NOT DESIGNATED FOR PUBLICATION

No. 110,882

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of
TRAYCE D. MCKINLEY,
Appellee,

and

MICHAEL K. MCKINLEY,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed January 23, 2015. Affirmed.

Rebekah A. Phelps-Davis, of Phelps-Chartered, of Topeka, for appellant Michael K. McKinley.

Pantaleon Florez, Jr., of Topeka, for appellee Trayce McKinley.

Casey E. Forsyth, of Young Williams Child Support Services, of Topeka, for appellee State of Kansas.

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

Per Curiam: Michael K. McKinley appeals the district court's order denying his motion to modify child support based on a material change of circumstances. He contends this court should review the district's court finding that (1) he was deliberately unemployed; (2) he presented no evidence that he was forced to resign for medical reasons or otherwise; and (3) his reduction in income due to retirement was not a material change in circumstances warranting a reduction in his child support obligation. However, we find the district court possessed substantial competent evidence based on the evidence

and testimony presented to conclude Michael was deliberately unemployed. Therefore, we affirm.

Trayce D. McKinley and Michael were married in 2000. They had two children, born in 2001 and 2006. On August 13, 2008, Trayce filed a petition for divorce. At the time of divorce, both parties were employed full time. The district court temporarily granted the parties joint custody of the children, with Michael being awarded primary residency. The court ordered Michael and Trayce to attend conciliation and alternative dispute resolution.

The district court granted the divorce on January 6, 2009, but reserved for a later determination the issues of custody, child support, maintenance, and division of the parties' property and debt. The parties subsequently filed financial disclosures and child support worksheets along with their proposals for the division of assets and liabilities. The court again ordered the parties to attend conciliation to address financial matters of the divorce. The parties attended and were largely successful in resolving issues; however, there was a continuing conflict regarding parenting time exchanges.

On September 4, 2009, the conciliator issued reports regarding division of property, parenting time exchanges, and appointment of a case manager. On October 14, 2009, the district court adopted those recommendations. The court allocated the child support responsibilities based on the parties' earnings from full-time employment as well as the cost of health insurance, daycare, and related expenses. Michael was ordered to pay child support in the amount of $52 per month beginning October 1, 2009. The court ordered the Kansas Department of Social and Rehabilitation Services (SRS), now known as the Kansas Department for Children and Families (DCF), to monitor and enforce the payments.

On December 14, 2010, the district court issued its agreed temporary support order, which instructed Michael to pay Trayce $872 per month in support beginning June

1, 2010. On January 25, 2011, SRS filed an affidavit alleging Michael was delinquent in child support payments, and it filed a motion requesting the district court modify the income withholding.

On March 29, 2011, the district court issued a new order requiring Michael to pay Trayce $1,040 each month in child support plus $60 per month for child support arrearages. Michael received a full-time salary from his employment as a security guard for Blue Cross Blue Shield (BCBS) in addition to a pension from the State of Kansas Retirement System for Public Employees (KPERS) from his previous career with the Topeka Police Department. On July 19, 2011, SRS again filed a motion to modify the income withholding from Michael because he had continued to be in arrears. On September 29, 2011, Trayce and Michael again appeared before an administrative hearing officer (AHO) to present their new agreed child support payment of $1,000, which included the arrearage. On October 3, 2011, Michael prepared a child support worksheet indicating his gross monthly income was $5,271.

On January 6, 2012, Michael retired from BCBS. Then, on January 9, 2012, Michael filed a pro se motion to modify the child support order based on a material change of circumstances. Michael cited a drastic change in his financial status due to retirement from his security guard job at BCBS. He claimed he retired due to medical reasons. He reported his monthly income had dropped to $2,531. At that time, his current child support payment was $1,000 per month, including the arrearage. Michael had fallen behind by over $5,000 in support payments. He requested the court eliminate his payment altogether.

On April 18, 2012, an AHO heard Michael's motion. On May 9, 2012, the AHO filed its order denying Michael's motion, finding no material change of circumstances. On May 23, 2012, Michael filed a motion for judicial review of the AHO's order denying his motion for modification.

On August 23, 2012, the district court granted Michael's motion for review. Because the court found the record insufficient for review, it set the case for a hearing. On November 2, 2012, the court heard evidence on the issue of whether Michael's retirement was a material change in circumstances warranting a modification in child support. No representative for BCBS testified.

Michael testified his annual income had drastically changed due to his retirement from BCBS. While employed at BCBS full time, Michael earned $2,100 per month and received $2,840.54 from his KPERS retirement account for a total monthly income of nearly $5,000. His child support payment was $1,000. After retirement, he testified his monthly income was $2,840.54 from KPERS in addition to $130 per month from his VA pension. He testified he did not receive any monthly pension payment from BCBS because he had chosen to roll the money into an IRA. He testified the basis for his retirement was medical reasons, including two previous injuries, which he felt affected his ability to serve as a security guard.

Prior to working as a security guard at BCBS, Michael was in the military and then worked for the Topeka Police Department. Michael testified he had suffered a knee injury while in the military that limited his mobility. He also testified about an ear injury he sustained while working for the police department that affected the hearing in his right ear. Michael stated he also suffered from tinnitus in his ear, which resulted in constant ringing. He stated he reinjured his knee while working for the police department. He testified his hearing had worsened since first suffering the injury. Although Michael had both injuries the entire time he worked for BCBS, upon retirement, he felt these physical limitations made him a "liability" at work. He stated he retired due to a concern for the safety of himself and others. Michael testified he was no longer able to perform the sort of duties he did at the police department and BCBS because he could not hear people yelling for assistance and was unable to run or make sudden stops due to his knee injury. Michael also testified his pension with BCBS vested after 5 years. After working at BCBS for 6 years, he made a personal decision to retire based on his concerns about his

physical status with his hearing loss and knee condition. Michael had not been advised by a doctor to retire.

Michael testified he felt that if he continued to work and BCBS felt he was unable to perform his duties they would release him and he would miss out on BCBS's contributions to his 401K account. Michael decided to approach his supervisor about retiring before BCBS felt he was a liability and let him go.

After his retirement from BCBS, Michael applied for other security work, including positions with USD 501, the Kansas Fish and Game Department, and St. Francis Hospital. He received a job offer from St. Francis but was unable to accept the position because the hours conflicted with the time he had his two young children. After that, Michael was unable to secure a position with the other two employers. Michael's testimony indicated he only applied for additional work as a security guard. Although he had retired from security work due to a self-diagnosed inability to perform the work, he continued to apply for security work because he was trying to find employment, whatever it was.

Michael also testified he lost his home to foreclosure after his retirement. He then moved to Altamont, Missouri, with his girlfriend. Trayce testified she believed Michael was working for his girlfriend's company because his truck had decals for the company on it and their children mentioned he worked for his girlfriend. Michael responded he has a decal for the company on his truck to help advertise it, not because he worked there. He also claimed he answered phones and took down phone messages for her but was never paid for this work. Michael stated he was helping out his girlfriend because she had suffered a back injury.

Rick Ediger, owner of Ediger Hearing Aid Service, testified at the hearing as well. Ediger is certified to test hearing and dispense hearing aids and other ear protection. Michael had been a customer of Ediger's for several years, and Ediger had performed

hearing tests on Michael. Ediger testified Michael's ear injury caused a constant ringing sound in his ear. However, he testified the test results of the damage to Michael's ear in July 2012 were the same as his test results from 1996. Ediger further testified Michael could carry on his activities of daily living even with the damage and tinnitus.

The district court noted Michael's gross income after retirement was $34,086.48.

The district court heard final arguments from the parties. Michael argued the modification was appropriate because of a material change in circumstances and his income had changed by greater than 10 percent. Trayce argued Michael was voluntarily unemployed, so the court should impute income to him. The court took the matter under advisement.

On October 16, 2013, the district court issued its ruling. The court found no evidence that Michael had been forced to resign his position at BCBS for medical reasons or otherwise. The court held Michael had "voluntarily left his employment at [BCBS] after his 'retirement,' a 401(k) account, had 'vested' following a sufficient number of years of service." The court additionally noted it might have found Michael's stated reasons for leaving employment at BCBS to be persuasive if it not for the efforts he had made to secure other employment that was apparently limited to the security field. The court found "the reduction in [Michael's] income as a result of his intentional decision to leave his employment [was] not a material change in circumstances sufficient to justify a reduction in his child support obligation." The court denied Michael's motion to modify child support. Michael timely appealed.

Michael sets out the following three issues: (1) Did the district court err in finding he is deliberately unemployed although capable of full time work within the meaning of the Kansas Child Support Guidelines (KCSG) §II.F.1.b.; (2) did the court abuse its discretion in finding he was not forced to retire for medical reasons or otherwise; and (3) did the court abuse its discretion in finding no material change in circumstances

warranting the modification of his child support obligation? Trayce frames the issues as being twofold: (1) Did the district court abuse its discretion in denying Michael's motion; and (2) did the court correctly apply the KCSG by imputing income to Michael? DCF, formerly SRS, also responded on behalf of the State. DCF simply framed the issue as whether the district court abused its discretion in determining Michael was voluntarily underemployed and therefore not entitled for a reduction in support payments.

The issues Michael complained of can be sufficiently addressed as: (1) Did the district court abuse its discretion in denying Michael's motion to modify child support; and (2) did the district court correctly apply KCSG §II.F.1.b? First, we will address whether the court properly denied Michael's motion?

The Kansas Child Support Guidelines (KCSG) provide instruction for courts on determining child support. The use of KCSG is mandatory. *In re Marriage of McPheter*, 15 Kan. App. 2d 47, 803 P.2d 207 (1990). Failure to follow the KCSG is reversible error without specific findings. *In re Marriage of Schwien*, 17 Kan. App. 2d 498, 839 P.2d 541 (1992). In relevant portion, KCSG provides:

> "The Kansas Child Support Guidelines are the basis for establishing and reviewing all child support orders in Kansas. . . . Judges and hearing officers must follow the guidelines and the court shall consider all relevant evidence presented in setting an amount of child support. . . . The purpose of child support is to provide for the needs of the child." See Kansas Supreme Court Administrative Order 261, effective April 1, 2012.

Child support is the "right of the child and can only be reduced or terminated by court order." *Brady v. Brady*, 225 Kan. 485, 488-89, 592 P.2d 865 (1979). In addition, common law recognizes that natural parents have a duty to provide for their minor children, which reflects "a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world." *State ex rel. Secretary of SRS v. Bohrer*, 286 Kan. 898, 906, 189 P.3d 1157 (2008) (citing 1 Blackstone's Commentaries 447); but see *In re Marriage of Risley*, 41 Kan. App. 2d 294,

201 P.3d 770 (2009) ("[W]e find Kansas common law no longer requires a parent to provide support for an adult incompetent child . . . .").

The district court that makes an initial order for child support retains jurisdiction to modify the child support payments. *Carey v. Carey*, 9 Kan. App. 2d 779, 689 P.2d 917 (1984); see also KCSG § V.A. ("Courts have continuing jurisdiction to modify child support orders to advance the welfare of the child when there is a material change of circumstances."). A district court may modify any prior child support order "within three years of the date of the original order or a modification order, when a material change in circumstances is shown." K.S.A. 23-3005. "'What constitutes a material change [in circumstances] depends on the case. . . . Most courts agree that the change should be material, involuntary, and permanent in nature.' [Citation omitted.]" *In re Marriage of Case*, 19 Kan. App. 2d 883, 889, 879 P.2d 632 (1994). "'The trial court is in the most advantageous position to judge how the interests of the children may best be served.' [Citation omitted.]" *In re Marriage of Bradley*, 258 Kan. 39, 42, 899 P.2d 471 (1995). Therefore, the decision whether to modify the child support lies within the sound discretion of the district court. *Herzmark v. Herzmark*, 199 Kan. 48, 55, 427 P.2d 465 (1967), *disagreed with on other grounds In re Marriage of Quint*, 258 Kan. 666, 907 P.2d 818 (1995). The same sound discretion is vested in the trial court for: determining the allowance of child support, *In re Marriage of Wilson*, 43 Kan. App. 2d 258, 259; 223 P.3d 815 (2010), the determination of whether there has been a material change of circumstances; *In re Marriage of Schoby*, 269 Kan 114, 120-21. 4 P.3d 604 (2000), and the decision whether to impute income to a parent, *In re Marriage of Case*, 19 Kan. App. 2d 883, 891, 879 P.2d 632 (1994).

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).

The ruling of the district court will not be disturbed absent a clear showing of an abuse of discretion. *Tyler v. Tyler*, 203 Kan. 565, 455 P.2d 538 (1969). The party asserting that the district court abused its discretion bears the burden of establishing such abuse. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

Michael challenges the district court's denial of his motion to modify citing numerous errors. He contends the court's conclusions defy logic and are contrary to the substantial credible evidence presented.

Here, the district court heard testimony and evidence regarding Michael's contention he was forced to retire for medical reasons. This included testimony from Michael and Ediger. In relevant portion, Michael testified (1) a doctor had not recommended he retire; (2) he had the injuries when he started the job; (3) he continued to apply only for positions in the security field despite claiming he was unable to perform that type of work; and (4) he retired soon after his pension was vested. Ediger testified the damage to Michael's ear had not changed since Ediger had tested it in 1996, contradicting Michael's testimony that his hearing had worsened. Michael presented no evidence from a doctor or medical professional recommending retirement or any evidence that he was disabled due to his injuries. Therefore, the court determined the evidence did not support this contention that he was not deliberately unemployed. Additionally, Michael testified he had the knee injury when he started at the police department and both the knee injury and the ear injury when he was hired at BCBS. This testimony suggested he was capable of working at BCBS with these injuries. Also, Michael presented no evidence indicating BCBS was concerned about his ability to perform his job.

The district court found Michael had voluntarily left BCBS once his retirement account had vested and based on his personal belief that "his hearing deficit might put others at risk given his position as a security officer." The court noted Michael claimed he retired from BCBS due to an inability to perform the work of a security officer, yet only sought other positions in the security field. Although Michael argues on appeal that it was clear from his testimony that the reason he applied for jobs in the law enforcement/security officer field was because he had no experience in any other field of work, this argument is unpersuasive. Michael's own testimony contradicts his contention. Michael testified he did administrative or secretarial work such as answering the phone and taking messages for his girlfriend's business, which indicated an ability to do work outside of the security field.

After reviewing the evidence, testimony, and file, the district court determined Michael had voluntarily left his employment and there was no evidence he had been forced to resign his position. This was not an arbitrary, fanciful, or unreasonable determination. The district court's primary concern is determining how the interests of the children will best be served. *Bradley*, 258 Kan. at 42. Therefore, the court was within its discretion to determine Michael's self-serving testimony regarding the reason for his retirement as insufficient to establish that he was not deliberately unemployed. Because the court found Michael was deliberately unemployed, the court appropriately found Michael had not established a material change in circumstances justifying a reduction in his child support obligation. Therefore, the court did not abuse its discretion when it denied his motion to modify child support.

The district court determined Michael had failed to meet his burden of establishing a material change of circumstances. When a district court finds a party did not meet its burden of proof, the appellate court must consider whether the district court arbitrarily disregarded undisputed evidence or relied upon some extrinsic consideration such as bias, passion, or prejudice to reach its decision. *Hamel v. Hamel*, 296 Kan. 1060, 1078, 299 P.3d 278 (2013). When analyzing Michael's contention as a negative finding of fact, his

argument still fails. Although Michael argues his testimony was undisputed, the court determined it was insufficient to establish he had been forced to retire for medical reasons. Also, Ediger's testimony contradicted portions of Michael's testimony because Ediger testified the damage had not worsened since 1996 and Michael could carry on functions of daily living, contrary to Michael's contention his hearing had worsened and he was unable to do any work. The district court's determination was well supported by the evidence. The court did not arbitrarily disregard undisputed evidence or rely on external considerations.

We must also determine if the district court properly applied the KCSG when it imputed income to Michael. We believe it did.

When reviewing the district court's interpretation and application of the KCSG, appellate courts have unlimited review. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009). However, the decision to impute income will not be disturbed on appeal in the absence of a showing of clear abuse. *Case*, 19 Kan. App. 2d at 891.

Michael argues the district court erred in using KCSG § II.F.1.b. He further argues the court erred in concluding it was appropriate to look at his recent work history, occupational skills, and the prevailing job opportunities to determine his potential and probable earning ability because Michael was not voluntarily unemployed. However, Michael's analysis as to how the court erred is vague. He appears to argue for a de novo review based on the court's application of KCSG but then only argues the substantial weight of the undisputed evidence indicates the court reached the wrong reason, suggesting a more deferential standard of review applies. Wading through Michael's murky analysis to ferret out what he actually complains of is unnecessary in this case. Michael's complaint of the use of KCSG § II.F.1.b. fails under any of the possible analyses.

The KCSG allows a court to impute income to "the parent not having primary residency in appropriate circumstances." § II.F.1. Those circumstances include "[w]hen a parent is deliberately unemployed, although capable of working full-time, employment potential and probable earnings may be based on the parent's recent work history, occupational skills, and the prevailing job opportunities in the community." KCSG § II.F.1.b.; see also *In re Marriage of Waggoner and Lambert*, No. 99,138, 2009 WL 1591394, at *3 (Kan. App. 2009) (unpublished opinion).

Although the district court did not state in its journal entry specifically that it was imputing income to Michael, implicit in its denial of his motion and refusal to reduce the support was a ruling that it would continue to use his previous income at BCBS in computing child support since his leaving there was voluntary. See *Waggoner*, 2009 WL 1591394, at * 3. (The essence of the district court's ruling, however, was that Waggoner "'voluntarily and knowingly quit that job.' We view the court's finding in this regard not so much as a finding that there was no material change of circumstances as much as it was, in essence, a ruling that it would continue to use [Waggoner's] previous income . . . in computing his child support since his leaving there was voluntary. We find no abuse of discretion in that ruling.")

Under a de novo review, the district court's determination will be upheld. The KCSG provides that "the court shall consider *all relevant evidence* presented in setting an amount of child support." (Emphasis added.) KCSG § I. KCSG further provides that the guidelines "are the basis for establishing and reviewing child support orders in Kansas." KCSG § I. It is reversible error for the court not to follow the KCSG. *Schwien*, 17 Kan. App. 2d 498. Therefore, when denying a motion to modify based on voluntary unemployment, it is appropriate to refer to KCSG for guidance. Additionally, the court may base probable income of someone who is voluntarily unemployed on "the parent's recent work history, occupational skills, and the prevailing job opportunities in the community." KCSG § II.F.1.b; see also 2 Elrod and Buchele, Kansas Law and Practice, Kansas Family Law § 14.25, p. 356 (rev. 1999). Therefore, Michael's argument that the

court failed to appropriately consider the testimony evidence fails under a de novo review.

For the same reasons, the district court's implicit imputation of income to Michael based on his BCBS income was not an abuse of discretion. The court determined Michael had voluntarily retired without a medical justification. It was not arbitrary, fanciful, or unreasonable to deny his motion based on an assumption that he could have continued earning his BCBS income had he not voluntarily retired and, therefore, the court refused to reduce his child support payment.

The district court did not err in applying the KCSG when reviewing the child support order from Michael and Trayce's divorce.

Affirmed.