken together these statutes mean "any district judge has authority to issue an order in any case in the judge's assigned district unless such action would contravene the administrative judge's supervisory authority." *Krogen*, 21 Kan. App. 2d at 725.

There is no suggestion that Judge Ballinger was acting contrary to the supervision exercised by an administrative or chief judge. The only issue is whether he could hear a K.S.A. 60-259 motion regarding a trial held before a retired judge sitting by assignment. Considering the statutes cited above, we hold that Judge Ballinger had the authority and power to hear this matter.

There are situations, such as cases alleging ineffective assistance of counsel, where it is preferable for the trial judge to review allegations regarding the trial. See *Gilkey v. State*, 31 Kan. App. 2d 84, 85, 60 P.3d 347 (2003). Even in that instance, however, assignment to the trial judge is not required, *Morrow v. State*, 18 Kan. App. 2d 236, 238-40, 849 P.2d 1004 (1993), especially where the matter may be determined from the record. See *State v. Washington*, 275 Kan. 644, 677, 68 P.3d 134 (2003) (reviewing ineffectiveness of counsel for the first time on appeal).

In the present case, the issues before Judge Ballinger were primarily legal, not factual. There were also no issues of credibility. As Fields acknowledged at the May 3, 2005, hearing when discussing the need for further proceedings: "I think that the Court will just review what's been submitted and render a legal ruling. I don't know why we need to come back." Judge Ballinger and the other counsel agreed. Larry has not shown that Judge Ballinger erred in hearing the court trustee's motions.

Court Trustee's Motions

Larry also attacks the court trustee's motions for reconsideration and to alter or amend the judgment, arguing the first motion was void and the second motion was untimely. Motions to reconsider are generally reviewed under an abuse of discretion standard. *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). Where the analysis requires statutory interpretation, review is unlimited. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 374, 130 P.3d 560 (2006).

Motion for Reconsideration

Larry contends this motion was void because "K.S.A. 60-259 does not recognize a 'motion for reconsideration'; moreover, said motion provided no specificity, which the

statute requires." On the first point, the title of a pleading does not control over its substance. See *Baxter v. John Weitzel, Inc.*, 19 Kan. App. 2d 467, Syl. ¶ 3, 871 P.2d 855, *rev. denied* 255 Kan. 1000 (1994). "Motions for reconsideration are equivalent to motions to alter or amend judgment filed pursuant to K.S.A. 60-259(f)." *Hundley v. Pfuetze*, 18 Kan. App. 2d 755, Syl. ¶ 1, 858 P.2d 1244, *rev. denied* 253 Kan. 858 (1993).

Turning to the substance, the court trustee's motion cited K.S.A. 60-259 and asked for both "a new trial and/or amendment of judgment." The issue is simplified here because the parties eventually agreed that the issue was one of law. Thus the request for a new trial became moot, and the only issue was whether to alter or amend the judgment.

As a result, Larry's second point, that K.S.A. 60-259 requires a definite statement, is incorrect as applied. The statute only requires a definite statement of "the grounds for a new trial." K.S.A. 60–259(c). There is no similar statutory requirement for a motion to alter or amend a judgment.

Naturally a motion to alter or amend should "specifically state[] the alleged error of the district court and the grounds relied upon." *In re Marriage of Hansen*, 18 Kan. App. 2d 712, Syl. ¶ 1, 858 P.2d 1240 (1993). It is true that the court trustee's allegations in the first motion were conclusory, but Larry cites no authority showing the motion was

therefore void. At the hearing on March 22, 2005, the court trustee clearly stated the issue on reconsideration, whether Judge Buchanan had erred in setting "aside these prior orders of the court in order to reach his decision." Judge Ballinger then continued the matter for further briefing, as described above.

Considering these facts and the totality of the record, Larry has not shown his substantial rights were prejudiced by the court trustee's failure to specify the basis for reconsideration in the first motion. See K.S.A. 60-2105.

Motion to Alter or Amend

Larry's complaint regarding this motion is limited to its timeliness. Larry contends "Judge Ballinger had no authority under K.S.A. 60-259 to grant the court trustee any time extensions." No extension was necessary, however, because the first motion was timely. At the hearing on March 22, 2005, Judge Ballinger did not purport to extend the time to file but simply continued the matter so the parties could brief the issues. This was not an abuse of discretion, and it was not impermissible under K.S.A. 60-259.

Prior District Court Orders

Larry next contends that the numerous district court orders finding arrearages and ordering payment were also void. Because he acquiesced in those orders by making payments, Larry may avoid their effect only if they were void. See *Vanover v. Vanover*, 26 Kan. App. 2d 186, 188-89, 987 P.2d 1105, *rev. denied* 268 Kan. 856 (1999) (Father's "voluntary partial payment of the child support or maintenance judgment clearly constituted acquiescence as to those parts of the judgment involving child support and maintenance."); *Sramek v. Sramek*, 17 Kan. App. 2d 573, 577, 840 P.2d 553 (1992), *rev. denied* 252 Kan. 1093 (1993) (one cannot acquiesce in a void judgment). Whether a judgment is void is a question of law subject to unlimited review. See *State ex rel. Secretary of SRS v. Clubb*, 30 Kan. App. 2d 1, 3-5, 39 P.3d 80 (2001).

Larry first contends the September 15, 1999, order was void because he was not served with Susan's motion. The arrearage calculation introduced into evidence by the court trustee, however, was derived in part from the January 13, 2000, order, not a prior order. Larry personally appeared and signed the January 13, 2000, order. Given these circumstances, any service issues connected with the September 15, 1999, order are moot.

Second, Larry argues the September 15, 1999, order is void because Susan's motion "did not comply with Supreme Court Rule 139 as no Domestic Relations Affidavit and no proposed worksheet accompanied the motions." This issue is moot for the reason stated above. Additionally, this court has also rejected a similar argument regarding the affidavit required to support contempt under K.S.A. 20-1204a. See *Johnson v. Johnson*, 11 Kan. App. 2d 317, 319-20, 721 P.2d 290 (1986). "In the present case there is a long history . . . of [the father] appearing in court and defending motions for citation without raising any objection to the failure of [the mother] to file an affidavit." 11 Kan. App. 2d at 320. Here as well, such a technical failure of the pleadings does not render void the orders signed by Larry and/or his counsel. See 11 Kan. App. 2d at 320.

Third, Larry contends all orders after the June 23, 1998, order are void because they compound interest. Larry agreed to the initial assessment of interest. With regard to compounding, Larry merely asserts that "a review of subsequent orders in the record indicate that the mistake was carried on in subsequent purported calculations of arrearage." The transcripts of the prior contempt proceedings are not in the record, and the January 13, 2000, order, the one upon which the current calculations rely, ordered Larry to pay child support arrearage of $15,000 *plus* interest, suggesting that interest would be calculated as a separate amount. During questioning by his counsel at trial, Larry also agreed with the statement "we haven't seen any kind of calculation from the

Court Trustee or anyone else about what interest might be." Absent a record affirmatively showing error, the district court's actions are presumptively correct. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Larry finally argues the prior orders were void "due to undue influence, equitable estoppel, possible fraud and prosecutorial misconduct." These assertions are frivolous. See *Roemer v. Crow*, 993 F. Supp. 834, 837 (D. Kan. 1998), *aff'd* 162 F.3d 1174 (1998) (a frivolous complaint lacks an arguable basis in fact or law). At trial Larry acknowledged the reasonableness of the court trustee's warnings regarding incarceration if he were held in contempt. The waivers Larry signed to proceed pro se advised him of this as well. The January 13, 2000, order advised him a warrant for his arrest would be issued if he did not comply. Larry was properly warned, not subjected to undue influence, fraud, or prosecutorial misconduct.

Larry's remaining arguments do not allege voidness. Larry protests that his agreement with Susan regarding the residency of the children should be binding under contract and equitable principles. We disagree. While Susan apparently agreed regarding the residency of the children, she never agreed to waive the prior judgments. Moreover, the record indicates her assignment of rights to SRS continued in force. See K.S.A. 39-755(b) and K.S.A. 2006 Supp. 39-756(a)(2) (SRS holds support rights under

assignments). The court trustee, who was enforcing these rights, was also not a party to the agreement. Finally, Larry continued paying on the January 13, 2000, judgment even after the purported agreement.

Larry also renews his assertion that he overpaid $16,711.12 and should have a judgment in that amount. The issue is moot because the prior orders were valid and Larry acquiesced in the judgment.

Attorney fees

Larry next asks for attorney fees under K.S.A. 60-211. Sanctions under this statute are reviewed for abuse of discretion. *Reyna v. General Group of Companies*, 15 Kan. App. 2d 591, 595, 814 P.2d 961, *rev. denied* 248 Kan. 996 (1991). Larry raised this issue below in passing, and neither Judge Buchanan nor Judge Ballinger addressed it.

The court trustee was justified in seeking a contempt order. Larry had admitted to contempt in the past and was still not in compliance. Larry was not entitled to fees under K.S.A. 60-211.

Double Jeopardy

Larry finally contends Judge Ballinger's ruling placed him "twice . . . in jeopardy for the same alleged offense." The relevant passage in Judge Ballinger's memorandum opinion is:

> "This Order and these findings do not prohibit [Susan] from requesting an additional Show Cause for failure to pay arrearages ordered. This motion to Show Cause can not be filed until after 30 days have expired from the date of filing this Order and there have been no further payments by [Larry]."

The issue is not ripe for decision unless Larry is again subject to contempt proceedings. See *In re M.R.*, 272 Kan. 1335, 1339, 38 P.3d 694 (2002) (courts do not give opinions on abstract propositions).

Affirmed.