NOT DESIGNATED FOR PUBLICATION

No. 95,386

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

TAMARA BRYANT,
Appellee,

v.

JERRY BRYANT,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed July 20, 2007. Affirmed.

Nancy A. Roe, of Kansas City, for appellant.

LeWanna Bell-Lloyd, of Olathe, for appellee.

Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

Per Curiam: Jerry D. Bryant appeals the child support orders entered by the

district court. He contends the district court erred by imputing income to him, finding him in contempt for not paying the full amount of child support, improperly granting a parenting time adjustment due to his nonvisitation, and granting a medical judgment in contravention of the property settlement agreement. We disagree and affirm.

Jerry and Tamara Bryant were divorced in March 1995. They have three children. On July 30, 2003, the district court modified Jerry's child support payment based on his annual income of $51,700, as reflected in his 2002 income tax return. Jerry lost his job in December 2003 and requested a reduction in his child support.

On August 2, 2004, a hearing was held and the district court imputed a wage of $51,700 per year to Jerry based on his skill as a diesel mechanic, past employment, and his capacity to earn wages. The district court ordered Jerry to pay $568 per month for March and April 2004 due to his unemployment income. For May and June 2004, the child support was set at $1,329 per month based on the imputed income, but that figure was thereafter reduced to $1,064 per month after July 1, 2004, due to the emancipation of one of the three children.

Jerry filed a motion to reduce child support in February 2005, but it was denied by the hearing officer based on a lack of change in circumstances. However, on June 29, 2005, the district court reduced Jerry's child support based on an imputed wage of

$40,000 and also granted a parenting time adjustment in favor of Tamara based on Jerry's nonvisitation for over 4 years. Jerry's motion for reconsideration was heard on September 6, 2005. In the meantime, the hearing officer found Jerry in contempt of court for not paying the full amount of his child support payment and ordering him to spend weekends in jail unless he paid the full child support payment. At the hearing to reconsider, the district court concluded that Jerry was not making a good faith effort to get back to his original income and was not working to his full capacity as an experienced diesel mechanic. This district court imputed $40,000 income to Jerry, granted a 10% parenting time adjustment based on Jerry's nonvisitation, and ordered Jerry to pay $947 per month in child support. The district court also found that Jerry was nearly $23,000 behind in his child support payments and that he was in indirect civil contempt of court for willful failure to pay child support.

Jerry contends the district court erred in adjusting his child support payments based upon his failure to exercise parenting time with the minor children. Jerry relies on *Barnett v. Cusimano*, 30 Kan. App. 2d 680, Syl., 46 P.3d 568 (2002), which provided: "The supplemental visitation adjustment of the Kansas Child Support Guidelines provides no authority to increase a noncustodial parent's child support obligation based solely upon the noncustodial parent's failure to exercise visitation or spend quality time with a minor child." The Kansas Child Support Guidelines, Supreme Court Administrative Order No. 180 (2006 Kan. Ct. R. Annot. 105) (Guidelines) have been modified since *Barnett* in

order to clothe the district court with such authority.

Section IV.E.2 of the Guidelines currently provide that the court "may allow an adjustment in favor of the parent with primary residency pursuant to IV.E.2.c. below." 2006 Kan. Ct. R. Annot. 118. Section IV.E.2.c provides: "The court may make an adjustment based on the historical non-exercise of parenting time as set forth in the parenting plan." 2006 Kan. Ct. R. Annot. 119. On June 29, 2005, the district court granted a parenting time adjustment as follows:

> "The Court finds that the father has not visited with the children in four years and the Court has heard the request from the mother for an adjustment due to lack of parenting time. This adjustment reflects the fact that if a parent doesn't visit with the child that parent certainly is not supporting any of the miscellaneous expenses of the child. The Court is going to grant, pursuant to IV E.2.[,] a parenting time adjustment.
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> "The Court finds that both boys, twin boys, that are 16 in July, the Court is going to find their school expenses are increased, their book expenses are increased, school supply expenses are increased, the food, clothing for a teenager is more expensive, and social activities that are necessary for a child to be properly socialized are increased. I'm going to grant a 10 percent increase in child support pursuant to E.2."

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 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). We find no error in the district court's decision to award a parenting time adjustment. Jerry's argument is not to the substance of the adjustment, only the authority to make the adjustment. The Guidelines now provide the authority for this type of adjustment and we find the district court's 10% adjustment was reasonable in light of the other adjustments allowed in Section IV.E.2.a and IV.E.2.b of the Guidelines. See 2006 Kan. Ct. R. Annot. 119.

Next, Jerry contends the district court erred by imputing income to him at $51,700 per year at the hearing on August 2, 2004, and $40,000 per year at the hearings on June 29, 2005, and September 6, 2005.

> "'A district court has continuing jurisdiction to change or modify an order made in a divorce action concerning the custody and support of minor children when the facts and circumstances made modification proper. Such matters rest in the sound judicial discretion of the trial court. [Citations omitted.] On appellate review the order of a trial court determining the amount of child support should not be disturbed absent a showing of manifest abuse of discretion.'" *In re Marriage of Schoby*, 269 Kan. 114, 121, 4 P.3d 604 (2000) (quoting *Thompson v. Thompson*, 205 Kan. 630, 631, 470 P.2d 787 [1970]).

Jerry did not appeal from the August 2, 2004, determination and we have no jurisdiction to consider that issue on appeal. An appellate court has the duty of questioning jurisdiction on its own motion. *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 246 Kan. 371, 373, 789 P.2d 211 (1990).

We next consider whether the district court erred in imputing income of $40,000 per year. The court found Jerry was not making a good faith effort to work at his full earning capacity. The court also found he was an experienced diesel engine mechanic, gave him credit that he was starting his own mechanic shop, and recognized his higher previous income.

The district court also heard testimony given by Jerry Kornberg, owner of a diesel mechanic shop in Lawrence, Kornberg's testimony gave the court a sense of what Jerry could be earning. The court also relied on testimony that Jerry's mother-in-law purchased groceries for his household and that through a lease agreement he set up through his mechanic business, the company paid his mortgage, utilities, vehicle gas, and car and home insurance. Based on the evidence presented and the district court's findings, we conclude the court did not abuse its discretion by imputing $40,000 income to Jerry. The district court's determination was a reasonable income determination based on all the evidence, including Jerry's prior earning history and his present earning capacity.

Next, Jerry contends the district erred in finding him in contempt for failure to pay the full amount of child support.

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.' [Citations omitted.]" *State v. Jenkins*, 263 Kan. 351, 358, 950 P.2d 1338 (1997).

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 determine questions of fact. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003).

On July 12, 2005, the judicial hearing officer found Jerry in contempt for failure to pay child support. The hearing officer ordered Jerry to pay his $1,164 monthly child

support, which included a $100 arrearage payment, otherwise he would spend the weekends in jail. The district court upheld the contempt order.

At the contempt hearing, Jerry testified that he paid around $130 per week or about $567 per month. The district court heard evidence that Jerry's child support payments averaged out to approximately $440 per month for the year prior to the hearing. Jerry was also in arrears for over $20,000 in failed child support payments. At the contempt hearing, counsel for Tamara also questioned Jerry concerning the child support worksheet he submitted in the case and Jerry's own computation of child support. Counsel questioned Jerry why he was not even meeting the monthly child support payment that he computed. Jerry stated that he had been paying what he could.

Jerry argues it was error for the district court to find that he was in contempt for not paying the full amount of child support when the support order was based on an imputed wage that the evidence demonstrated could not be obtained. He argues it was an abuse of discretion for the district court to order him to spend weekends in jail for the nonpayment of child support which was impossible for him to pay.

The district court heard evidence on the substantial arrearage compiled by Jerry's failure to pay, and the failure to pay the full amount of his child support payments. The district court concluded that Jerry was failing to make a good faith effort to support his

children. The district court also relied heavily on the fact that Jerry's mother-in-law was shouldering considerable household expenses and that Jerry had structured his company to pay personal expenses out of company funds which lowered his income in terms of child support computations.

The evidence presented showed that Jerry frequently failed to pay the full amount of his child support payments. Jerry argues that the substantial arrearage was based on retroactive computation that created an immediate $8,000 judgment and that he could never catch up on his arrearage. This is not a persuasive argument. The evidence supports the underlying findings that Jerry failed to comply with the court order for child support and that his perpetual underpayment regularly increased the arrearage. In consideration of all the surrounding circumstances, there is strong evidence that Jerry was structuring his life to avoid paying the full child support and failing to make any significant attempt or good faith effort to pay the full child support. We conclude the district court did not err in finding Jerry's failure to pay support constituted indirect civil contempt. We also conclude the district court did not abuse its discretion in fashioning a remedy to allow Jerry to continue working during the week but spending weekends in jail if he refused to pay the full child support payment.

Jerry's final argument is that the district court erred in granting a judgment against him for medical expenses when Tamara failed to comply with the divorce decree and

property settlement concerning the payment of the medical expenses of the minor children. However, there was no timely appeal taken from the district court's order. We have no jurisdiction to consider this issue. See *Snodgrass*, 246 Kan. at 373.

Affirmed.