NOT DESIGNATED FOR PUBLICATION

No. 99,138

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

MARY E. WAGGONER,
Appellee,

and

CALVIN LAMBERT,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; RICHARD J. ROME, judge. Opinion filed June 5, 2009. Affirmed.

Terry Bruce and *Gregory D. Bell*, of Forker, Suter & Rose, of Hutchinson, for the appellant.

Myndee M. Reed and *Arlyn Miller*, of Martindell Swearer & Shaffer LLP, of Hutchinson, for the appellee.

Before CAPLINGER, P.J., BUSER, J., and BUKATY, S.J.

Per Curiam: Calvin Lambert appeals the decision of the district court denying his motion to decrease his child support payments. He argues the court erred in ruling there was not a material change in circumstances that would allow a decrease in support. We find while there was a material change in circumstances, namely, a substantial decrease in Calvin's income, the court did not abuse its discretion in denying the motion under the facts presented here. We affirm.

The relevant facts begin when Calvin and Mary Lambert were granted a divorce in October 1998 on grounds of incompatibility after a 15-year marriage. The district court ordered joint custody of the parties' three young children with Mary having residential placement. It ordered Calvin to pay child support in the amount of $1,689 per month based on a salary of approximately $100,000 per year. This support obligation increased several times over the years based upon both the older ages of the children and the increases in Calvin's income. In July 2005, the court set Calvin's child support payment at $2,569 per month. His annual income at the time was over $160,000.

On August 31, 2005, about 6 weeks after this increase, Calvin submitted his resignation to his employer, Waggoners Inc. (Waggoners). The company manufactures and sells cushions for church pews. It is owned by three of Mary's brothers. Calvin had worked for the company since 1993 and was a sales representative working on

commissions only at the time he resigned. Calvin claimed he left the company because of increased stress due to travel and office hours and he wanted to spend more time with his children and other family. He also claimed he was treated differently by his former in-laws after the divorce and there were such things as new ceilings placed on his commission levels.

Calvin went to work with Sauder Manufacturing (Sauder) as a sales representative. Sauder sold worship furniture such as pews, chairs, and auditorium seating. In order to work for Sauder, Calvin had to establish himself as an independent contractor by incorporating his own business. He set up a corporation, Lambert & Associates (L&A), in order to accomplish this. Sauder paid L&A on a commission basis. Calvin continued to receive commission checks from Waggoners through the end of February 2006 for work he had done before he resigned. He testified that his L&A had not grown to the amount of commissions he had at Waggoners, but L&A income was growing. His tax returns for 2006 indicated a taxable income of $61,414, of which $25,000 was from his current wife Diana, and the remainder from his commissions from Waggoners.

By way of brief background, as of November, 2006, Calvin was in arrears in his child support payments in the amount of nearly $10,000. Mary filed a motion to find him in contempt for failure to pay. On December 5, 2006, Calvin filed a motion to modify

child support based upon the substantial decrease in his income following his resignation from Waggoners. The district court dismissed the motion due to Calvin's failure to file a domestic relations affidavit. By May 2007, Calvin was in arrears in the amount of $21,093.30 and the court gave him until June 29, 2007, to purge himself of the contempt by paying the arrearage.

In June 2007, Calvin refiled his motion to reduce support. A few weeks later, the district court heard evidence on the motion. At the hearing, Calvin testified that he took out a loan from Sauder for $21,093.30 to pay his arrearage and he was now current on his child support. A percentage of his commissions from Sauder goes to pay back the loan. He also testified that he had received a loan from Sauder for nearly $70,000 to help pay for start-up costs for L&A.

Calvin testified he did not quit his employment at Waggoners to intentionally reduce his income and his child support payments. He maintained that he works earnestly and diligently for Sauder and his income is currently a monthly stipend of $1,200. Diana is the financial overseer for L&A and she testified that L&A lost $19,017 in 2005 and $6,547 in 2006.

Paul Waggoner, Mary's brother and one of Waggoners' principle owners, testified that the company had not treated Calvin any differently after his divorce from Mary than they had during the 5 years Calvin worked for the company before the divorce. Paul said they were shocked when Calvin resigned and he thought Calvin had done a great job for Waggoners. He said they treated all sales employees the same and did not force Calvin to work any excess hours. Waggoners had placed a ceiling on commissions but that was done before Calvin and Mary's divorce. He testified that Calvin's last performance review before he quit was positive and favorable.

After hearing the evidence, the district court denied Calvin's motion to reduce child support. The court commented that child support monies are for the benefit of the affected children and the amount determined is in theory an amount in the children's best interest based on Calvin's income. The judge stated, "And I believe that there has not been a substantial change of circumstances shown by [Calvin] in this case. I - - he voluntarily and knowingly quit that job." In commenting on Calvin's quality of life argument, the court stated:

> "But we have to - - we have to take life the way it comes and - - and also look at the amount of money that - - that goes into their households, the defendant's household. I can't add it all up, but there are a lot of benefits - - telephone lines, computer line, I guess, and I don't know what all is paid out. But

that money is money that he generates, and I have not added it all up, but it is substantial."

Calvin argues in his only issue on appeal that the district court erred in finding that because he was voluntarily underemployed, there was not a material change in circumstances. He concedes that he was underemployed since his income was substantially less than he was earning at Waggoners, but argues there was no evidence he left that company for the purpose of avoiding his child support obligation. There is only evidence that he miscalculated in leaving secure employment and starting his own business venture with uncertain income.

We review a district court's determination of child support for abuse of discretion. *In re Marriage of Case*, 19 Kan. App. 2d 883, 889, 879 P.2d 632, *rev. denied* 255 Kan. 1002 (1994). If reasonable persons could disagree with each other about the propriety of the action taken by the district court, the court did not abuse its discretion. *In re Marriage of Cray*, 254 Kan. 376, 387, 867 P.2d 291 (1994).

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. K.S.A. 2008 Supp. 60-1610(a)(1); *In re Marriage of Schoby*, 269 Kan. 114, Syl. ¶ 4, 4 P.3d 604 (2000). In the end, what constitutes a material change in circumstances depends on the facts of a

specific case, but the change should be material, involuntary, and permanent in nature. 1 Elrod, Kansas Family Law Handbook § 14.042B, p. 14-23 (rev.1990); see also *In re Marriage of Johnson*, 24 Kan. App. 2d 631, 633, 950 P.2d 267 (1997), *rev. denied* 264 Kan. 821 (1998).

We initially observe as a technical point, that to the extent the district court found there had not been a material change in circumstances that would permit it to review Calvin's child support order, it erred. Clearly, Calvin experienced a change in financial circumstances contemplated by Kansas Child Support Guidelines (KCSG). Section V.A. of those provisions specify that one of the material changes in circumstances that warrants judicial review of support orders is a: "Change of financial circumstances of the parents or the guidelines which would increase or decrease by 10% [the parents' support obligation]." 2008 Kan. Ct. R. Annot. 131.

A material change in circumstances is simply a precondition that must be met by a party seeking adjustment of their child support obligation. Calvin met that condition. The essence of the district court's ruling, however, was that Calvin "voluntarily and knowingly quit that job." We view the court's finding in this regard not so much as a finding that there was no material change of circumstances as much as it was, in essence, a ruling that it would continue to use Calvin's previous income at Waggoners in

computing his child support since his leaving there was voluntary. We find no abuse of discretion in that ruling. See *In re Marriage of Bradley*, 282 Kan.1, 8, 137 P.3d 1030 (2006) (If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.).

Under Section II.F. of the KCSG, income may be imputed to the noncustodial parent if that parent is deliberately unemployed or underemployed. 2008 Kan. Ct. R. Annot. 114; *In re Marriage of Scott*, 263 Kan. 638, 645, 952 P.2d 1318 (1998). Specifically, Section II(F)(1)(d) provides: "When there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the court may evaluate the circumstances to determine whether actual or potential earnings should be used." 2008 Kan. Ct. R. Annot. 114; See *In re Marriage of Johnson*, 24 Kan. App. 2d at 634.

This court has previously observed that a voluntary decision to change from higher paid employment to accept lower paid employment by a parent who owes child support is "always suspect." *In re Marriage of Case*, 19 Kan. App. 2d 883, Syl. ¶1. In *Case*, Sue Ann Miller and Carlton Case were granted a divorce in 1989, and Case was ordered to pay $800 a month in child support. At the time of the divorce, Case worked for Southwestern Bell and earned approximately $35,000 a year. Miller earned $25,152 a

year as a schoolteacher. In 1991, Case accepted a voluntary buy-out offer from Southwestern Bell and retired on December 31. However, Case believed from newspaper articles that if he did not accept the buy-out, he would lose his job or be transferred away from Topeka. Case did not want to leave Topeka because his children were there, so he accepted the buy-out. Case looked for other similar jobs in Topeka and looked for job opportunities in the classified ads. However, he did not submit any job applications after leaving Southwestern Bell. Instead, Case learned a major Topeka photography studio would be closing and he decided to open his own photography studio. His income declined dramatically while operating the photo studio, and in 1992, had amounted to a gross annual amount of $6,180. Case then filed a motion to reduce child support. The district court found there had been a material change in circumstances for Case which justified a modification in the amount of his support. While it found Case was not purposefully underemployed, it did determine that it must impute to him a higher income than he was actually earning at the photo studio in calculating his support obligation.

This court affirmed the district court. Even though it upheld a court ruling somewhat different than the one in this case, it stated two principles relevant to the present case. It observed that its abuse of discretion standard of review would have permitted it to also affirm a contrary finding by the district court. It also stated that in the instance of a voluntary termination of employment, "Before such a change in

circumstances can be used as a justification to reduce support, the trier of fact must be convinced the termination was for rational and sufficient reasons, and that the obligor cannot in fact obtain appropriate employment at a similar wage." 19 Kan. App. 2d 890.

Applying these rules from Case, we find no abuse of discretion in the district court's decision here.

To begin with, Calvin has failed to articulate rational and sufficient reasons for leaving a well paying position at Waggoners to engage in the same type of work at far less compensation. He admitted at the hearing on his motion that he had been told by other sales representatives it would take 2 years to start an income flow when starting his own business, although he thought it would only take him 1 year. Yet he left Waggoners, with full knowledge that at that time he had family expenses of $84,000 per year plus a support obligation that amounted to $30,828 per year. Also, it appears from the evidence that Calvin is working similar hours now and traveling about as much as he was with Waggoners. His arguments about leaving for a better "quality of life" are not supported by the record. Also, it appears that the changes Waggoners made in compensation rules that Calvin apparently did not like were made prior to the divorce and applied to all employees equally. There is no explanation why Calvin stayed with the company for 7 years following the divorce and only decided to make a change in 2005.

All of this makes the timing of Calvin's resignation from Waggoners appear suspicious. He gave notice of that resignation approximately 6 weeks after the district court again increased his child support in light of his increasing income. We acknowledge that Calvin did not file a motion to decrease support until some 15 months after he left Waggoners and this might weigh in his favor of his argument he did not change employment for the purpose of avoiding child support. However, it is just one factor in the mix of circumstances the district court had to consider.

We also note that the district court had difficulty determining exactly how much income Calvin receives from L&A. From our review of the record, we confess to the same difficulty. Although L&A pays Calvin a small amount of money ($1200 per month) and only began paying that several months after he had left Waggoners, L&A pays and has paid in the past a large amount of personal expenses on behalf of Calvin and Diana. Those include: health, life and homeowners insurance; cell phones; internet; unreimbursed medical expenses; and a substantial portion of the mortgage on the house. In light of this evidence, the claim of Calvin on his domestic relations affidavit that his only income is $1200 a month has questionable credibility.

Cases such as this where a noncustodial parent voluntarily changes jobs require the courts to balance competing factors. On the one hand, there is the legitimate interest of a parent to have freedom to pursue other employment and business opportunities. On the other hand, there is the interest of the minor children in having a standard of living consistent with the one they have had for several years. One commentator in this area of the law suggests that neither factor should win out over the other in every case.

> "An intermediate test offers the best way of resolving voluntary reduction of income issues involving employment related decisions. The good faith approach, which places primacy on individual freedoms, excludes consideration of the needs of the persons to whom support obligations run. The strict approach places primacy on the responsibility of the obligor to meet support obligations, to the exclusion of other legitimate and significant factors. An intermediate approach, however, permits a court, after considering the relevant factors, to make the best possible reconciliation of the conflicting interests of support and individual freedom." Becker, *Spousal and Child Support and the 'Voluntary Reduction of Income' Doctrine*, 29 Conn. L. Rev. 647, 673, (Winter 1997).

Kansas cases have recognized the delicate balance that must sometimes be reached between these so-called good faith and strict approaches. See, *e.g., In re Marriage of McNeely*, 15 Kan. App. 2d 762, 766-67, 815 P.2d 1125, *rev. denied* 249 Kan. 776 (1991) (noncustodial father was about to enter law school and reduce his income, but this court held that the trial court could properly impute his prior income to him because, as parent

of a child of tender years, the father might have to sacrifice and delay law school until the children's mother had received her undergraduate degree or at least support the children as if he was delaying law school).

We reiterate that our standard of review is abuse of discretion. *Case*, 19 Kan. App. 2d at 889. The district court was familiar with the parties. It heard the evidence, weighed that evidence, and then determined essentially that Calvin's child support obligation outweighed his right to voluntarily terminate his employment at Waggoners. Inherent in this decision was the question of who should bear the brunt of Calvin's miscalculation of how long it would take to resurrect his income stream. The district court found Calvin should shoulder this burden. Because some reasonable people may agree with the propriety of this decision and other reasonable people may not, we find no abuse of the court's discretion. *Cray*, 254 Kan. at 387.

Affirmed.