

NOT DESIGNATED FOR PUBLICATION

No. 111,176

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, *et al.*,
Appellee,

v.

KEVIN WADE BURTON,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; CHRISTINA DUNN GYLLENBORG, judge. Opinion filed January 23, 2015. Vacated and remanded with directions.

Weston R. Moore, of Moore Law Center, of Olathe, for appellant.

Allen S. Russell, Jr., of Kansas City, Missouri, for appellee.

Before STANDRIDGE, P.J., ATCHESON, J., and BURGESS, S.J.

Per Curiam: Kevin Wade Burton (Father) seeks relief from the district court's order awarding a lump sum payment of \$9,000.65 to Anne Braun (Mother) for money she spent to obtain health insurance for their two minor children. Although framed by the court as an order to reimburse Mother for his share of medical expenses Mother paid, Father argues the order is actually a retroactive award of child support, which is precluded by Kansas law. Father also argues the court's order impermissibly required him to provide child support for a child he had no legal obligation to support. For the reasons stated below, we agree with Father that the district court utilized the wrong legal framework to analyze Mother's request for relief and the matter must be remanded for

further proceedings. On remand, the court shall construe Mother's motion as a request to enforce medical child support under the Income Withholding Act and provide an opportunity for the parties to create a sufficient evidentiary record upon which the court can properly resolve that motion.

FACTS

Father and Mother are the parents of two minor children. The parents were never married. As the assignee of Mother's right to receive child support, the Kansas Department for Children and Families (DCF)—formerly known as the Kansas Department of Social and Rehabilitation Services—filed a petition for support on August 12, 2004. In its petition, DCF sought an order requiring Father (1) to pay child support in accordance with the Kansas Child Support Guidelines (the Guidelines) and (2) to provide or share in the cost of health and dental insurance for the children and to pay or share in any medical expenses not covered by health and dental insurance.

Prior to the hearing on the petition, a DCF staff attorney prepared a child support worksheet with Mother and Father. Based on the information in the worksheet, the district court entered a journal entry for support dated September 10, 2004, which set forth the following orders:

- Father must pay monthly child support of \$470 effective August 1, 2004, and on the first day of each month thereafter.
- Father must maintain health insurance coverage for the children and provide Mother with indicia of insurance sufficient to obtain medical services for the children. As contemplated by the parents' child support worksheet, Father's child support obligation will be credited for the anticipated costs of maintaining this coverage.

- All necessary medical expenses not covered by health insurance will be assessed in accordance with the parties' proportional share of income, which in this case was calculated to be 89.5% for Father and 10.5% for Mother.
- Upon a material change of circumstances or if more than 3 years has passed since the journal entry of support was filed, each parent or other party to this action may request that the child support obligation be reviewed according to the support guidelines.

Both parties have experienced changes relating to their income and employment since 2004. Nevertheless, there is no evidence in the record to suggest that either party requested the court to review or modify its order; thus, the September 10, 2004, journal entry of support remains in effect today.

Based on various orders in the record on appeal, it appears Father lost his job approximately 3 or 4 months after the journal entry for support was filed. It also appears that Father worked intermittently from 2005 to 2009 and paid child support during times of employment. The record reflects that Father has been continuously employed and paying \$470 in monthly child support as ordered since 2009. In November 2009, the district court ordered Father to begin paying an extra \$141 per month—for a total of \$611 per month—in order to catch up on past-due child support. Father's arrearages for this past-due child support were paid in full as of July 2010.

On October 25, 2010, the district court received notice that there were issues pending related to the current parenting plan. The issues appeared to be based on the fact that Father had moved from Kansas to Colorado. The parties were ordered to mediation, and, on January 26, 2011, the district court filed an Agreed Order Concerning Parenting Time related to travel for the children back and forth to Colorado for visits with Father.

Almost 2 years later, Mother filed a pro se motion for reimbursement to recover \$10,056.59 in costs she incurred to purchase health care insurance for their two children. This is the motion at issue on appeal. It was assigned to an administrative hearing officer for resolution, and a hearing was held on November 29, 2012. Presumably because the pro se motion was framed by Mother on a preprinted form requesting unreimbursed medical expenses, the hearing officer construed the cost of health and dental insurance premiums paid by Mother as uninsured medical expenses. Finding the amount of expenses incurred to be reasonable under the circumstances, the hearing officer held the total amount of the expense (\$10,056.59) had to be assessed against each party in accordance with the parties' proportional share of income as required by the journal entry of support filed in 2004. As such, the hearing officer ordered Father to reimburse Mother for \$9,000.65, which was 89.5% of the \$10,056.59 Mother paid to purchase health and dental insurance for the children. The hearing officer's order was approved by the district court judge on November 30, 2012. Father appealed from this order. The district court held a de novo hearing but ultimately affirmed the hearing officer's award of \$9,000.65.

ANALYSIS

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). Nevertheless, we have unlimited review over the interpretation 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).

Father claims the district court erroneously construed the health and dental insurance premiums paid by Mother as uninsured medical expenses and, in turn, incorrectly ordered Father to reimburse Mother for them based on his proportionate share of income. Father asserts the Guidelines make clear that money paid by Mother for health and dental insurance premiums for the children is separate and distinct from expenses

Mother may have incurred to pay for health and dental care needed by the children that was not covered by insurance. Father further asserts that by construing Mother's actual cost for health and dental insurance premiums as uninsured medical expenses, the court retroactively modified a provision within the 2004 journal entry of support that required him to pay only \$68 per month toward the purchase of health and dental insurance for the children, and Kansas law precludes the courts from retroactively modifying child support in that manner. For the reasons stated below, we agree with Father that the court erred.

The Guidelines require the district court to calculate child support by using a child support worksheet, which is set forth in the Guidelines at Appendix 1. Although the Guidelines have been amended since the journal entry of support was filed in September 2004, none of the amendments are relevant to the issue presented. With respect to the allocation of costs associated with providing health and dental care for the parties' children, the Guidelines clearly differentiate between (1) the cost of purchasing health and dental insurance and (2) the cost of health and dental expenses not covered by the insurance. Specifically, Kansas Child Support Guidelines, Section IV.D.4 (2014 Kan. Ct. R. Annot. 127) instruct as follows:

"IV.D.4. Health, Dental, Orthodontic, and Optometric Expenses (Line D.4)

"IV.D.4.a. Health, Dental, Orthodontic, and Optometric Premiums

"The cost to the parent or parent's household to provide for health, dental, orthodontic, or optometric insurance coverage for the child is to be added to the Gross Child Support Obligation. If coverage is provided without cost to the parent or parent's household, then zero should be entered as the amount. If there is a cost, the amount to be used on Line D.4 is the actual cost for the child or children.

"The court has the discretion to determine whether the proposed insurance cost is reasonable, taking into consideration the income and circumstances of each of the parties and the quality of the insurance proposed, and to make an adjustment as appropriate. The cost of insurance coverage should be entered in the column of the parent or parent's household which is providing it, and the total is entered on Line D.4

"IV.D.4.b. Unreimbursed Health Costs

"In all residential arrangements, including shared residency, the court shall provide that all necessary medical expenses (including, but not limited to, health, dental, orthodontic, or optometric) not covered by insurance (including deductible) should be assessed to the parties in accordance with the parties' proportional share on Line D.2 of the worksheet." (2014 Kan. Ct. R. Annot. 140.)

Also relevant are the instructions in Section IV.D.8 of the Kansas Child Support Guidelines (2014 Kan. Ct. R. Annot. 127):

"IV.D.8. Adjustment for Health, Dental, Orthodontic, and Optometric Premiums and Work-Related Child Care Costs (Line D.8)

"If costs of health, dental, orthodontic, and optometric premiums and/or work-related child care costs are included in the total child support obligation, the parent or the parent's household actually making the payment is credited. The amount paid is entered in the column of the parent(s) providing the payment on Line D.8" (2014 Kan. Ct. R. Annot. 142.)

Under IV.D.4.a and IV.D.8 of the Guidelines, the district court is required to include the cost of purchasing health and dental insurance when calculating total child support and to later adjust the child support obligation by providing a credit to the child support obligation of the parent who has been ordered to pay the premiums. Consistent with these Guidelines, the child support worksheet has designated lines upon which to record the cost of the insurance premiums and the related adjustment in calculating child support. For these reasons, the cost of health and dental insurance premiums necessarily becomes part of the monthly child support obligation.

Under IV.D.4.b of the Guidelines, however, health and dental expenses that fall outside the scope of the insurance coverage are not required to be considered when the district court calculates total child support. Instead, the Guidelines instruct that the cost of health and dental expenses *not* covered by insurance should be assessed to each party in

accordance with the parties' proportional share of the combined adjusted income. Consistent with the Guidelines, the child support worksheet does not request any information regarding uninsured health and dental expenses. For this reason, uninsured health and dental expenses incurred are not part of the monthly child support obligation and are subject to reimbursement based on the proportional share of the parties' income.

In this case, Mother filed a pro se Motion for Reimbursement of Medical/Dental Expenses using a preprinted form provided by the Johnson County District Court Trustee's office. Attached to the motion was a letter drafted by Mother's employer stating that from July 16, 2007, to October 19, 2012, the employer withheld \$16,328 from Mother's earnings to pay the cost of health and dental insurance premiums for both Mother and her children. The letter went on to explain that out of the \$16,328 Mother paid, \$6,271.41 was attributable to Mother's own health and dental insurance premium and \$10,056.59 (approximately \$235 per month) was attributable to the children's health and dental insurance premiums. Although it appears from the letter Mother attached to her motion that she wanted a judgment against Father for money she paid to purchase health and dental insurance when he failed to do so, the language of the motion itself requested judgment against Father for Father's share of uninsured health and dental bills she already had paid.

Based on the district court's 2004 journal entry of support and the Guidelines applicable here, Mother's *purchase* of health and dental insurance based on Father's failure to do so cannot be construed as an *uninsured* medical expense assessed to the parties in accordance with their proportional share of income. By construing it as such, the district court erroneously applied the Guidelines. The court's error amounts to an abuse of discretion. See *State v. Bowen*, 299 Kan. 339, 348-49, 323 P.3d 853 (2014) (a district court abuses its discretion when its ruling is based on an error of law).

But the district court's error does not preclude further review. As noted above, it readily appears from the substance of the pro se motion filed by Mother that she was seeking a judgment against Father for money she paid to purchase health and dental insurance for their children when he failed to do so as specifically required by the court's journal entry of support. This court liberally construes pro se pleadings to give effect to the substance of the claims rather than the form in which they are presented. *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005).

Given the substance of Mother's claim, we construe her request for judgment against Father as a motion to enforce child support under the Income Withholding Act within the Kansas family law code, K.S.A. 2014 Supp. 23-3101 *et seq.* "The purpose of the income withholding act is to enhance the enforcement of all support obligations by providing a quick and effective procedure for withholding income to enforce orders of support and to provide children access to health coverage under their parents' health benefit plans." K.S.A. 2014 Supp. 23-3101(b). Under the Income Withholding Act, a court order requiring an obligor parent to provide health insurance coverage for a child under a health benefit plan constitutes a "medical child support order" that necessarily becomes incorporated into the court's child support order and subject to collection through a new or existing income withholding order. K.S.A. 2014 Supp. 23-3102(h), (m); K.S.A. 2014 Supp. 23-3115(c) ("[A]t any time after a medical child support order requiring enrollment of a child in a health benefit plan is entered, the court upon motion shall enter an income withholding order consisting in whole or in part of a medical withholding order."). Treating a medical child support order as child support subject to income withholding is consistent with IV.D.4 of the Guidelines, which requires the cost of providing health and dental insurance to be considered in calculating and adjusting each of the parents' support obligations.

Significant here, K.S.A. 2014 Supp. 23-3118(a) applies when the obligor parent fails to obtain or maintain health benefit coverage as ordered:

"Except for good cause shown, the obligee shall be granted judgment against the obligor if: (1) The obligor was subject to a medical support order for a child; (2) under the Kansas child support guidelines the obligor received credit toward a cash child support obligation based upon health benefit premiums to be paid by the obligor; and (3) the anticipated premiums were not paid in full by the obligor because of the obligor's delay or failure in obtaining health benefit coverage for the child or the obligor's failure to maintain health benefit coverage for the child. "

If the court ultimately does grant judgment against the obligor, then K.S.A. 2014 Supp. 23-3118(b) governs the manner in which the court must calculate the amount of judgment to award:

"The amount of the judgment shall include the lesser of: (1) Actual costs incurred by the obligee for substantially similar health benefits; or (2) the difference between the actual amount of the cash child support order and the amount the cash child support order would have been without the credit for unpaid premiums and with any premiums paid by the obligee for substantially similar health benefit coverage."

With regard to the factors in K.S.A. 2014 Supp. 23-3118(a), Father (obligor) concedes he was subject to a medical support order, he received a credit toward his child support obligation based on the requirement that he pay for the health and dental insurance premiums, the anticipated premiums were not paid by him, and he failed to maintain health and dental coverage for his children. Significantly, however, Father claims good cause for his failure to purchase the insurance. Father informed the district court in the proceedings below that Mother began purchasing health and dental insurance for the children through her employer in July 2007 at a time when he was unemployed. Although he later secured employment, Father further informed the court that Mother repeatedly told him she wanted to continue purchasing health and dental insurance for the children through her employer. Father stated that Mother's decision in this regard was consistent with material changes to the parties' circumstances since the 2004 order of support, including the significant increase in Mother's income as compared to Father's,

the parties' agreement that Father would pay all costs associated with transporting the children from Kansas to Colorado for his parenting time, and the addition of another child by a different partner to each of the parents' families. Considered in the context of child support enforcement proceedings under the Income Withholding Act, the reasons provided by Father for failing to purchase health and dental insurance could be construed by the district court as a showing of good cause sufficient to avoid judgment against him for that failure.

If the court determines Father has failed to show good cause and judgment is required, Father alternatively claims it would be error to require him to share in any costs associated with purchasing health and dental insurance for a third child Mother has with her current husband. As stated above, the manner in which the district court must calculate the amount of judgment is governed by K.S.A. 2014 Supp. 23-3118(b). Nevertheless, this statutory provision requires only that the lesser result of two calculations be the minimum award of judgment. Although subject to that requirement, the court remains vested with the discretion necessary to determine a proper amount of judgment. For purposes of remand, we note that making that determination may prove more difficult a task than it would appear. Under K.S.A. 2014 Supp. 23-3118(b), the court must calculate the actual costs incurred by Mother to obtain substantially similar health and dental insurance for the children. Mother concedes the cost to purchase health and dental insurance would be the same regardless of the number of children covered. Nevertheless, Mother asserts the entire insurance premium is the actual cost she incurred to obtain health and dental insurance for Father's two children because she incurred no additional cost to add her newborn son to the policy when he was born. Mother's assertion, however, presumes she would *not* have purchased health and dental insurance to cover her third child if Father had complied with the court's order to purchase health and dental insurance for his two children. If, in fact, Mother would have purchased insurance to cover her third child regardless, then there is an argument that Mother's

actual cost to purchase health insurance for Father's two children was reduced to zero once her third child was born.

Given the district court utilized the wrong legal framework to analyze Mother's request for relief, a proper evidentiary record was never developed. Accordingly, we remand this matter for further proceedings. On remand, the court shall construe Mother's motion as a request to enforce medical child support under the Income Withholding Act and provide an opportunity for the parties to create a sufficient evidentiary record upon which the court can properly resolve that motion. In so doing, the court shall make the findings of fact necessary to decide whether Father has shown good cause for failing to purchase health and dental insurance as is required under K.S.A. 2014 Supp. 23-3118(a) to avoid judgment against him. If the court ultimately grants judgment against Father under K.S.A. 2014 Supp. 23-3118(a), then the court shall make the findings of fact necessary to decide the appropriate amount of judgment to award Mother. Although we decline to further direct the district court on remand, we are mindful that the district court maintains continuing jurisdiction to enforce or modify any order concerning child support when the facts and circumstances make enforcement or modification proper. See *In re Marriage of Schoby*, 269 Kan. 114, 121, 4 P.3d 604 (2000).

Vacated and remanded with directions.