

## NOT DESIGNATED FOR PUBLICATION

No. 110,636

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

## IN THE MATTER OF THE MARRIAGE OF

ANN MARIE PASLAY,  
*Appellee,*

and

RICHARD ALAN PASLAY,  
*Appellant.*

## MEMORANDUM OPINION

Appeal from Shawnee District Court; MARY E. MATTIVI, judge. Opinion filed August 22, 2014.  
Affirmed in part, reversed and vacated in part, and remanded with directions.

*Michael Jilka*, of Nichols Jilka LLP, of Lawrence, for appellant.

No appearance by appellee.

Before MCANANY, P.J., GREEN and BUSER, JJ.

*Per Curiam:* Richard and Ann Paslay are the parents of two children, Shane (born 3/2/96) and Kelsey (born 12/10/98). The parties were divorced in 2006. Ann has had primary placement of the children, and Richard has been paying child support. The children have been going to parochial schools all along. Richard approved of this arrangement but has not contributed to the tuition expense for the children. Since 2006, the court reviewed the amount of ordered child support on at least three occasions but without any adjustment for the children's tuition expense.

Shane was to enter his senior year at Hayden High School in the fall of 2013. Kelsey was scheduled to enter Hayden that fall as a freshman. So in May 2013, Ann moved to modify child support in order to require Richard to contribute to the tuition expense. She claimed in her motion that the annual tuition for the two children would be \$7,900, but she stated in her Mini Domestic Relations Affidavit filed with her motion that the annual tuition cost would be \$7,800. She also claimed she needed additional support because Shane had begun driving and had a monthly expense for car insurance and Ann's income had been reduced because she had to stop working and was now on disability.

At the July 2013 hearing on Ann's motion, Ann stated both parties had agreed that the children would receive a Catholic education. Although Ann had been able to handle the tuition payments in the past, she said her circumstances had changed and she requested that Richard help pay a portion of the tuition cost. She told the court the annual tuition cost for the two children would be \$7,800. She stated further that she "had to go on disability because of osteoporosis and cartilage missing in between the ribs" and her income had been reduced to \$2,070 gross per month. Ann acknowledged that she applied for scholarships for the children, but she had not yet been notified whether they would be granted.

Richard told the court he did not object to the children attending parochial schools. Although Richard is not a Catholic, he agreed that his son Shane should continue to attend Hayden for his senior year because of Shane's "social situation and the fact that he's on the football team." But Richard questioned whether Kelsey should attend, given Richard's tight finances and the fact that "at times he's lost a job," though he now is working 40 hours a week. (Richard's support obligation had been temporarily reduced in 2010 during his period of unemployment and was readjusted in 2011 to accommodate his reduced income level when he again obtained employment.) Richard told the court he could not afford to contribute to the tuition expense.

The court found that "the children have been going to Catholic education since the beginning" and the parties had agreed that their children should receive a Catholic education. In its July 11, 2013, order, the court directed the district court trustee to prepare a child support worksheet. The district court denied Richard's motion to reconsider, finding that Richard had acquiesced to sending his children to parochial schools.

In August 2013, Richard learned that Hayden High School had awarded scholarships to the two children after the date of the hearing on Ann's motion to modify. The scholarships reduced the tuition for the children to \$5,700. Accordingly, in September 2013, Richard moved for relief from the court's prior order based on newly discovered evidence. He also claimed that at the hearing on Ann's motion she misrepresented to the court the true tuition cost. According to Richard, the pre-scholarship tuition for the children was \$7,300, not \$7,800 as Ann had told the court at the hearing. Richard asked the court for relief based on the correct net amount of tuition. The district court denied relief, stating:

"Respondent says in his motion that he tried to contact Hayden High School before July 10, 2013 to obtain tuition information but was unable to do so as the school offices were closed for summer. Respondent has had three years to determine tuition for Shane. In addition, Respondent made no written request for financial records, filed no formal discovery, issued no subpoenas for any records, made no written response to Petitioner's motion and did not ask for a continuance at any time in order to better prepare for hearing as suggested by the Shawnee County Family Law Guidelines 6.01(A)(B)(C). Respondent had almost two months to file additional pleadings and to verify any disputed costs, as he did after the fact.

"The Respondent was represented by competent counsel at the hearing to modify support. He was given every opportunity to argue any and all issues. At no time did the Respondent suggest that he prepare a child support worksheet after verifying costs. The Petitioner appeared *pro se*, so the Court ordered the District Court Trustee to prepare the worksheet and include the cost of Hayden High school tuition. Respondent objected to

the inclusion of the cost of private school on the worksheet, but did not object to the specific amount presented to the court. The Court overruled the objection to inclusion and found that private school tuition is a reasonable extraordinary expense in this case and would be included in the worksheet. Car insurance for Shane was not a factor on the worksheet.

"Based on relevant circumstances of this case and upon the best interests of both Paslay children, Respondent's Motion for Relief from Order is denied."

Richard appeals.

*Order Requiring Richard to Contribute to Children's Education Expenses*

Richard's first contention is that the district court abused its discretion by making a special needs adjustment to the child support order and requiring him to contribute to the children's high school tuition. We review the district court's child support award for any abuse of discretion. *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 259, 223 P.3d 815 (2010). But we have unlimited review over the interpretation of the Kansas Child Support Guidelines. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009).

The district court may deviate from the amount of child support determined through use of the Kansas Child Support Guidelines based upon findings supported by substantial evidence. *In re Marriage of Atchison*, 38 Kan. App. 2d 1081, 1089, 176 P.3d 965 (2008).

Richard does not challenge the adequacy of the district court's findings, but he argues that the district court erred by finding that he acquiesced to paying to send his children to parochial schools. But that was not the court's finding. The court found he acquiesced to sending his children to parochial schools. Richard concedes that he acquiesced to sending the children to Catholic schools.

Richard claims that the district court erroneously relied on *In re Marriage of Debenham*, 21 Kan. App. 2d 121, 896 P.2d 1098 (1995). He points out that the issue in *Debenham* was whether the child should attend private school, not whether one parent should be ordered to help pay for the private school tuition. While *Debenham* is not on point, Richard's fundamental issue fails when we consider Section IV.E.4 of the Kansas Child Support Guidelines (2013 Kan. Ct. R. Annot. 140-41), which provides:

"Extraordinary expenses of the child are items exceeding the usual and ordinary expenses normally incurred, including but not limited to, the cost of private school . . . which are not considered elsewhere in the support order or in computations of the worksheet. The court shall have discretion to award extraordinary expenses so long as they are reasonable."

Here, the court determined the parents had agreed to parochial school educations for their children, and the court determined it was in the best interests of the children to continue to attend Catholic schools. Richard was ordered to contribute to that cost as authorized by § IV.E.4 of the Guidelines. The district court did not abuse its discretion in doing so.

#### *Order Setting the Child Support Amount*

The amount Richard should contribute is another matter. Richard argues that the district court erred in refusing to correct the tuition amount in calculating his child support obligation.

At the July 10, 2013, hearing, Ann claimed the annual tuition for the two children for the coming year would be \$7,800. She stated she had applied for scholarships for the children but did not know if they would be granted and, if so, in what amount. In August 2013, Richard found out that each child had been given a scholarship of \$800, resulting in a reduction of the tuition to \$5,700 per year.

On September 10, 2013, Richard filed a motion asking the court to recalculate child support using the correct figures. He claimed newly discovered evidence and that at the hearing on Ann's motion she misrepresented the amount of tuition owed for the children. In a letter decision, the district court denied relief.

We look to the substance of the motion rather than its title to determine its nature. *In re Estate of Heiman*, 44 Kan. App. 2d 764, 769, 241 P.3d 161 (2010). Richard's motion was filed within 28 days following the court's Order to Modify Child Support, which ordered Richard to pay support of \$1,347 per month. Richard's motion was entitled "Motion For Relief From Order," but from the content of the motion we take it to be a motion to alter or amend the judgment under K.S.A. 2013 Supp. 60-259(f). We generally treat motions to reconsider as motions to alter or amend under 60-259(f). We review the district court's ruling on a motion for relief under 60-259 for any abuse of discretion. *Miller v. Johnson*, 295 Kan. 636, 677, 289 P.3d 1098 (2012).

As a basis for denying relief, the district court found that Richard had 3 years to determine the tuition for Shane but failed to do so. This ignores the fact that additional child support to cover the cost of tuition was not an issue until Ann filed her motion to modify child support in May 2013. Until then, Ann had voluntarily borne the children's education expense without seeking contribution from Richard, though the parties had been back to court several times over the years to modify child support.

As an additional basis for denying relief, the court held that Richard failed to conduct formal discovery, ask for a continuance, issue subpoenas for records, or adequately prepare for the hearing. But the point of Ann's motion was to establish a higher level of child support which incorporated the cost of educating the children, and the amount of the children's tuition depended on whether they received financial aid in the form of scholarships. The scholarships for the children were not awarded until after the hearing on Ann's motion.

Ann's motion was heard on July 10, 2013. According to the chain of e-mails attached to his motion, Richard had not been on the school notification list for news affecting his children. It was not until August 29, 2013, that Richard learned that the net tuition amount for the children for the coming year would be \$5,700. Richard attached to his motion invoices dated August 29, 2013, showing the gross tuition for the children was \$7,300, from which reductions were made for the \$800 scholarships the children received on July 29, 2013, after the date of the hearing on Ann's motion.

Further, the court found that Richard objected to contributing to the education expense, "but did not object to the specific amount presented to the court." Again, this ignores the fact that Richard was not in the position to determine the proper amount of the special needs adjustment because he had no information about the net tuition expense until August 29, 2013, well after the hearing on Ann's motion.

Richard's motion pursuant to K.S.A. 2013 Supp. 60-259(f) provided the trial court the opportunity to correct prior errors, to reconsider its findings of fact and conclusions of law, and to make appropriate amendments and alterations to its order. See *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001).

The district court's child support order was based on a child support worksheet prepared by the district court trustee that contained an overstated special needs tuition calculation. The trustee's calculation was based on annual tuition of \$7,900, which was contrary to the amount stated by Ann at the hearing and which also failed to take into account \$1,600 in scholarships. Richard sought relief as soon as the true facts became apparent. The district court denied relief based on erroneous facts. In so doing, the district court abused its discretion. See *Northern Natural Gas Co. v. ONEOOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 106, *cert. denied* 134 S. Ct. 162 (2013). Accordingly, we must reverse and set aside the district court's ruling on Richard's posthearing motion and remand for further proceedings.

Richard also claimed Ann misled the court in stating at the hearing that the tuition was \$7,900 when, in fact, the preschoolship tuition was \$7,300. Because of our ruling on the scholarship issue, we need not reach this issue.

Affirmed in part, reversed and vacated in part, and remanded for further proceedings.