NOT DESIGNATED FOR PUBLICATION

No. 111,251

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

S.D. and E.D.,
Appellees,

v.

DAVID H. GRANDIN,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; NEIL B. FOTH, judge. Opinion filed December 19, 2014. Affirmed.

James R. Borth, of Olathe, for appellant.

James R. Orr, of Westwood, for appellees.

Before PIERRON, P.J., BRUNS, and SCHROEDER, JJ.

Per Curiam: David H. Grandin appeals the district court's order denying his request for a multiple-family application under the Kansas Child Support Guidelines (KCSG) and imputing 700 hours of additional income to him based on his prior employment at a liquor store. However, this court lacks jurisdiction to consider the issue regarding a multiple-family adjustment because this is not an appeal from an original order of child support nor is this an appeal from a request by a parent having primary residency for an increase in support. Moreover, based on a review of the record on appeal, we conclude that there is substantial competent evidence to support the district court's imputation of income to Grandin. Thus, we affirm.

FACTS

On June 13, 2008, S.D. filed a petition to obtain medical information and for other relief alleging that she was pregnant with Grandin's child. S.D. gave birth to E.D. on August 13, 2008, and in November 2008, she amended her petition to include a determination of paternity. Thereafter, on February 26, 2009, the district court entered an agreed order for genetic paternity testing.

Nearly 3 years later, the district court held a final hearing on the matter, and it entered an order on June 29, 2012. In the order, it was determined that Grandin is the natural father of E.D. In addition, the order granted sole legal custody of the child to S.D. The district court also denied Grandin's request for a multiple-family adjustment pursuant to III.B.6. of the KCSG (2014 Kan. Ct. R. Annot. 132) and ordered him to pay child support. Specifically, the district court denied the request for a multiple-family adjustment because he was sharing equal time with an older child whom he had also fathered. On July 2, 2012, Grandin filed a motion to reconsider in which he argued that the district court erred in not granting his application for a multiple-family adjustment. Although the matter was set for hearing, it appears that Grandin withdrew his motion before the hearing took place.

Furthermore, in the first half of 2013, the district court entered several journal entries relating to Grandin's failure to pay child support. Following a motion for contempt by the court trustee, the district court held an evidentiary hearing on November 2, 2013. After the hearing, the district court found that Grandin possessed the assets necessary to make child support payments and held him to be in indirect contempt of the June 2012 child support order. More specifically, it found that Grandin had an arrearage in excess of $20,000, and he was ordered to pay $913 each month through a wage withholding order. He was also ordered to appear before the district court at a later date to review his compliance with the order.

On June 20, 2013, Grandin filed a pro se motion for child support modification. In the motion, he asked the court to lower his child support payments on behalf of E.D. because of a decline in his investment income. He also requested that the district court reduce his payments because his older child was currently living with him.

On November 12, 2013, the district court held a hearing on Grandin's motion to modify child support. At the hearing, Grandin testified his older child was no longer living with the child's mother. Rather, Grandin testified that he had the older child "almost 100 percent of the time" and that the mother exercised parenting time every other Sunday. At the time of the hearing, he stated that he had a "de facto" residential custody agreement with the mother of his older child and that he would be filing an action to formally address the matter shortly after the hearing.

Grandin also offered testimony regarding his income. He stated that he had worked at UPS for nearly 6 years loading trucks. Usually, he works about 6 hours a day for 5 days each week. According to Grandin, his hourly pay from UPS was $14.62 and that anything over 5 hours in a day is treated as overtime. In addition, Grandin testified that he is the beneficiary of two spendthrift trusts from which he received $7,749 in 2012. He also received nearly $7,000 from oil and mineral royalties in 2012.

In sum, Grandin testified that his projected annual income for 2013 was about $32,000. Additionally, Grandin testified that before his older daughter had come to live with him, he had worked about 5 hours in the evenings at a liquor store. Regardless, Grandin stated that he had voluntarily quit the liquor store job to stay at home with his older daughter.

At the conclusion of the hearing, the district court found that based on the plain language of the KCSG, Grandin was not entitled to a multiple-family adjustment because his motion was not the original order of child support for E.D. In addition to calculating

Grandin's income from UPS and from investments, the district court imputed 700 hours of work at $9 per hour—$6,300—based on his prior employment at the liquor store. In sum, the district court calculated his annual income at $41,236 as reflected in a journal entry filed on December 30, 2013. Thereafter, Grandin timely appealed to this court.

ANALYSIS

Multiple-Family Adjustment

The first issue asserted by Grandin on appeal is whether the district court erred in failing to apply the multiple-family adjustment in ruling on his motion to modify child support. The KCSG are the basis for establishing and reviewing child support orders in Kansas. *In re Marriage of Burton*, 29 Kan. App. 2d 449, 451, 28 P.3d 427 (2001). Courts must use the KCSG when calculating child support orders. *In re Marriage of Beacham*, 19 Kan. App. 2d 271, 272, 867 P.2d 1071 (1994). In the absence of specific findings, a district court's failure to follow the KCSG is reversible error. *In re Marriage of Schletzbaum*, 15 Kan. App. 2d 504, 507, 809 P.2d 1251 (1991).

Our review of a district court's interpretation and application of the KCSG is unlimited. *In re Marriage of Thomas*, 49 Kan. App. 2d 952, 954, 318 P.3d 672 (2014). We are not to look beyond the guidelines' language if we can discern the legislature's intent from its plain and unambiguous words. *In re Marriage of Hoffman*, 28 Kan. App. 2d 156, 159, 12 P.3d 905 (2000).

Section III.B.6 of the KCSG provides that "[t]he Multiple-Family Application may be used only by a parent not having primary residency *when establishing an original order of child support or an increase in support is sought by the parent having primary residency*." Kansas Child Support Guidelines, Section III. B. 6 (2014 Kan. Ct. R. Annot. 132) (Emphasis added.). Although Grandin argues that the district court erred in denying

his request for a multiple family adjustment, we find that the plain and unambiguous language in Section III. B. 6 controls. Because Grandin is not appealing from an original order of support or from a request for an increase in support sought by S.D., he is not entitled to a multiple-family adjustment as a matter of law. See *In re Marriage of Kallenbach & Hedenkamp*, No. 95,272, 2007 WL 656358, at *5 (Kan. App. 2007) (unpublished opinion) (multiple-family application not available since district court was not establishing an original order of support nor was parent with primary residence seeking increase in support).

Moreover, although Grandin argues that the district court erred in not applying the multi-family adjustment in the original order entered in June 2012, we lack jurisdiction to decide the issue at this late date. It is well-settled that Kansas appellate courts have jurisdiction to consider an appeal only if a party files an appeal within the time limitations and in the manner prescribed by the applicable statutes. *Wilkinson v. Shoney's, Inc.*, 265 Kan. 141, 143, 958 P.2d 1157 (1998). A party must appeal a final order within 30 days of the entry of judgment. K.S.A. 60-2103(a). Moreover, we do not interpret K.S.A. 60-2102(a)(4) as granting us jurisdiction to go back and consider the original order of child support in this appeal. See generally *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 223 P.3d 815, 818 (2010) (original order of child support is a final decision). In the present case, the time for Grandin to appeal the district court's initial order of child support has long passed.

Imputed Income

Grandin next contends that the district court erred in imputing income to him. We review this issue under an abuse of discretion standard. *In re Marriage of Hoffman*, 28 Kan. App. 2d at 156. Judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d

1106 (2013). The party asserting that the district court abused its discretion bears the burden of establishing such abuse. *Northern Natural Gas Co.*, 296 Kan. at 935.

Under the KCSG, a district court may impute income to the noncustodial parent in "appropriate circumstances." *In re Marriage of Hoffman*, 28 Kan. App. 2d at 158. Section II.F. of the KCSG expressly provides as follows:

> "II.F.1. Income may be imputed to the parent not having primary residency in appropriate circumstances, *including* the following:
>
> > "II.F.1.a. Absent substantial justification, it should be assumed that a parent is able to earn at least the federal minimum wage and to work 40 hours per week. Incarceration does not constitute substantial justification.
> >
> > . . . .
> >
> > "II.F.1.e. 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." (Emphasis added.) Kansas Child Support Guidelines, Section II. F (2014 Kan. Ct. R. Annot. 130).

Here, it is undisputed that Grandin does not have primary residency of E.D. or that he voluntarily quit a second job he previously held at a liquor store. Nevertheless, he argues that as long as his weekly income is greater than the federal minimum wage multiplied by 40 hours, he need not actually work 40 hours each week. Despite his creative argument, his reading "would read legislative intent into the statute that is neither readily apparent nor particularly sensible." 28 Kan. App. 2d at 159. See *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998). We also reject this argument because such an interpretation of the KCSG would eviscerate the 40-hour assumption.

Although the district court did not specifically state that Grandin was deliberately underemployed, its decision to impute income to him implies such a finding. See *In re Marriage of Everett and Zipper*, No. 108,141, 2013 WL 646500, at *3 (Kan. App. 2013) (unpublished opinion) (District court's imputation of income was an implicit finding that parent was deliberately underemployed). In particular, Grandin admitted that he only worked approximately 1,300 hours annually at UPS, while the KCSG assumes that he is able to work 40 hours each week, or 2,000 hours annually. Kansas Child Support Guidelines, Section II. F.1.a. (2014 Kan. Ct. R. Annot. 130). He further admitted that he had recently worked parttime at a liquor store earning approximately $8 per hour before voluntarily quitting his job.

We note that Grandin cites *In re Marriage of Everett and Zipper*, No. 108,141, 2013 WL 646500, in which a panel of this court found that a parent was deliberately underemployed. But unlike the present case, the issue was the *amount* of income the district court imputed to the parent. 2013 WL 646500, at *3. Similarly, *In re Marriage of Johnson*, 24 Kan. App. 2d 631, 634, 950 P.2d 267 (1997), is not applicable in this case because it involved a district court that imputed income to a parent who was terminated from his job for testing positive for marijuana. Finally, Grandin cites *Stephen v. Stephen*, 1997 OK 53, 937 P.2d 92 (1997), in which the Oklahoma Supreme Court found that it was inequitable to impute a $50,000 annual salary to a stay-at-home mother who wished to educate her two young children thereby preventing the husband from lowering his child support payments. 1997 OK at 97. Yet, the children receiving the support in *Stephen* were the beneficiaries of the mother's decision to stay at home, and in the current case, Grandin claims he quit his job at the liquor store to benefit his older child—not E.D. Thus, we do not find that these cases support Grandin's position.

In conclusion, "[i]f . . . the parent has the ability to work and chooses not to, there should be flexibility in imputing income. If the person has worked in the past, employment potential and probable earnings could be imputed based on recent work history . . ." 2 Elrod and Buchele, Kansas Law and Practice, Kansas Family Law § 14.25, p. 356 (1999). We find that this principle applies to imputing income to someone who is intentionally underemployed as well as to those who are intentionally unemployed. Accordingly, we conclude that the district court did not abuse its discretion when it imputed income to Grandin under the circumstances presented.

Affirmed.