NOT DESIGNATED FOR PUBLICATION

No. 98,197

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, *ex rel., et al.*,
Appellees,

v.

MICHAEL J. BUDDENHAGEN, *et al.*,
Appellants.

MEMORANDUM OPINION

Appeal from Crawford District Court; JOHN C. GARIGLIETTI, judge. Opinion filed March 14, 2008. Sentence vacated; case remanded with directions.

Michael J. Buddenhagen, appellant pro se.

Randy M. Barker, of Kansas Department of Social Rehabilitation Services, of Topeka, for appellees.

Before MARQUARDT, P.J., MALONE, J., and BRAZIL, S.J.

Per Curiam: Michael J. Buddenhagen appeals the district court's entry of default judgment for child support and costs. We vacate the judgment and remand for further proceedings.

On September 1, 2005, the Kansas Department of Social and Rehabilitation Services (SRS) filed a petition to establish paternity and set child support under the Kansas Parentage Act, K.S.A. 38-1110 *et seq.* The petition stated that N.M.C., the natural mother (Mother) of J.D.C., had indicated that J.D.C.'s father could be either Buddenhagen or Dan A. Kelly and requested a determination of paternity. The petition requested payment for past and future medical expenses, child support, and the costs of the proceeding.

The petition was served on Buddenhagen on September 6, 2005. Buddenhagen responded to the petition and sent a letter to SRS's attorney, Barbara A. Wright, on September 19, 2005, telling her that he had signed J.D.C.'s birth certificate as the father. He challenged the propriety of conducting a paternity proceeding since he had already acknowledged paternity to SRS. Buddenhagen also stated that he had been sentenced to 178 months in prison but hoped to be released in 12 to15 months, at which time he would assume his parenting obligations.

On October 21, 2005, SRS mailed notice of a *Ross* hearing to be held on December

15, 2005. See *In re Marriage of Ross*, 245 Kan. 591, 783 P.2d 331 (1989). On December 15, 2005, in a hearing at which Buddenhagen was not represented, the district court adopted the recommendations of the guardian ad litem and ordered genetic testing of Mother, J.D.C., Buddenhagen, and Kelly.

On July 10, 2006, the district court dismissed without prejudice SRS's petition for failure to prosecute. The case was reinstated August 1, 2006, after SRS received the results from the genetic testing which indicated a 99.99 percent probability that Buddenhagen was the natural father of J.D.C.

On August 16, 2006, SRS issued a notice to Buddenhagen that a hearing would be held at 10 a.m. on September 8, 2006. The notice did not provide any information regarding the purpose or subject of the hearing. On September 5, 2006, Buddenhagen filed a motion to allow him to participate in the hearing by telephone. He contested the paternity testing costs as unnecessary legal expenses, and requested the court's consideration of his current incarceration in assessing support obligations.

On September 25, 2006, the district court entered a default judgment, stating that Buddenhagen had failed to appear in person or by counsel at the hearing on September 8. The court adopted SRS's child support calculation, which imputed a monthly gross salary of

$893 to Buddenhagen. The court also ordered Buddenhagen to obtain and maintain health insurance coverage for J.D.C., to pay 50 percent of all uncovered or uninsured medical costs, and to reimburse the Aid to Dependent Children program $5,143.96 plus accrued interest, and assessed $147 for court costs against Buddenhagen. The district court ordered Buddenhagen to pay $128 per month for current child support, $42 per month for past due child support, and that up to 50 percent of Buddenhagen's income be withheld from his income each month.

Buddenhagen filed a timely notice of appeal.

Default Judgment

The district court found that Buddenhagen had failed to enter an appearance in the case. Buddenhagen claims he did enter an appearance. SRS appears to characterize the issue as a challenge to the district court's denial of Buddenhagen's request to participate in the hearing by telephone but then analyzes the issue as though Buddenhagen is challenging the propriety of the default judgment.

This court liberally construes pro se pleadings to give effect to the substance of the claims rather than the form in which they are presented. *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005). In his third issue, Buddenhagen contends that the

district court denied him due process by failing to comply with the notice provisions of K.S.A. 60-255(a) when it entered a default judgment. Buddenhagen claims: (1) he entered an appearance and (2) the court failed to provide proper notice before entering a default judgment.

Default judgments are governed by K.S.A. 60-255, and appellate review of the interpretation and application of a statute is unlimited. *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007). Similarly, whether a party's due process rights have been violated is also a question of law, subject to unlimited appellate review. *In re Creach*, 37 Kan. App. 2d 613, 618, 155 P.3d 719 (2007). Therefore, contrary to SRS's position on appeal, the standard of review of Buddenhagen's challenge to the default judgment is not an abuse of discretion.

K.S.A. 60-255(a) provides, in pertinent part:

> "Upon request and proper showing by the party entitled thereto, the judge shall render judgment against a party in default for the remedy to which the party is entitled. . . . If the party against whom judgment by default is sought has appeared in the action, he or she (or, if appearing by representative, his or her representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application."

According to the record on appeal, SRS did not move for a default judgment. Instead, the district court apparently, *sua sponte*, granted a default judgment against Buddenhagen after noting Buddenhagen's failure to appear at the hearing. On appeal, SRS attempts to justify the district court's action by arguing that default judgment was proper since Buddenhagen failed to defend against any of the claims.

SRS fails to provide any authority for its position, and, indeed, the weight of authority in Kansas is contrary to SRS's position. SRS's argument addresses the legally sufficient nature of Buddenhagen's responsive pleadings, but Kansas courts have clearly distinguished an "answer" from an "appearance" for purposes of default judgment. An "appearance," as that term is used in the Kansas Code of Civil Procedure, K.S.A. 60-101 *et seq.*, means an overt act by a party which apprises a party opponent, through the court, of an intent to deny or challenge the opponent's claim. See *Jones v. Main*, 196 Kan. 91, 92-94, 410 P.2d 303 (1966) (finding inarticulate response to garnishment petition sufficient to establish an appearance); *Sharp v. Sharp*, 196 Kan. 38, 40-42, 409 P.2d 1019 (1966) (finding motion for bill of particulars in a divorce case sufficient to constitute an appearance); *Midland Bank of Overland Park v. Rieke*, 18 Kan. App. 2d 830, 834, 861 P.2d 129 (1993) (informal contact with plaintiff insufficient to constitute appearance by defendant); *Hood v. Haynes*, 7 Kan. App. 2d 591, Syl. ¶ 1, 644 P.2d 1371 (1982) (informal contact with the court sufficient to constitute appearance).

In *Jones*, the Kansas Supreme Court stated:

> "Clearly, this garnishee defendant never intended for one moment to permit the inference that he owed Main so much as a farthing. That he may have been so unversed in the intricacies of the law as to omit from his answer certain formalities required by statute detracts not one whit from the authenticity of his intentions nor, for that matter, from the clear import of the language he actually employed. We believe the inference may safely be drawn that Perfecto, in his untutored way, did what he believed was necessary to make plain to the plaintiffs, through the processes of court, that he owed Main nothing. We believe further that what Perfecto did to convey that intelligence to the Joneses fairly constituted an appearance within the contemplation of the statute." 196 Kan. at 94.

Similar comments apply to Buddenhagen's responses to the petition in this case. As SRS concedes, Buddenhagen filed a letter answer to the petition to determine parentage. Even though Buddenhagen admitted paternity, he challenged the propriety of pursuing genetic testing and unnecessary legal proceedings to establish paternity. He also noted, "I was just sentenced to 178 months in the Kansas Dept. of Corrections [*sic*] although I am confident I will win my appeal and be released within the next 12-15 months, I will more than likely be getting a job that will afford me to pay my support obligations." The clear implication of this statement was that Buddenhagen was not capable of paying his support obligations while he is in prison.

On September 5, 2006, Buddenhagen filed his "Response to Pleadings and Motion to be Heard by Phone Conference." In part, Buddenhagen requested:

> "Defendant respectfully requests that the Court take into consideration his current circumstances in it's [*sic*] Judgement [*sic*] and Order pursuant to K.S.A. 38-1121 et seq., in that:
>
> "1. Defendant is incarcerated in the Kansas Department of Corrections with a release date of November 11, 2017.
>
> "2. Defendant is currently indigent. . . .
>
> "3. Defendant takes full responsibility for his parenting of [J.D.C.], however, for the State to order further support to accrue for the next 11 years would place additional hardship on Defendant and place him at a poor advantage of starting over upon release."

Buddenhagen acknowledged his financial responsibilities to J.D.C.; however, he asked the court to consider his incarceration and consequent inability to provide for J.D.C. immediately. Notably, Buddenhagen is not challenging based on his inability to participate in the *Ross* hearing designed specifically to address the paternity question. Buddenhagen does challenge his exclusion from the September 9 hearing to establish child support. Buddenhagen's request is in opposition to SRS's request for child support to be imposed by the court. Buddenhagen's responses to the petition constitute an appearance within the meaning of K.S.A. 60-255(a).

Because SRS and the district court failed to comply with the procedure established by K.S.A. 60-255(a), the judgment against Buddenhagen is vacated and the case is remanded for further proceedings.