KS.SUP.CT.LAW.LIB. Fax:7852961863 Oct 19 2007 09:11 P.02

NOT DESIGNATED FOR PUBLICATION

No. 97,777

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

SUZANNE NELSON,
Appellant,

and

RONALD NELSON,
Appellee.

MEMORANDUM OPINION

Appeal from Miami District Court; RICHARD M. SMITH, judge. Opinion filed October 19, 2007. Affirmed.

Elizabeth Hill, of The Hill Law Firm, P.C., of Overland Park, for appellant.

Jerold A. Bressel, of Law Offices of Jerold A. Bressel, P.A., of Overland Park, for appellee.

Before MARQUARDT, P.J., BUSER, J., and LARSON, S.J.

Per Curiam: Suzanne Nelson appeals the trial court's child support and attorney fee orders. We affirm.

Suzanne and Ronald were married in 1982 and had two children; Leigh was born in 1986 and Britt was born in 1989. Suzanne filed for divorce in July 2001. A divorce decree was filed in December 2001 that incorporated the parties' permanent parenting plan agreement. The agreement specified that child support would terminate upon the occurrence of one of the following events: (1) a child's death; (2) a child's emancipation; or (3) the child's 18th birthday, unless the child is still attending high school, in which case the support should continue until June 30 in the year the child reaches 18 years of age.

Ronald reduced his child support payments when Leigh graduated from high school after she turned 18 in 2004.

In January 2006, Suzanne filed a motion for modification of the child support because Leigh had reached the age of 18, both parties had a change in income, and Britt's age moved her to a different age bracket on the Kansas Child Support Guidelines (Guidelines). She also filed an accusation in contempt against Ronald claiming child support arrearage.

At the hearing on Suzanne's motions, she announced that Ronald had agreed that child support for Britt should be $1,000 per month, so she dropped the contempt action. The trial court was asked to decide when the $1,000 amount would become effective.

Suzanne argued that the $1,000 per month should have started in June 2004 when support for Leigh ended. She also argued that Ronald was dishonest when he did not have the trial court order a new child support payment, which resulted in additional attorney fees for her. Suzanne requested $2,500 for her attorney fees, arguing that the parties were not in an equal position since Ronald was able to do most of the work himself.

Ronald argued that *Brady v. Brady,* 225 Kan. 485, 592 P.2d 865 (1979), allowed automatic child support termination once a child reaches the age of majority and has graduated from high school. He disputed Suzanne's claims about dishonesty, and claimed that neither party was required to return to court for the modification.

The trial court agreed with Ronald's interpretation of *Brady* and ordered his child support obligation set at $575 per month effective July 1, 2004, and increasing to $1,000 per month effective February 6, 2006. The trial court denied Suzanne's request for attorney fees. Suzanne appeals.

Timeliness of the Notice of Appeal

The child support journal entry was filed on October 23, 2006. Suzanne's notice of appeal was filed on November 27, 2006. Ronald argues that the notice of appeal was filed more than 30 days after the journal entry was filed, rendering the notice untimely. He urges that Suzanne's appeal should be dismissed on jurisdictional grounds.

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). In the absence of a statute authorizing an appeal, no appeal is available. *Nguyen v. IBP, Inc.*, 266 Kan. 580, 588, 972 P.2d 747 (1999). K.S.A. 60-2103(a) requires that all appeals be taken within 30 days from the entry of the judgment.

On its face, Suzanne's notice of appeal appears to be untimely. Suzanne did not address the timeliness of her notice of appeal in her brief. However, at oral argument to this court she stated that even though the notice of appeal was not timely, it should be accepted because of her attorney's excusable neglect when the appeal time was calendared in her office. No authority was given for excusable neglect in filing the notice of appeal.

K.S.A. 60-206(e) adds 3 days to the prescribed filing period for any document served by mail. In the instant case, there is no fax header on the journal entry to suggest that it was

filed by fax. Thus, we assume that the mail rule applies, and 3 days should be added to the 30-day period.

The 30th day after the journal entry was filed was November 22, 2006. Adding 3 days for mailing brings us to Saturday, November 25, 2006. Pursuant to K.S.A. 60-206(a), if the last day of the computed period is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Suzanne's notice of appeal was filed on Monday, November 27, 2006. Using the statutorily mandated method for counting days, Suzanne's notice of appeal is timely filed.

Modification of Child Support

On appeal, Suzanne argues that Ronald was required to file a motion to modify his child support obligation before reducing the amount of child support. Suzanne argues that the *Brady* decision is inconsistent with the Guidelines and contrary to K.S.A. 60-1610(a).

The standard of appellate review of a trial court's order determining the amount of child support is abuse of discretion. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 526, 920 P.2d 450 (1996). Inasmuch as this

issue requires us to interpret the meaning of a statute, our standard of review is plenary. See *Foster*, 281 Kan. at 374.

K.S.A. 60-1610(a)(1)(B) allows the trial court to order termination of child support when the child graduates high school after reaching age 18 earlier in the academic year.

In *Brady*, 225 Kan. 485, Syl. ¶ 4, the Kansas Supreme Court held that a child support order shall terminate when such child attains the age of 18, unless the support continues by prior written agreement of the parents. The court referred to this as the proportionate share rule of divisibility, and found it preferable to other methods because it avoids needless litigation, as neither party has to seek an immediate court order to alter a child support obligation. 225 Kan. at 491.

Brady has been applied by this court in cases decided after the adoption of the Guidelines. See *e.g., In re Marriage of Steven*, 30 Kan. App. 2d 794, 796, 48 P.3d 1284 (2002); *In re Marriage of Kasper*, 29 Kan. App. 2d 461, 464, 27 P.3d 948 (2001).

The parenting agreement which was incorporated in the Nelson's divorce decree includes language which conforms with K.S.A. 60-1610(a) and states that child support shall cease upon the occurrence of any one of the following events:

"3.4 Attainment by the child of his/her 18th birthday; however, in the event a minor child reaches the age of eighteen (18) years prior to graduation from high school, support for that child shall continue to and until June 30 of the school year in which such child reaches the age of eighteen (18) years, if the child is still attending high school."

The law in Kansas is clear. Ronald's child support obligation for Leigh terminated on June 30, 2004, because she turned 18 prior to the end of her final year of high school. This position is echoed in the relevant statute and in post-Guidelines case law.

This court is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *Noone v. Chalet of Wichita*, 32 Kan. App. 2d 1230, 1236, 96 P.3d 674, *rev. denied* 278 Kan. 846 (2004). This court may not overturn any Kansas Supreme Court decision.

The trial court correctly determined that Ronald's child support obligation to Leigh automatically terminated on June 30, 2004, which reduced his payment to $575 per month as of July 1, 2004. Once the parties stipulated to a new amount, the trial court correctly determined that February 6, 2006, is the effective date for the $1,000 per month support, which is 1 month after Suzanne filed her motion to modify. See K.S.A. 60-1610(a)(1). The trial court correctly established all of Ronald's child support obligations.

Attorney Fees

Suzanne argues that Ronald came to court with unclean hands, and that his behavior required that she file the motion to modify child support, which caused her to incur attorney fees. Suzanne notes that as a professional courtesy, her counsel attempted to handle this without utilizing the trial court, but that Ronald would never agree to fully settle the issue.

Generally, where the trial court has authority to grant attorney fees, its decision is reviewed under the abuse of discretion standard. *Tyler v. Employers Mut. Cas. Co.*, 274 Kan. 227, 242, 49 P.3d 511 (2002). K.S.A. 60-1610(b)(4) allows the trial court to award attorney fees "as justice and equity require."

Suzanne's arguments concerning Ronald's unclean hands and child support arrearage are without support in the record on appeal. Suzanne's most recent domestic relations affidavit shows her with gross wages of over $4,000 a month as a real estate agent. We see no evidence that the trial court's ruling on attorney fees was an abuse of discretion.

Affirmed.

NOT DESIGNATED FOR PUBLICATION

No. 98,109

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JENNIFER MALAN, f/k/a JENNIFER PACKARD,
Appellee,

and

SCOTT PACKARD,
Appellant.

MEMORANDUM OPINION

Appeal from Cherokee District Court; A.J. WACHTER, JR., judge. Opinion filed October 19, 2007. Affirmed.

Edward J. Battitori, of Meek & Battitori, of Baxter Springs, for appellant.

Robert L. Farmer, of Nuss & Farmer, P.A., of Fort Scott, for appellee.

Before MARQUARDT, P.J., BUSER, J., and LARSON, S.J.

Per Curiam: Scott Packard appeals the trial court's child support and visitation orders. We affirm.

Scott and Jennifer were married in 2002 and have one child. Jennifer filed for divorce in October 2005. The divorce decree was filed in February 2006; however, the issues relating to child custody were bifurcated and decided at a later date.

At the time the divorce decree was filed, Jennifer was living in Pittsburg and working in Carl Junction, Missouri, while Scott continued to reside in the family home in Chetopa. The two residences are located approximately 50 miles from each other. Prior to the final hearing on custody and visitation, the couple split their time with the child as follows: The first 2 weeks of the month, Jennifer dropped the child off at 5 p.m. at Scott's on Thursday and picked him up at 5 p.m. on Monday. The 3rd week of the month, Jennifer dropped the child off at 5 p.m. on Thursday and picked him up at noon on Sunday. The final week of the month, Jennifer dropped him off at 5 p.m. on Thursday and picked him up at 5 p.m. on Friday. Jennifer testified that this parenting schedule was supposed to be temporary.

At the hearing to settle child custody and visitation in late December 2006, Jennifer asked to be named primary residential parent, with Scott having visitation every other weekend and on alternating Wednesday nights. Scott wanted to keep things essentially the

way they were, although he agreed to be flexible on some of his visits so that Jennifer could have more quality weekend time with the child.

The trial court determined that both parents were capable and loving; however, it determined that the shared custody arrangement resulted in a lack of a permanent home and would create problems when the child started school. The trial court also noted that in Kansas, shared custody is generally disfavored. For those reasons, the trial court adopted Jennifer's parenting plan, with the addition of Scott having 8 consecutive weeks during the summer. The trial court also ordered Scott to maintain dental and health insurance coverage for the child. Scott timely appeals.

Scott contends that the shared custody schedule was not detrimental to the child. Scott believes the trial court had a duty to look at the facts of the case and determine the child's best interests. Scott also contends that the trial court used the child starting school in the future as a material change in circumstance for an immediate change in the parenting plan.

When the custody issue is between parents, the paramount consideration of the court is the welfare and best interests of the child. The trial court is in the best position to make the inquiry and determination. In the absence of an abuse of sound judicial discretion, the trial court's judgment will not be disturbed on appeal. *In re Marriage of Rayman*, 273 Kan.

996, 999, 47 P.3d 413 (2002).

In Kansas a court may change a prior custody order upon a showing of a material change in circumstances. The prior custody order may be a parenting plan which was agreed to by the parents. *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 887, 125 P.3d 1081 (2006). In this case, there is no prior custody order from the trial court. The only mention of visitation was Jennifer's testimony that the plan was temporary; Scott never denied this assertion.

An appellant has the duty to designate a record sufficient to establish the claimed error. Without an adequate record, the claim of alleged error fails. *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003). Given the lack of documentation, we have only Jennifer's uncontroverted testimony that the shared custody was a temporary plan. Jennifer need not prove a material change in circumstances to modify a temporary parenting plan. Rather, the plan entered by the trial court was essentially the first formal plan for this family. Given that fact, we must determine whether the order entered by the trial court was an abuse of discretion.

Our appellate courts have recognized that while trial courts have the power to decide custody between parents, it is generally agreed that shared custody should be avoided

whenever reasonably possible. It is thought that frequent shifting from one home environment to another could easily be detrimental to the emotional and physical well-being of any child. *In re A.F.*, 13 Kan. App. 2d 232, 237, 767 P.2d 846 (1989).

In the instant case, the temporary custody arrangement required the child to be in transit for approximately an hour during each frequent transfer between the parents. Jennifer had very little weekend time with the child, which meant that Scott had much more free time with the child. Scott admitted that he got more "quality" time with the child under the temporary schedule.

Further, Jennifer is a school teacher and generally keeps the same schedule as the child. She currently lives with her parents, so the child would not need a babysitter during the day. Scott is chief of security at the correctional facility in Labette Correctional Camp. His position requires him to be on call 1 week during the month. If he is called during that call week, he has to report to the facility. If Scott has the child and needs to go to work, the child stays with Scott's mother, who lives approximately 3 miles from Scott's home.

We have no doubt that both Jennifer and Scott are capable and loving parents. However, there is an advantage to the child having a primary home with stability. We do not believe that the trial court's final custody order was an abuse of discretion. The record on

appeal indicates that the trial court made its decision based on the best interests of the child.

When the trial court entered its custody and visitation order, it also required Scott to maintain health and dental insurance for the child, provided it is available through his work. Scott argues that the trial court erred when it ordered him to pay the child's health insurance. He claims that Jennifer had been paying it and neither party requested modification of that arrangement. Jennifer testified at the hearing that she was providing health insurance for the child. Scott testified that he was originally paying for the child's health insurance. This meant that for some period of time, both parents paid for health insurance.

Jennifer's child support worksheet shows that she was paying for the child's health insurance. There is no child support worksheet in the record on appeal from Scott. Without an adequate record on appeal regarding the health insurance, we are unable to evaluate this issue and, therefore, affirm the trial court's order. See *Alivio,* 275 Kan. at 172.

Affirmed.