NOT DESIGNATED FOR PUBLICATION

No. 101,124

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, *ex rel.*
JAKEEIA SISK, JEROME SISK, JR., JERRIE D. SISK, and
THE SECRETARY OF SOCIAL AND REHABILITATION SERVICES,
Appellees,

v.

JEROME A. SISK,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ANTHONY J. POWELL, judge. Opinion filed January 29, 2010. Affirmed.

Clifford L. Bertholf, of Wichita, for the appellant.

Joy Kay Williams, of Office of the Court Trustee, of Wichita, for the appellees.

Before MARQUARDT, P.J, PIERRON, J., and BUKATY, S.J.

Per Curiam: This case began in 1993 when Jerome Sisk was ordered to pay monthly child support for his two minor children. Over the years, Sisk did not make his monthly payments as ordered, and a substantial arrearage developed. In December 2000,

the essential parties appeared before a hearing officer on a motion Sisk filed to modify his support order. According to the order entered by the hearing officer following that proceeding, the parties agreed that Sisk's child support arrearage amounted to $41,922.01 and that Sisk should pay a monthly amount towards that arrearage plus an amount for current support.

Nearly 7 years after entry of this order and after numerous proceedings were held concerning Sisk's failure to pay his current and arrearage child support payments as ordered, he moved to set aside the above order and to again determine the amount of his arrearage. He sought relief under K.S.A. 60-260(b)(4) and (6). Specifically, he alleged that the prior order was void because he had never received notice that the amount of his arrearage would be in issue at the hearing when it was determined and that this amounted to a violation of his right to due process. Sisk also maintained that he should owe only a portion of the arrearage because he had actual custody of his minor children during part of the time leading up to December 2000. Both the hearing officer and the trial court rejected Sisk's arguments and denied his motion. Sisk now appeals from the trial court's decision.

We find there is no basis under the statutes cited by Sisk to set aside the determination of arrearage made in 2000 and affirm.

The facts relevant to the legal issues in this appeal are essentially undisputed.

By way of a default judgment, Sisk was ordered to pay monthly child support payments to the mother of his two minor children (dates of birth 03/22/85 and 10/05/86), beginning December 1, 1993.

Sisk filed a motion several years later to reduce those child support payments, and a hearing was held on that motion on December 27, 2000. The only document in this appellate record from that hearing is the order that resulted from it which was filed January 2, 2001. It reflects that Sisk along with the mother of the children (Mother) and a representative of the State were present at the hearing. The order further provided as follows: The Court is advised that the parties have reached *an agreement upon the issues before it.* "Whereupon the Court *adopts the agreement of the parties as the order of the Court* as set forth below." (Emphasis added.) The order then recited the terms of that agreement in eight separate numbered paragraphs.

The order reflects that the parties agreed that Sisk would pay monthly child support payments of $347. That apparently was a decrease from the $464 ordered originally in 1993. In addition, the parties agreed that Sisk had a child support arrearage in the amount of $41,922.01 as of December 26, 2000, and that judgment for said sum should be granted against Sisk. The parties further agreed that Sisk would pay $232 per month towards his arrearage. Sisk, Mother, and the representative of the State all signed the order under the notation "APPROVED AS TO FORM."

The next court proceeding occurred in May 2001, when Sisk moved to obtain the custody of his minor children and to terminate his current child support obligation. The court ultimately dismissed the motion. The docket notes reflect "NO APPEARANCE" on this motion.

On November 26, 2003, Sisk appeared with his attorney at a hearing on an accusation in contempt based on his failure to pay child support. Sisk pled guilty to the contempt charges. When the State insisted on having the amount of the arrearage in the journal entry, Sisk's attorney stated that he would like to have an opportunity to look into the arrearage amount. The State maintained, however, that there had already been a $41,922 judgment for child support arrearages entered at the hearing in December 2000. The hearing officer then suggested that Sisk file a proper motion in order to adjust the arrearage. Sisk's attorney indicated that Sisk might not even challenge the arrearage: "And we are not necessarily arguing that. We don't know that we are going to contest that."

The hearing officer found that Sisk owed the amount of $45,603.94, as of October 11, 2002, and that judgment for that amount plus statutory interest should be entered against Sisk. The hearing officer placed Sisk on probation for 3 years with an underlying 12-month jail sentence. Further, he reiterated that Sisk was to pay $347 a month toward his current child support obligation and $232 a month toward his arrearage. At the end of

his orders, he wrote, "Arrearage amount to be determined at a later date per motion of respondent." Both Sisk and the representative of the State signed the written order under the notation "APPROVED AS TO FORM."

The hearing officer next scheduled a hearing in December 2005 on the State's motion to revoke probation based upon Sisk's failure to make his payments as ordered. Sisk failed to appear at the hearing. In a written order, the hearing officer found as follows: Sisk had failed to pay as required, the case now involved arrearages only, Sisk's probation should be revoked and then reinstated for 3 years with an underlying 12-month jail sentence, Sisk could purge himself of contempt with the payment of $40,000, and Sisk be ordered to pay $225 per month towards his child support arrearages. Again, Sisk's attorney signed the order after the notation "APPROVED AS TO FORM."

In March 2007, the State again moved to revoke Sisk's probation based upon his failure to make his monthly child support payments. At a hearing the following July, the parties agreed that Sisk was in violation of the orders in the December 2005 journal entry. The matter was continued, however, to allow Sisk to file certain motions.

Then in September 2007, Sisk at last filed a motion to determine his child support arrearage. He also moved under K.S.A. 60-260(b)(4) and (6) to set aside any prior order determining that arrearage. At a hearing a few months later on the motion, Sisk argued that the December 27, 2000, order, which determined the arrearage to be $41,922.01, was

void because he had never been given notice that the arrearage was to be determined at that time and this violated his right to due process. Additionally he contended he had actual custody of his minor children during much of the time that he had been ordered to pay support and he should owe only a portion of the alleged arrearage.

The hearing officer denied the motion, finding Sisk had been afforded sufficient due process, the doctrine of res judicata applied to prevent a redetermination of arrearages, and Sisk's motion was not filed within a reasonable time.

Sisk appealed to the district court, and the court denied the appeal in a lengthy memorandum.

Is the Order that Determined the Child Support Arrearage Void Under K.S.A. 60-260(b)(4)

Sisk first contends the trial court erred in refusing to set aside the determination of his child support arrearage entered on December 27, 2000, as void under K.S.A. 60-260(b)(4).

K.S.A. 60-260(b) provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (4) the judgment is void. . . . The motion shall be made within a reasonable time."

Our Supreme Court recently set forth the standard of review to be applied when a party attacks a judgment as void under this section:

> "Although abuse of discretion is generally the correct standard for review of district court decisions under K.S.A. 60-260(b), [citation omitted], this is not so when a judgment is attacked as void under K.S.A. 60-260(b)(4). A judgment is void and therefore a nullity if a court lacked jurisdiction to render it or acted in a manner inconsistent with due process. [Citations omitted.] A district court has no discretion to exercise in such a case; either a judgment is valid or it is void as a matter of law. Thus, a reviewing appellate court must apply a de novo standard once a district court has made the necessary findings of fact. [Citations omitted.]" *In re Adoption of A.A.T.*, 287 Kan. 530, 598, 196 P.3d 1180 (2008).

In this case, the district court never held an evidentiary hearing, and its findings are essentially undisputed. As a result, we need not scrutinize those factual findings, and the question of whether the judgment here is void for lack of due process is solely a question of law over which we have de novo review.

Although the K.S.A. 60-260(b) requires the motion to be made within a reasonable time, our Supreme Court has held a void judgment is a nullity and may be vacated at any time. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997); see also *Sramek v. Sramek*, 17 Kan. App. 2d 573, 576, 840 P.2d 553 (1992), *rev. denied* 252 Kan. 1093 (1993) ('A judgment that is void for lack of due process may be set aside at any time.' [Citation omitted.]"); *Barkley v. Toland*, 7 Kan. App. 2d 625, 630, 646 P.2d 1124, *rev. denied* 231 Kan. 799 (1982) ("[A] motion to set aside a void judgment can be made at any time, since the passage of time cannot cure the defect in the judgment."). Therefore, Sisk's motion to set aside the child support arrearage judgment cannot be deemed untimely if the judgment was in fact void for lack of due process. This does not provide a basis for reversal, however, because the trial court went on to address the merits of the motion and found Sisk was afforded due process. We agree with that determination.

Sisk argues that the January 2001 order is void because the determination of the arrearage amount was made without notice, without a hearing, and without an opportunity for him to inform the hearing officer of the facts.

Sisk fails to cite any case that is on point with the present case. Although he cites a number of cases to support his position, the cases are easily distinguishable from the case at hand. See *In re Gault*, 387 US. 1, 33-34, 18 L. ed. 2d 527, 87 S. Ct. 1428 (1967) (involving juvenile court proceeding held after arrest of juvenile where adequate notice of

charges was not given in advance of hearing); *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983) (holding that plaintiff denied due process where in contested post-termination hearing, he was not given notice of all reasons for termination until hearing); *State v. Buckle*, 4 Kan. App. 2d 250, 604 P.2d 743 (1979) (determining that trial court should not have rendered judgment against third party in contested bond forfeiture hearing where notice of hearing served on third party stated only that judgment was sought against third party's son); *Bethany Medical Center v. Niyazi*, 18 Kan. App. 2d 80, 82-83, 847 P.2d 1341 (1993) (setting aside default judgment entered before expiration of statutory answer time; such judgment was denial of due process); *Sramek*, 17 Kan. App. 2d at 575-76 (holding that judgment in proceeding to hold father in contempt for failure to pay child support was void where order to appear was not served in compliance with contempt statute; father did not appear in person or through counsel at hearing);

Here, unlike the cases cited previously, Sisk was the one who initiated the proceedings and actually placed the amount of his child support in issue when he moved to modify his child support payments. Granted, his motion only sought a reduction in the amount of current support to be paid. He had to know, however, that in modifying monthly child support payments, the district court may also set an amount for him to pay toward the arrearages and the actual amount of those arrearages would have to be determined in order to accomplish that. Thus, when Smith filed his motion to modify child support, he should have been on notice that the amount of his child support obligation (past and present) was subject to inquiry and determination.

Moreover, the most distinguishing fact separating the present case from the cases cited by Sisk is that Sisk participated in the proceedings and agreed to the $41,922.01 arrearage amount. The appellate record shows that Sisk appeared at the December 27, 2000 hearing and, presumably had an opportunity to be heard on the arrearage issue. Nowhere, however, is it indicated that Sisk ever contested the amount of the arrearage at that hearing, or moved for a continuance, or asked to present evidence on the arrearage issue. Instead, Sisk signed the order, which stated that he agreed to the $41,922.01 arrearage amount and also the monthly payments towards that amount. After the filing of the order, Sisk never asked for reconsideration of the arrearage amount, nor did he appeal the order.

It appears then, that Sisk waived any defects in the initial notice concerning the amount of his child support arrearage by his appearance at the hearing and then his agreeing to the arrearage amount. See *Hein v. Board of Eduation., U.S.D. No. 238*, 10 Kan. App. 2d 303, Syl., 698 P.2d 388, *rev. denied* 237 Kan 886 (1985) (holding that appellant's request for hearing and his subsequent participation therein constituted waiver of any deficiencies in the notice).

Moreover, the facts we have set forth reflect that on other occasions Sisk appeared in court regarding child support issues after the hearing officer made the arrearage determination in December 2000 and acknowledged either personally or through his

attorney that he was aware of the arrearage determination. He then never did anything about it until he filed the current motion. On one occasion, his counsel even indicated he did not think Sisk was contesting the amount.

The trial court did not err in refusing to find that the determination of arrearage entered in December 2000 was void under K.S.A. 60-260(b)(6).

Sisk's Request for Relief Under K.S.A. 60-260(b)(6)

Finally, Sisk argues that the judgment for child support arrearages should be set aside under K.S.A. 60-260(b)(6) because the hearing officer would have never entered the judgment if he had known the actual facts at the time.

K.S.A. 60-260(b) enumerates six grounds allowing a trial court to relieve a party from a final judgment. K.S.A. 60-260(b)(6) is the general catch-all provision, which allows a trial court to relieve a party from a final judgment or order for any other reason justifying relief from the operation of the judgment. A party seeking relief under K.S.A. 60-260(b)(6) must do so within a reasonable time.

Whether to grant relief on a motion for relief from judgment under K.S.A. 60-260(b)(6) rests within the sound discretion of the trial court. Absent an abuse of that

discretion, the trial court's ruling will not be disturbed. *In re Marriage of Lane*, 34 Kan. App. 2d 519, 522, 120 P.3d 802 (2005), *rev. denied* 281 Kan. 1378 (2006).

Specifically, Sisk contends that his children moved into his home and resided with him for a substantial period of time prior to the entry of the arrearage determination in December 2000 and if the hearing officer had known that fact, he would not have found an arrearage in the amount of $41,922.01.

To support his argument on this issue, Sisk cites *In re Marriage of Hunt*, 10 Kan. App. 2d 254, 697 P.2d 80 (1985). *Hunt* involved a divorce action in which the trial court granted the wife's motion for relief from judgment under K.S.A. 60-260(b)(6). The court set aside its original order of maintenance of $200 per month that was in the divorce decree and replaced it with an order of $400 per month. The trial court based its decision on the fact that the wife did not discover until after the divorce decree had been filed that her husband had resumed his job with the National Guard and was earning significantly more money than what he had previously testified to. The wife had filed her motion to set aside the judgment within a year of the entry of the original order of maintenance.

Hunt is distinguishable from the situation in this case. Here, unlike the wife in *Hunt*, Sisk knew about the information that could have affected the trial court's order. If Smith's representations are true, he is the one who had custody of the children and should have informed the trial court of this fact. Yet, he signed off on the January 2001 order

determining his child support arrearage and never seriously pursued a modification of child support until many years later. He apparently did move to terminate his child support obligation in May 2001, but he failed to pursue his motion, and the court ultimately dismissed it. Not until he filed his motion in September 2007, nearly 7 years after the December 2000 hearing, did Sisk challenge the arrearage amount. Additionally, under the circumstances here, nearly 7 years is not a reasonable time to seek relief under K.S.A. 60-260(b)(6). The trial court stated this very well when it said:

> "At the December 27, 2000, [hearing] where the arrearage amount was originally set, it is true that Mr. Sisk was without the benefit of counsel, but according to the order, he *agreed* to the arrearage finding—an arrearage finding stating that he owed $41,922.01. A significant sum for any person to have to contemplate repaying. Yet despite this large judgment against him, Mr. Sisk hardly showed any urgency about the matter. He had numerous opportunities subsequent to this order, with the assistance of counsel, to seek to overturn or modify the arrearage order. For example, as early as 2003, Mr. Sisk's counsel raised the issue of the arrearage but did nothing about it until his present motion which was filed in 2007. He was even invited by the Hearing Officer to raise the issue by motion, but yet did nothing. That is a passage of time in excess of four years. Even more astounding is that Mr. Sisk admitted to being in contempt of court without making a formal request to challenge the accuracy of the arrearage figure.
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> " . . . Mr. Sisk now asks the court to believe that during significant period of time he was under a child support order, he was the one who had custody of his minor children. One would think with so much at stake, and

having the benefit of counsel, at least at subsequent proceedings, that urgent steps would have been taken to reverse what Mr. Sisk claims to be a very harsh order. Inexplicably, he never did until the 11th hour."

Sisk's failure to take any action on the child support arrearage judgment amount for such a long period of time precludes a ruling in his favor on this issue. The power given to a court to set aside a judgment under K.S.A. 60-260(b)(6) is not provided in order to relieve a party from free, calculated and deliberate choices he or she has made. The party remains under a duty to take legal steps to protect his or interest. *Chowning, Inc. v. Dupree*, 6 Kan. App. 2d 140, 143, 626 P.2d 1240 (1981) (citing *Neagle v. Brooks*, 203 Kan. 323, Syl. ¶ 5, 454 P.2d 544 [1969]). Based on the circumstances present in this case, we find no abuse of discretion in the trial court's ruling on this issue.

Affirmed.