NOT DESIGNATED FOR PUBLICATION

No. 111,826

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of
LAUREN RANDAL ATTERBURY,
Appellant,

and

DUSTY JAMES ATTERBURY,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Opinion filed February 27, 2015. Appeal dismissed.

Ronald A. Lyon, of Law Office of Ronald A. Lyon, of Wichita, for appellant.

Nancy Ogle, of Ogle Law Office, L.L.C., of Wichita, for appellee.

Before MCANANY, P.J., ATCHESON, J., and HEBERT, S.J.

Per Curiam: Lauren Atterbury appeals from an order of the district court denying her motion to set aside an agreed order regarding child custody and support.

Procedural Background

Lauren and Dusty Atterbury were granted a divorce on May 9, 2011. Lauren was granted primary residential custody of their only child, Kale. Dusty was granted reasonable parenting time and ordered to pay child support.

Lauren thereafter decided to move to Texas, and on February 6, 2013, the parties signed an agreed order shifting primary residential custody to Dusty and eliminating all child support obligations. The agreement also provided that if Lauren moved back to Kansas, she and Dusty would share residential custody on an alternate weekly basis. The agreed order was approved and entered by the district court, and filed on February 25, 2013.

Lauren returned to Kansas a few months later and the parties implemented the alternate weekly shared custody arrangement. On February 27, 2014, Lauren filed a motion to set aside the agreed order, alleging that the district court lacked jurisdiction to order the custody and support modifications because the order was filed without an accompanying Child Support Worksheet (CSW). Lauren argued that the custody and support orders set forth in the original decree should be reinstated.

On March 31, 2014, the district court held a hearing on Lauren's motion. The district court declined to set aside the agreed order and reinstate the original decree, and, instead, adopted the "de facto" custody arrangement for shared custody. The district court also ordered the parties to participate in Limited Case Management (LCM) to address parenting issues raised by Lauren's motion. The district court further ordered the parties to complete a CSW so that a new support obligation could be determined.

It is from this order of March 31, 2014, that Lauren filed her appeal herein.

Subsequently, Lauren and Dusty participated in the LCM as ordered by the district court. The LCM report indicates that during the process, they agreed to a parenting plan where each would share residential custody on alternate weeks—a plan virtually identical to the "de facto" plan which had been incorporated in the agreed order and adopted by the district court. The parties also completed and filed the CSW as ordered.

On June 12, 2014, Dusty filed a motion asking the district court to adopt the LCM report. Lauren requested a hearing on the motion, which the district court conducted on June 24, 2014. Although Lauren indicated at the hearing that she did not agree to the LCM plan, the district court adopted the recommended shared custody arrangement and ordered Dusty to pay child support based on the new CSW. A written journal entry was filed on July 21, 2014. Neither party appealed from this order and judgment of the district court.

(On June 19, 2014, this court had issued a show cause order noting that the district court order of March 31, 2014, was not final due to the pending child support calculation. Lauren responded on July 2, 2014, to notify this court that the district court had now made a child support determination. Noting responses from both parties, the appeal was retained.)

After the parties had filed their respective briefs during September 2014, Dusty filed a motion on October 23, 2014, for recovery of attorney fees and expenses.

The March 31, 2014, Order

Lauren argues in her appeal that the district court erred by not setting aside the agreed order of February 2013. She claims that the district court did not have jurisdiction to enter the agreed order because neither party filed an accompanying CSW as required by Kansas Child Support Guidelines. She suggests that the district court erred by adopting the "de facto" custody arrangement by which the parties were abiding pursuant to the agreed order rather than setting the agreed order aside and reinstating the residential custody arrangement from the original divorce decree.

The agreed order modified both child custody and child support. These are separate issues which are subject to separate analysis.

Custody

On appeal, this court reviews a district court order granting or denying a child custody modification for an abuse of discretion. *In re Marriage of Grippen,* 39 Kan. App. 2d 1029, 1031, 186 P.3d 852 (2008).

Modification of child custody is governed by K.S.A. 2014 Supp. 23-3218. A district court may modify any prior custody order when a material change of circumstances is shown. Modification is in the sound discretion of the district court and the district court may change custody or modify an order when "'the facts and circumstances make modification proper.' [Citation omitted.]" *In re Marriage of Schoby,* 269 Kan. 114, 121, 4 P.3d 604 (2000).

This court has stated that a material change in circumstances ""must be of a substantial and continuing nature as to make the terms of the initial decree unreasonable."' [Citation omitted.]" *Johnson v. Stephenson,* 28 Kan. App. 2d 275, 280, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). Here, it would seem obvious that Lauren's planned move to Texas would be a material change of circumstances which would render the original decree unworkable. The parties acknowledged as much by reaching the agreed order of child custody modification, which the district court approved by entering the February 2013 order.

The modification of custody does not require the attachment of a CWS in order to be effective. The district court had jurisdiction to accept the parties' agreement and did not abuse its discretion by so doing.

Support

Child support is governed by a different statute than child custody. See K.S.A. 2014 Supp. 23-3001 *et seq.* The district court may modify a child support order within 3 years of the date of the original order when a material change of circumstances occurs. K.S.A. 2014 Supp. 23-3005(a). Lauren's move to Texas, and the agreement to change primary custody to Dusty, materially changed the circumstances of Dusty's child support obligation under the original decree. Again, the parties acknowledged such change by seeking district court approval of their agreed order. The district court clearly had subject matter jurisdiction to approve or deny the proposed change.

K.S.A. 2014 Supp. 23-3002(b) requires that a motion for a child support order or modification must be accompanied by a completed CSW, and it is conceded that this was not done when the agreed order was presented. Although this oversight may result in a finding of error in entering the child support modification, it does not strip the district court of subject matter jurisdiction, nor does it have any effect on the agreed child custody modification.

In ruling on Lauren's motion, the district court corrected the error by ordering the parties to complete the required CSW so that a new child support obligation could be calculated. Since the parties were abiding by the agreed order, the district court did not abuse its discretion by affirming the support obligation of that agreed order subject to correction of the statutory deficiency before determining the amount to be assessed.

Acquiesence

While it would appear that Lauren's arguments on her appeal would carry little or no merit, what is more disturbing here is Lauren's failure to address the fact that she has

at least once, and arguably several times, agreed to the custody arrangement which she continues to challenge.

Despite filing her appeal of the March 2014 order, Lauren thereafter participated with Dusty in the LCM ordered by the district court. The LCM report indicates that during the LCM process, Lauren and Dusty entered into a parenting plan agreement under which "[t]he parents shall continue to share residential custody by alternating parenting time every other week." This agreement did not change the "de facto" arrangement which they had presented in their agreed order and which the district court had ordered in response to Lauren's motion.

Dusty moved the district court to adopt the LCM parenting agreement. Lauren objected and requested a hearing, which the district court conducted on June 24, 2014. In a written journal entry filed on July 21, 2014, the district court adopted the recommended parenting plan "over the objection of the Petitioner [Lauren] and without further hearing." The district court found that the LCM recommendation "does not differ substantially from the present shared custody arrangement set forth in the agreement of the parties dated February 6, 2013, nor does it differ substantially from the present shared custody orders previously entered by this court" and, by interlineations, adding "nor does it differ substantially from the de facto arrangement recognized by the court at the March 2014 hearing." Based on documents provided by the parties, the journal entry also sets forth a child support obligation from Dusty to Lauren which was actually greater than the amount ordered in the original decree.

Acquiesence to a judgment occurs "when a party voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal. [Citation omitted.] A party that voluntarily complies with a judgment should not be allowed to pursue an inconsistent position by appealing from that judgment. [Citation omitted.]" *Alliance Mortgage v. Pastine,* 281 Kan. 1266, 1271, 136 P.3d 457 (2006). The

acquiescence rule is not strictly applied in divorce cases because of "the peculiar situations of the parties and the equitable considerations involved." *In re Marriage of Powell,* 13 Kan. App. 2d 174, 176, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989). However, the principles are illustrative.

Here, the objective of Lauren's appeal was to have primary residential custody reinstated as in the original divorce decree. She clearly acted inconsistently with this objective by participating in the LCM process which was ordered by the very judgment from which she appealed. The result of that process was an agreement to continue a custody arrangement virtually identical to that which she and Dusty had been operating since her decision to go to Texas and her decision to return to Kansas. Lauren acquiesced to the district court's orders of July 21, 2014, by taking no appeal from that decision.

Upon expiration of the time for appeal, the July 21, 2014, order constituted a final judgment determining all pending issues of child custody and child support, superseding all prior orders involving these issues, including the March 2014 order from which Lauren's appeal herein had emanated.

There remains no issue, case, or controversy remaining before this court requiring adjudication of any interest involving these parties. Lauren's appeal is, therefore, dismissed as moot. See *McAlister v. City of Fairway*, 289 Kan. 391, 400, 212 P.3d 184 (2009).

Motion for Attorney Fees

Dusty has moved for an assessment of his attorney fees and expenses pursuant to Supreme Court Rule 7.07(c), which provides:

> "If an appellate court finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay, it may assess against the appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel." (2014 Kan. Ct. R. Annot. 71.)

In the July 2014 orders and judgment, the district court denied both parties' motions for attorney fees. Had the matter ended there, the district court's ruling would appear to be a fair and equitable exercise of judicial discretion. But the matter did not end there. For whatever reason, which we are at a loss to fathom, Lauren continued to pursue her earlier appeal, filing her brief on September 2, 2014. Dusty's response was filed on September 30, 2014, and his motion for attorney fees followed on October 23, 2014. We have determined that Lauren's appeal had little or no merit and that the order appealed from has been superseded by final orders of the district court from which she took no appeal. Based on these determinations, we cannot avoid the conclusion that Lauren's appeal falls squarely within the Supreme Court's definition of a frivolous appeal as being "'[o]ne in which no justiciable question has been presented and appeal is readily recognized as devoid of merit in that there is little prospect that it can ever succeed.' Black's Law Dictionary 601 (5th ed. 1979)." *Blank v. Chawla,* 234 Kan. 975, 982, 678 P.2d 162 (1984).

Dusty is entitled to recovery of reasonable attorney fees and expenses incurred in the preparation of his responsive brief herein. The documentation attached to his motion suggests that his attorney expended 30.1 hours at $175 per hour, a total of $5250.50, and spent an additional $180.45 to reproduce the brief for filing. Lauren does not directly contest the requested amount, relying on her insistence that no recovery is warranted because her appeal was not frivolous.

While it is true that Dusty could perhaps have filed a simpler motion to dismiss the appeal as moot rather than preparing a full responsive brief, we are not in a position to

second-guess his procedural decisions. It was solely the action of Lauren in filing and then continuing to pursue her appeal that instigated the necessity of some response from Dusty.

Without doubting the expertise and experience of Dusty's appellate counsel or minimizing the effort expended, we determine that recovery of attorney fees in the amount of $2625, together with the cost of reproducing the brief, will provide an equitable recompense to Dusty under the circumstances of this case. Accordingly we sustain his motion and grant Dusty a judgment against Lauren in the total amount of $2805.45.

Appeal dismissed; judgment for attorney fees granted.