NOT DESIGNATED FOR PUBLICATION

No. 108,141

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

KARIN EVERETT (Formerly Zipper),
Appellee,

and

RONALD ZIPPER,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed February 15, 2013. Reversed and remanded with directions.

Joseph W. Booth, of Lenexa, for appellant.

No appearance for appellee.

Before ATCHESON, P.J., PIERRON, J., and LARSON, S.J.

PIERRON, J.: Ronald Zipper appeals the increase in the amount of his child support payments. He argues there was insufficient evidence to support the district court's decision to impute income to him in the amount of $125,000. We agree with Ronald based on a lack of substantial competent evidence to support the imputed income.

Ronald and Karin Everett (formerly Zipper) were married in July 1993. The couple had one child, B.Z., born in May 1994. Karin filed for divorce on September 14, 1999, when B.Z. was 5 years old. On June 25, 2001, the district court granted a divorce based on incompatibility and gave both parents joint custody of B.Z. Beginning July 15,

2001, the parties agreed that Ronald would pay monthly child support payments of $1,200 and spousal maintenance of $1,000.

On December 29, 2004, 4 years after the divorce, Ronald and Karin entered into an agreed order wherein they shared equal physical custody of B.Z. and Ronald's child support payment was reduced to $326 per month. The child support payments were based in part on a child support worksheet submitted by Karin showing her annual income was $50,000 and Ronald's annual income was $65,000. Over the next several years, Karin and Ronald engaged in a bitter custody battle over B.Z. including allegations of abuse, custody investigations, and court-ordered mediation. Ronald's contact with B.Z. became limited.

On May 24, 2011, Karin filed a motion to modify child support. B.Z. was 17 years old at the time. Karin supported the motion with the following reason: "Child support had not been modified in the above captioned case for more than three years and therefore no material change in circumstances is required to justify the requested modification." Karin later submitted a child support worksheet indicating her annual income was $71,248 and Ronald's was $62,193. On September 16, 2011, a district court hearing officer heard Karin's motion for modification of support. The hearing officer found Karin's annual income was $64,764 and Ronald's was $54,912. The hearing officer concluded:

> "After taking the motion under advisement, the Hearing Officer finds that the IRA withdrawals reported as income by [Ronald] for the previous tax years should not be included in his gross income for child support purposes as such withdrawals are not regular income; [Ronald] produced documents at the hearing that would indicate that his account is nearly depleted. Effective July 1, 2011, [Ronald] shall pay child support in the amount of $741 per month."

The hearing officer attached a child support worksheet using the above stated annual incomes in figuring Ronald's child support obligation.

Ronald appealed the hearing officer's decision to the district court alleging the effective date of any modified order should be prospective and the hearing officer improperly calculated his income because he had not received a paycheck since March 2010. Ronald also filed a motion to terminate child support because he was not allowed any parenting time with B.Z. At the hearing before the district court, the parties stipulated to Karin's income but disputed Ronald's income. The district court heard evidence concerning Ronald's medical practice, how it was losing money, and how Ronald was using money from his individual retirement account (IRA) to keep the practice running. Karin argued that the evidence showed that Ronald's income was the profit shown on the profit and loss statement plus the reimbursed expenses for a total income of $43,000. Ronald submitted an affidavit arguing his income was $18,158, and even if expenses paid by the company were included, his income was $45,008. Ronald was not sure how his accountant came up with his business having a profit of $25,000 on the profit and loss statement for 2011.

The district court found that Ronald was an orthopedic and sports medicine specialist and that early in this case he had earned $88,000 per year. The court stated that Ronald was a capable and educated person and able to earn a reasonable income in the medical field. The court concluded:

> "Court finds that there's been a stipulation that [Karin's] income is 67,000—$64,764 per year. The Court finds that income will be imputed to [Ronald] pursuant to the Kansas Child Support Guidelines, Section 2F income may be imputed to the parent not having primary residency in appropriate circumstances. The appropriate circumstances, the Court finds there to be appropriate circumstances to impute income in this case as [Ronald] is a well educated doctor with a specialty in orthopedics and sports medicine. There's been no evidence to indicate that he's not capable, that he's not healthy, not capable of continuing to provide medical care in the medical community and earn a reasonable income thereafter. He's making over $80,000 back in the 90's. This is now year 2012. It's common knowledge that the medical costs, community, and incomes within the medical field has increased dramatically over that period of time. The Court imputes to [Ronald] the amount of $125,000 per year in income."

As a result of the district court's imputation of income to Ronald, the court entered the following order:

> "[Ronald] shall pay, as and for the support of the parties' minor child, the sum of $1,494.00 ($1,489 plus $5 enforcement allowance) on the first day of each month, **retroactive to July 1, 2011** through March 30, 2012 pursuant to Administrative Order 216. [Ronald] shall pay, as and for the support of the parties' minor child, the sum of $1,543 ($1,538 plus $5 enforcement allowance) for the period April 1, 2012 through June 30, 2012 pursuant to Administrative Order 261. (See child support worksheets attached hereto and incorporated herein.)"

The district court found Ronald's child support obligation terminated on June 30, 2012, when B.Z. graduated from high school.

Ronald appeals. Karin has not submitted an appellate brief.

The Kansas Child Support Guidelines (Guidelines) allow for income to be imputed to a noncustodial parent "in appropriate circumstances." Administrative Order No. 216, Guidelines § II.F.1 (2011 Kan. Ct. R. Annot. 120). Appropriate circumstances include, but are not limited to, situations when "there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support." Guidelines § II.F.1.d (2011 Kan. Ct. R. Annot. 120).

A finding that Ronald is deliberately underemployed so as to avoid child support obligations is a finding of fact. We review findings of fact for substantial competent evidence. Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009).

While the district court did not explicitly state that it found Ronald to be deliberately underemployed, such a determination is implicit in the district court's decision to impute income to Ronald since he claimed he had virtually no income at all and it was all derived from his IRA contributions. We conclude there was substantial competent evidence to support this implicit finding. Our problem is whether there is evidence to support the amount of income the district court decided to impute to Ronald.

Ronald contends the district court erred by imputing significantly higher income to him than he was actually earning and significantly higher than any amount argued by the parties. He maintains there was no basis to support the district court's decision. We agree.

We have unlimited review over the interpretation and application of the Guidelines. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009). In setting child support, the district court must determine the gross annual income of each party. The court's determination of a party's potential income or imputed income is a finding of fact. We review findings of fact for substantial competent evidence. Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined. *Frick Farm Properties*, 289 Kan. at 709.

District courts should have flexibility when imputing income to deliberately underemployed parents and should take both past earnings and potential employment opportunities into account when making such determinations. 2 Elrod and Buchele, Kansas Family Law Handbook § 14.25, p. 356 (rev. 1999). Here, the district court failed to provide any reasoning whatsoever for imputing Ronald's annual income of $125,000. The district court correctly pointed out that Ronald is a highly-educated medical doctor. Initially, we question the district court's decision because it is far off base from the amounts requested by either party and is a higher annual salary than has ever been used in the case to determine child support payments.

We find that the district court lacked the substantial competent evidence required to back up its finding that Ronald should be imputed an income of $125,000. The district court did not provide any factual basis for the figure it arrived at. The court's journal entry of judgment states: "The Court takes judicial notice of pleadings in the Court file and pursuant to K.S.A. 60-409, 410 and 411, and the Kansas Child Support Guidelines, Section II,F., imputes an income to the [Ronald] of $125,000 per year." The district court improperly used its judicial notice power.

K.S.A. 60-409 governs the parameters for taking judicial notice. Under K.S.A. 60-409(a), courts shall take judicial notice, without request by a party, "of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." See *Razey v. Unified School District*, 205 Kan. 551, 554-55, 470 P.2d 809 (1970). A court may, under K.S.A. 60-409(b), also take judicial notice of the following matters:

> "Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (2) the laws of foreign countries and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."

In other words, "'[u]nder the doctrine of judicial notice courts take cognizance[,] without proof[,] of facts known generally by well-informed persons, but not of particular facts not of common notoriety, of which they have no constructive knowledge, or which may be disputed by competent evidence.' [Citation omitted.]" *Razey*, 205 Kan. at 555. Importantly, "'[j]udicial notice takes the place of proof, and it is of equal force.' [Citation omitted.]" *Insurance Office v. Woolen-mill Co.*, 72 Kan. 41, 47, 82 P. 513 (1905).

The district court was perplexed as to why Ronald would stay in a medical practice that was losing money rather than look for other opportunities in the medical field that were more advantageous. The answer to the court's quandary is not apparent in the record. However, through our reading of the hearing transcript, the district court found that it was "common knowledge that the medical costs, community, and incomes within the medical field has increased dramatically over that period of time." Then the district court randomly imputed income to Ronald in the amount of $125,000. Common knowledge of rising medical care costs may cause Ronald to have an imputed annual income, but how the court arrived at an imputed salary of $125,000 is not apparent in the record.

We find the figure of $125,000 to be arbitrarily constructed and without substantial support in the evidence. The district court abused its discretion by ordering child support payments based on Ronald's imputed income of $125,000. The district court must recompute the child support using Ronald's income at the time of the hearing which was either a maximum of $45,008 as argued by Ronald or $43,000 as argued by Karin or even the $54,912 amount used by the hearing officer, all of which have an arguable basis in the evidence. The district court is certainly free to impute income to Ronald above what the parties are claiming, but the court must provide an adequate explanation in the journal entry for any imputation of income to Ronald under Guidelines § II.F.1.

Reversed and remanded with directions.