

NOT DESIGNATED FOR PUBLICATION

No. 109,411

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

RICHARD FRIARS,
Appellant,

and

JESSICA BRUCH,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed January 10, 2014. Reversed and vacated and remanded with directions.

Benjamin J. Fisher, of Hutchinson, for appellant.

Shannah K. Corcoran, of Hutchinson, for appellee.

Before STANDRIDGE, P.J., SCHROEDER, J., and LARSON, S.J.

Per Curiam: Richard Friars appeals from the decision of the district court to modify his child support obligation. We have reviewed the record and find that substantial competent evidence does not support the court's order to the extent that it imputes an annual income of \$127,722 because Richard was deliberately unemployed for the purpose of avoiding child support. Accordingly, we reverse the district court judgment, vacate the order modifying Richard's child support obligation, and remand to the district court for further findings as specifically described below.

FACTS

Richard and Jessica Friars (now Jessica Bruch) were divorced on June 2, 2005. Under the terms of the property settlement agreement incorporated into the divorce decree, the court granted the parties joint custody of their minor child, with Jessica having primary residential custody. The agreement stated that Richard would pay \$350 per month in child support. A motion for modification of child support based on the age of the child was filed in May 2011, and the parties subsequently agreed to increase child support to \$533 per month. On the child support worksheet submitted at that time, Richard's income was listed at \$50,000.

On November 8, 2012, Jessica filed a motion to increase child support, claiming a substantial change of circumstances because Richard's income had substantially increased. A hearing was held on January 4, 2013. At the hearing, Jessica submitted a child support worksheet seeking an increase to \$1,595 in monthly child support. Her attorney explained the request for an increase in child support sought to impute income to Richard based on an annual income at \$166,000, which was calculated from the wage of \$3,200 per week he earned from May to November 2012 at his job with Michels Corporation (Michels). In support of her request to impute income, Jessica submitted a letter from Michels stating that Richard voluntarily quit his job with the company on November 7, 2012. Jessica's attorney informed the court that three separate individuals told Jessica that Richard had said he was going to quit his job rather than pay increased child support.

In response to Jessica's arguments, Richard requested an evidentiary hearing to present documentation of his income and other relevant evidence. The district court denied Richard's request for an evidentiary hearing on grounds that a motion to modify child support generally was an issue submitted on arguments and exhibits. The court then

gave Richard a week to submit a domestic relations affidavit (DRA) and any other evidence Richard wanted the court to consider in deciding the motion.

On January 10, 2013, Richard filed a written pleading in response to Jessica's motion, a DRA, and various other exhibits. The district court issued a decision to counsel via e-mail on January 13, 2013. The e-mail stated: "Counsel, I have examined the DRA submitted by [Richard]. The child support will be based on minimum wage for [Jessica] and an annual income of \$127,722 for [Richard]." Thereafter, the district court ordered Richard to pay \$1,317 in monthly child support.

Richard filed a motion to reconsider on January 17, 2013, alleging the district court failed to consider all the evidence he provided and requesting the court set an evidentiary hearing. A nonevidentiary hearing was held on January 25, 2013. Richard asked the court to either grant his request for an evidentiary hearing or state on the record with specificity how it reached its decision. In response, the district court explained that it modified child support based on the annualized the income Richard received in 2012 from the job he quit voluntarily. The court then concluded that the order of child support e-mailed to the parties would remain in place but Richard would be permitted to set the matter for an evidentiary hearing if he wanted. Although an evidentiary hearing was scheduled for March 7, 2013, Richard filed a notice of appeal on February 7, 2013, and the hearing was never held.

ANALYSIS

On appeal, Richard claims the district court deprived him of his right to due process by denying his request for an evidentiary hearing on the motion for modification of child support. He also claims the district court erred by imputing an annual income of \$127,722 to him based on a finding that he was deliberately unemployed for the purpose of avoiding child support.

Parental child support obligations in a divorce action are governed by statute and guidelines established by our Supreme Court. See generally K.S.A. 2012 Supp. 23-3001 *et seq.*; K.S.A. 2012 Supp. 20-165; Kansas Child Support Guidelines (2013 Kan. Ct. R. Annot. 123). Use of the Kansas Child Support Guidelines (KCSG) is mandatory in a divorce action, so failure to follow the KCSG is reversible error. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

Due process

Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *In re Marriage of Soden*, 251 Kan. 225, 234, 834 P.2d 358, *cert. denied* 506 U.S. 1001 (1992). Due process is flexible in that not all situations calling for the same procedural safeguards call for the same kind of procedure. 251 Kan. at 235. "A due process violation occurs only when a party is able to establish that he or she was denied a specific procedural protection to which he or she was entitled. [Citation omitted.]" *In re Marriage of Hutchison*, 47 Kan. App. 2d 851, 856, 281 P.3d 1126 (2012).

Jessica filed a motion to increase child support on November 8, 2012. In the motion, Jessica informed the court that she had requested financial information from Richard a month earlier but he had failed to provide the requested information within 30 days as required under the KCSG. On November 29, 2012, Jessica filed a DRA. On November 30, 2012, the district court ordered Richard to provide a current wage statement and documentation showing his year-to-date earnings and per diem payments from his employer. On December 21, 2012, a notice was filed setting Jessica's motion for hearing on January 4, 2013.

The hearing on Jessica's motion to modify child support took place on January 4, 2013, as noticed. At the time the hearing was held, Richard had been aware for at least 2

months that Jessica claimed his income had substantially increased during the course of the last year and wanted to modify his child support payments as a result. Just prior to that 2-month period, Jessica requested information about Richard's income under the procedure outlined in the KCSG, but Richard failed to produce it. As a result, the court ordered Richard to provide the income information after Jessica filed the motion, but, again, he failed to produce it. And, although Richard had 2 weeks' notice that the matter would be heard, he presented only argument at the hearing itself and failed to present any evidentiary documentation to support his position.

Notwithstanding his failure to comply with Jessica's request or the court's order to provide the financial information necessary to resolve the pending motion, Richard requested the court defer ruling on the motion and schedule an evidentiary hearing. Richard argued that an evidentiary hearing on the issue of child support was necessary so the court could consider evidence documenting his earnings of roughly \$89,000 year-to-date from his job at Michels, evidence documenting the unique nature of his work as an out-of-state welding subcontractor, evidence of expenses he was paying on behalf of the minor child, evidence regarding Jessica's education level and ability to seek employment, and evidence regarding undeclared cash payments Jessica and her husband may have been receiving from an "illegal daycare" business. In response, Jessica proffered testimony that she was not operating a daycare, had no income reported on tax returns in the previous year, and explained that she did not work outside the home and was not required to do so.

Finding that the matter could be determined based on arguments and exhibits of counsel, the court denied Richard's request for an evidentiary hearing and gave him up to and including January 10, 2013, to provide any and all additional evidence he wanted the court to consider in making its decision on the motion to modify child support. On January 10, 2013, Richard timely submitted to the court a responsive pleading to the motion to increase child support, a DRA, and several exhibits. In his responsive pleading,

Richard claimed his income—including all contractual reimbursement and per diem payments—was \$96,852 per year based on a 4-year average. Richard further claimed that he generally worked out-of-state jobs every year starting in the spring and was laid off or voluntarily terminated in the fall season due to a lack of work. Specifically, Richard explained that he took a job with Minnesota Limited in November 2012 from which he was laid off in December 2012 due to a lack of work and that he currently was receiving unemployment benefits. Richard attached to his pleading a DRA, a proposed child support worksheet, proof of his income for the past 4 years, documentation of expenses he claimed to be legitimate business expenses, and various exhibits reflecting the lower income levels for pipe welders in Hutchinson as compared to outside of Hutchinson, a letter from Michels stating that he had voluntarily quit in November 2012, and a letter from Minnesota Limited stating that he had been laid off for a lack of work in December 2012. He also attached a letter from his union stating that its members travel throughout the United States and receive per diem payments because the members were responsible for their own expenses while working away from home.

The district court ultimately granted Jessica's motion and ordered Richard to pay \$1,317 in monthly child support based on an imputed annual income of \$127,722. Richard filed a motion to reconsider and another request for an evidentiary hearing. At a nonevidentiary hearing on his motion, the court denied his motion to reconsider but granted Richard's request for an evidentiary hearing. Although the evidentiary hearing was scheduled for March 7, 2013, Richard filed a notice of appeal on February 7, 2013, and the hearing was never held.

On appeal, Richard claims the district court deprived him of his right to due process by denying his request for an evidentiary hearing on the motion for modification of child support. But the record here clearly reflects that the district court ultimately granted Richard's request for an evidentiary hearing and Richard elected to waive that hearing by filing this appeal instead. Thus, Richard's claim of error necessarily fails for

two reasons. First, the court granted Richard's request for evidentiary hearing; thus, the alleged error upon which Richard's claim is without foundation in fact. Second, the fact that Richard was authorized to proceed with an evidentiary hearing but purposely declined to do so necessarily precludes Richard from now complaining on appeal that the district court deprived him of his right to an evidentiary hearing. See *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003) ("A party may not invite error and then complain of that error on appeal.").

But even if the court had not ultimately granted Richard's request for an evidentiary hearing, Richard's due process claim would still fail because there is no indication here that an evidentiary hearing was necessary to resolve any dispute in fact related to the issue of child support. The United States Supreme Court has noted that an evidentiary hearing is not likely to be an effective prophylactic measure to safeguard against an erroneous deprivation of a protected liberty interest when the resolution of the dispute simply turns on the consideration of objective evidence. *In re Marriage of Hutchison*, 47 Kan. App. 2d at 859 (citing *Mathews v. Eldridge*, 424 U.S. 319, 344-45, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976]). Only where the decision turns on questions of fact does due process require an opportunity to confront and cross-examine adverse witnesses. *In re Marriage of Hutchison*, 47 Kan. App. 2d at 859 (citing *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]).

To that end, Kansas Supreme Court Rule 172 (2013 Kan. Ct. R. Annot. 273) allows the chief judge in each judicial district to appoint a judge of the district court to preside over summary hearings on the issues of establishment, modification, or enforcement of child support. In the 27th Judicial District of Kansas, the Division I and Division II district court judges preside over summary hearings on the issues of child support on the motions docket every Friday pursuant to Rule 6(c) of the 27th Judicial District Court Rules. Like any motion, a request to modify child support can be submitted based on arguments and documentary written evidence. If documentary evidence and

arguments of counsel are insufficient and live testimony is necessary to properly resolve a factual dispute related to a pending request to modify child support, then the matter must be scheduled for an evidentiary hearing on a special setting. The party claiming the need for an evidentiary hearing bears the burden of scheduling it. 27th Judicial District Court Rule 6.

In this case, modification of child support turned in large part on whether Richard became deliberately unemployed when he left his job at Michels, which presented a question of fact. In support of his position on this factual question, Richard submitted documentary evidence to establish his employment and income, including his tax returns from 2009 to 2011, information on the lower salaries available for pipeline welders in Hutchinson, a letter from Michels stating that he voluntarily quit in November 2012, a letter from Minnesota Limited stating that he was hired in November 2012 and laid off for lack of work in December 2012, a paystub from Minnesota Limited, and a letter from his union describing how its members were paid. Although Richard concedes his ability to present documentary evidence comports with due process, he claims his inability to present evidence at an evidentiary hearing deprives him of this constitutional right. In alleging that he was denied the right to be heard at a meaningful time and in a meaningful manner, however, Richard fails to identify precisely what evidence he was unable to present to the court for consideration in the absence of an evidentiary hearing.

Richard's first request for an evidentiary hearing was made verbally at the January 4, 2013, motion hearing. In making this request, Richard did not identify or otherwise refer to particular evidence he wanted considered by the court that was not suitable for submission by pleadings and attached exhibits as contemplated by the court. Richard made his second request for an evidentiary hearing within his written motion for reconsideration but did not allege in conjunction with this request that he had been deprived of the opportunity to present any evidence he wanted considered by the court. Richard's third request was made orally at the January 25, 2013, hearing on Richard's

motion for reconsideration and, as noted above, this request was granted. But even so, Richard failed in making the request to identify or otherwise refer to any particular evidence he wanted considered by the court that had not already been considered based on the parties' written submissions. Simply put, Richard failed to bear his burden to establish that an evidentiary hearing was necessary to resolve any dispute in fact related to the issue of child support that could not have been resolved based on the documentary evidence submitted by the parties.

Based on the discussion above, we conclude Richard had sufficient notice and ample opportunity to present evidence and be heard on the motion to modify child support filed by Jessica.

Abuse of discretion

The interpretation or application of the KCSG is a question of law subject to unlimited review. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009). A district court's child support award is reviewed for abuse of discretion. *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 259, 223 P.3d 815 (2010). A judicial action constitutes an abuse of discretion

"if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

Substantial competent evidence is that which is both relevant and substantial and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. In other words, substantial evidence is such legal and relevant evidence as a reasonable

person might accept as being sufficient to support a conclusion. *Venters v. Sellers*, 293 Kan. 87, 93, 261 P.3d 538 (2011). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, cert. denied ___ U.S. ___ (October 10, 2013).

Modification of child support is governed by K.S.A. 2012 Supp. 23-3005, but the determination of the amount to be paid for child support is provided for in K.S.A. 2012 Supp. 23-3002. That statute states the district court shall consider all relevant factors, including the financial resources and needs of both parents, the financial resources and needs of the child, and the physical and emotional condition of the child. K.S.A. 2012 Supp. 23-3002. Likewise the KCSG require district courts to "consider all relevant evidence presented in setting an amount of child support." KCSG § I (2013 Kan. Ct. R. Annot. 123).

Section II.D (2013 Kan. Ct. R. Annot. 124) of the KCSG specifies that the domestic gross income for a wage earner is income from all sources, including that which is regularly or periodically received. That same provision notes: "It may be necessary for the court to consider historical information and the seasonal nature of employment." KCSG § II.D (2013 Kan. Ct. R. Annot. 125). In addition, the KCSG allow the district court to impute income to the parent not having primary residency in appropriate circumstances, including when a parent is deliberately unemployed or deliberately underemployed for the purpose of avoiding child support. KCSG § II.F.1 (2013 Kan. Ct. R. Annot. 126). If a parent is deliberately unemployed, the district court may assess that parent's income based on his or her recent work history, occupational skills, and the prevailing job opportunities in the community. KCSG § II.F.1.b (2013 Kan. Ct. R. Annot. 126). When there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the district court may assess the circumstances to determine

whether actual or potential earnings should be used. KCSG § II.F.1.e (2013 Kan. Ct. R. Annot. 126).

Here, the district court imputed an annual income of \$127,722 to Richard. In its January 13, 2013, e-mail to counsel, the district court's only explanation for its decision was that it had examined the DRA submitted by Richard. At the January 25, 2013, hearing on Richard's motion to reconsider, the district court summarily explained that it reached its prior decision by annualizing the income Richard received in 2012 from the job he "quit voluntarily."

We have reviewed the record on appeal and conclude the district court's decision to impute an annual income of \$127,722 to Richard is not supported by substantial competent evidence. As explained by the district court, the decision to impute the annualized income Richard received from Michels during the 6-month period from May to November 2012 was based on the court's explicit finding that Richard voluntarily left that job and the court's implicit finding that Richard was deliberately unemployed. Although the letter from Michels stating that Richard voluntarily quit his job with the company on November 7, 2012, supports the court's explicit finding that Richard voluntarily left that job, there is no evidence to support the court's implicit finding that Richard was deliberately unemployed. See *Ward*, 292 Kan. 541, Syl. ¶ 3.

To that end, Richard argues there is undisputed and substantial competent evidence in the record to establish that he was *not* deliberately unemployed. Specifically, Richard states that he submitted to the district court a letter from Minnesota Limited stating that he was hired on November 16, 2012, and laid off on December 16, 2012, due to a lack of work. But the fact that Richard started a new job approximately 9 days after leaving Michels does not eliminate the possibility that Richard was deliberately unemployed at the time of the court's decision, especially since the new job only lasted a month.

Simply put, we are unable to determine whether the district court abused its discretion in imputing an annual income of \$127,722 to Richard based on a finding that he was deliberately unemployed for the purpose of avoiding child support because the court failed to provide sufficient findings of facts to support its decision. See *Ward*, 292 Kan. 541, Syl. ¶ 3 (a trial court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support in the record). As such, we remand the case to the district court for further findings and conclusions setting forth the reasoning behind and explanation for imputing an annual income of \$127,722 to Richard based on a finding that he was deliberately unemployed for the purpose of avoiding child support. Should the district court determine on remand that Richard was not deliberately unemployed, the court shall recalculate Richard's child support obligation using the requisite standards set forth in the KCSG.

Judgment reversed, child support order vacated, and case remanded with directions.