Case No. 18-119489-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

JAIME L. WHILDIN, PETITIONER-APPELLANT
&
THOMAS M. WHILDIN, RESPONDENT-APPELLEE

BRIEF OF APPELLANT JAIME L. WHILDIN

Appeal from the District Court of Miami County, KS
Honorable Steven Montgomery
District Court Case No. 13DM280

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Oral Argument Requested

TABLE OF AUTHORITIES

APPENDIX (RULE 7.04) UNPUBLISHED CASES:

Nature of the Case

This case involves the enforcement of the parties' Marital Separation Agreement (MSA) and its provisions relating to child support. While finding it necessary to impute income, the court found the provision in the MSA where Thomas Whildin's stipulation that his self-employment income was no less than $75,000 was void as a matter of public policy. Further, Thomas Whildin had agreed to specific recordkeeping provisions to document his self-employment income, and the court refused to enforce that agreed upon obligation. Finally, the MSA allowed for fees, and Jaime Whildin was awarded none after notice to cure was sent, and Thomas Whildin failed to cure.

Statement of the Issues

Issue One: The court erred when it refused to enforce the parties' agreement that Thomas would keep competent business records. The court initially characterized the promise as invalid; the court asserted that it was too hard or expensive for Thomas' "tiny" business, then urged him to do better record keeping.

Issue Two: The court erred when it failed to apply the stipulation of fact that Thomas' income be imputed at a minimum of $75,000 a year. This stipulation had been made by the parties and approved by the Court in the Decree. The stipulation did not take from the Court its lawful ability to set a child support amount under the KCSG.

Issue Three: The Court erred when it applied the extended income formula without arguments in support, supporting facts or competent evidence. In short, the court failed to apply the proper analysis as required under Kansas law.

Issue Four: The court erred when it refused to grant Jaime fees as allowed by the parties' Marital Separation Agreement (MSA) when Thomas breached the agreement by not following the stipulation of fact as well as Thomas' failing to *keep competent business records.*

Facts

This is a post-divorce matter. Jaime Whildin (Jaime) and Thomas Whildin (Thomas) were married in 2003. At the time of the divorce, there were two minor children of the marriage. The Petition for Divorce was filed on October 10, 2013. (R.Vol.1, p. 11-12.) The parties entered into a Separation Agreement and Property Settlement agreement (MSA) that was filed with the Court on July 18, 2014. (R.Vol.2, p. 156.)

Germane to this appeal are the following provisions:

> **Agreements and Stipulations for Future Modification of Child Support:** The Husband is self-employed and there has been significant dispute as to what is Husband's gross domestic income from employment for purposes of calculating child support. There was also significant dispute as to the method of computing child support given the options available under the child support guidelines for an equal or nearly equal parenting time setting. To resolve this matter the parties agreed to certain stipulations regarding any future child support modification action or proceeding, to wit:
>
> . . .
>
> B. Stipulations as to Husband's Record Keeping: In an effort to help reduce the conflict as to the determination of Husband's income from self-employment for future support modification purposes, the Husband has agreed and stipulated that he will maintain proper financial records, financial reports, and source documents what is common for a business which has implemented generally accepted accounting methods and practices. Furthermore, the Husband shall employ a certified public accountant ("CPA") to assist Husband with his bookkeeping and accounting practices for the business. The Husband shall at a minimum have said CPA prepare quarterly (Jan-Mar; April-June; July-Sep; and Oct-Dec) financial reports[1] as well as year-end financial reports. Husband shall provide to the CPA the various source documents[2] for review by the CPA in preparation of the financial reports reflecting the Husband's business related income, expenses, assets and/or liabilities, etc. The Husband shall

maintain said financial records, financial reports and supporting sources documents for a minimum of three (3) full calendar years, as well as the year-to-date. For example, if we were in calendar year 2019 when Husband sought modification, then Husband would need complete financial records, reports, and source documents for calendar years 2016, 2017, and 2018 plus the year-to-date information for 2019.

(*Footnotes*:

[1]"Financial Reports" include but are not limited to: Income Statement (a.k.a. Profit and Loss Statement); Balance Sheet; Statement of Owner's Equity; Statement of Cash Flows; Ledgers; Accounts Receivable; Accounts Payable; etc.

[2] "Source Documents" means something more than just the bank statements or credit card statements for the business, but will also include the same. "Source documents" would also refer to the actual invoice or statement from a vendor for supplies, 1099 issues to contract laborers, receipts for gas, etc. Thus, as used herein "source documents" are meant to include but are not limited to: 1) receipts, statements, bills, invoices or any other documents to support any sums owed by the business for any business related expense or accounts payable; 2) cancelled checks, credit card receipts, receipts or any other documents evidencing payment made by the business to any individual or entity for any business related expenses or accounts payable; 3) receipts, journals, statements, invoices, or any other documents to show sums billed by the business to any individual or entity for which it was paid or has an account receivable; 4) any receipts, deposit tickets, or any other documents reflecting payments received by the business for its materials or services from any individual or entity; 5) etc.)

C. Stipulations as to Husband's Income for Future Support Modification Purposes: The parties agree and stipulate that for any and all future child support modification actions that the Husband's gross domestic income at the time of the child support modification shall be either Husband's gross domestic income at that time or the sum of $75,000.00, whichever is greater. The parties further stipulate and agree that the sole basis for Husband's gross domestic income to be determined to be less than the sum of $75,000.00 it would require the Court to determine that Husband is disabled or unable to be gainfully employed due to a serious injury or illness. (R.Vol.2, p. 164-166).)

On August 8, 2014, the court issued its Decree of Divorce. In part, since business records subpoenas from two separate casinos indicated Thomas gambled

more than $135,000 in an 18-month period in 2012-2014 the parties were in conflict over Thomas' income (R.Vol.2, p. 104), this Decree included its own provisions relating to the parties' stipulations over Thomas' self-employment business records and his stipulated gross domestic income for support going forward. The relevant provisions in the Decree are:

> 27. The parties have reached other agreements in their PSA relative to child support, which the Court hereby adopts and orders the adherence to said stipulations. Accordingly, it is ordered and decreed that the following stipulations shall apply to any subsequent action to modify child support, to wit:
>
> a. The Respondent shall employ appropriate record keeping to aide in the determination of Respondent's gross domestic income from self-employment as more specifically provided for by the terms of the PSA;
>
> b. The Respondent shall have no right to seek an increase in the child support paid by the Petitioner to Respondent until on or after July 1, 2016; and,
>
> c. For any and all future child support modification actions the Respondent's gross domestic income at the time of the child support modification action shall be the greater of the Respondent's actual gross domestic income at the time of the modification action or the sum of $75,000.00. The Respondent and any Court modifying child support shall be prohibited from using a sum less than $75,000.00 for Respondent's gross domestic income, unless a Court were to determine that Respondent is disabled or unable to be gainfully employed due to a serious injury or illness. (R.Vol.3, p. 6-7.)

The Child Support Worksheet approved by the court included a stipulated income for Father at $10,000/month in self-employment income, with reasonable business expenses set at -$2,344/month, or $91,874 per year. (R.Vol.3, p. 10.)

Twenty months after the Decree approved the MSA, on March 18, 2016, Thomas filed his Motion to Modify Child Support. The motion stated that a material change occurred on three bases: ¶4a, that Jaime's income had increased;

4b the motion complained the parties did not have an expense sharing plan and Thomas as support obligee was being required to pay all expenses; and, 4c Thomas' receipt of alimony would soon terminate. (R.Vol.3, p. 93*ff.*)

In her Answer to the Motion to Modify Child Support, Jaime asserted the defenses afforded her in the decree, including Thomas' promise to wait until after July 1, 2016 to move for modification, the factual stipulations the parties entered into on Domestic Income, and Thomas' court ordered obligation to keep business records. Jaime requested fees, as agreed. (R.Vol.3, p. 128-129.) Jaime served this Answer on Thomas' counsel. The promises and stipulations are set out *supra.*

In addition, she requested reimbursement of medical, direct and extracurricular expenses. (R.Vol.3, p. 151.) Jaime asserted that Thomas was avoiding paying $301.96 for his portion of uninsured medical expenses (R.Vol.3, p. 152, ¶7) and an additional $836.46 in direct expenses and extracurricular activities. (R.Vol.3, p. 155, ¶16.) Thomas filed a response. (R.Vol.3, p. 158.) The response included a tax return included the fact that for the tax year 2015 Thomas had $30,189 in income, including the $4,200 he had received in maintenance from Jaime. (R.Vol.3, p. 177.) This represents a drop in Thomas' income from August 2014, when he agreed he made $91,874 a year to 2015, the year he claims to have earned about $25,000/year and expects to continue to suffer this lower income. (R.Vol.3, p. 98.)

In contrast, Jaime remained economically functional, her annual salary was set in 2016 at $131,913.00. (R.Vol.3, p. 117.)

Jaime sought a number of business records subpoena's and records from tax preparers, employers, banks and casinos. (R.Vol.3, p. 190, 197, Vol.4. p. 1, 8, 15.)

A hearing was set for August 5, 2016, and Jaime moved for a continuance. She complained that Thomas had not complied with the agreed order to keep proper business records (*supra* p. 3), had not responded to discovery attempts resulting in the need to issue a number of business record subpoenas which were noticed on July 13, 2016, and Jaime plead that she preferred to conciliate the dispute rather than litigate. (R.Vol.4, p. 28.)

Thomas promptly objected, wanting immediate litigation instead. Primarily, Thomas complained that Jaime's spousal maintenance obligation had terminated, thus he desired a higher child support award. (R.Vol.4, pp. 32-33.)

Jaime then filed her Brief in Opposition to Respondent's Motion to Modify Child Support. (R.Vol.4, pp. 38-45.) The brief stated that the underlying divorce matter involved conflict over Thomas' self-employment, and the disputes were resolved through the agreements regarding Thomas' income, first of which was for his record keeping, and second was the stipulation of facts relative to Thomas' income capacity for future modifications. (R.Vol.4, p. 39-40.) In support of her argument, Jaime asserted the validity of MSA's as set out in *In the Matter of the Estate of McLeish*, 49 Kan.App.2d 246, 255, (2013) and *Frazier v. Goudschaal*, 296 Kan. 730, 749, 295 P.3d 542 (2013) for its comments on the enforceability of contracts and public policy constraints. (R.Vol.4, p. 42.) Jaime argued that the

contract was valid, that both parties had testified in support of the later court finding that the promises were in the best interests of the children, and that Jaime relied upon those promises which Thomas breached. (R.Vol.4, p. 44.)

The matter was heard on August 5, 2016. (R.Vol.6.) The court began with acknowledging that it had reviewed the file. It denied the motion for a continuance. Further, based on the pleadings and other research, the court made a few preliminary rulings. The court found in 2016 that, in spite of language prohibiting modification of the child support until July 2, 2016, the prohibition was void as against public policy as well as the stipulation on Thomas' income. (R.Vol.6, p. 1-3.) Stating:

> Therefore, the parties' agreement that there will be no modification until September - or, I'm sorry, until a specific date being July 1st of 2016 or that the $75,000 be used forever as Dad's income is unenforceable. (R.Vol.6, p. 3.)

The court found it had the jurisdiction to proceed. (R.Vol.6, p. 3.)

The court then ruled on the issue of whether a penalty should be assessed against Jaime for not reporting an increase in her income voluntarily. The court denied the request to assess a penalty because the parties had relied in good faith on the agreement which prohibited modification until July 01, 2016. The court would start any modified order effective April 1, 2016—the date closest to the filing of the motion to modify. (R.Vol.6, p. 3.) The issued rulings on reimbursement issues and then proceeded to hear arguments on Thomas' income.

The court's inquiry began with daycare. Thomas was described as "Mr. Mom" who dedicated much of his time to cooking, cleaning, and managing the children's active schedules. Further compounding Thomas' problems was the fact the children go to school in Louisburg, and Thomas lives in LaCygne. This, Thomas argued, limits his work days on all but Mondays and Tuesdays because he has to be available on Wednesdays, Thursdays and Fridays to pick the children up from school. Thomas claims on those three days he could only work 9 a.m. to 2 p.m. Thomas denied that he had sought out the services of a daycare provider and claimed that the school did not have after school care. (R.Vol.6, p. 5-8.) The court indicated that the past practices were not relevant and wanted to focus on how the parties would proceed forward. Jaime responded she was not opposed to daycare, and that the parties used daycare providers when they were married. Jaime suggested her mother, maternal grandmother, would watch the children after school for no charge as she lives with Jaime and the children. The school's bus service would drop the children at Jaime's house, and she lives close enough to the school so that the bus would not always be needed. (R.Vol.6, pp. 9-12.)

Thomas objected to the cost of the bus service, but was already paying for the bus, and to maternal grandmother watching the kids because she had recently moved and may not stay at Jaime's home. The court responded that it expected parents to work 40-hours a week, and maternal grandmother removes the objection of any cost. Jaime rebutted Thomas' complaint that grandmother may not stay by saying she has moved, changed her drivers' license and had taken a temporary

part-time job that would not inhibit her daycare abilities. Further, the paternal grandparents lived near Thomas, and their help was available. (R.Vol.6, pp. 13-14.) The court simply wanted to assure that Thomas worked full time and concluded that the parties would utilize both maternal and paternal grandparents for daycare and transportation to make that happen. (R.Vol.6, pp. 15-18.)

Returning to the parties' stipulation that Thomas would make a minimum of $75,000 a year, the court stated:

> THE COURT: So now let's talk income real quick and I - I --This $75,000, I'm just saying I'm not stuck on it. I'm not saying you can't argue it. Does that make sense? I'm not -- I'm not saying I'm throwing it in there because it was part of the property settlement, but I'm not saying you can't argument - argue that. Do you understand what I'm sayin'? (R.Vol.6, p. 18.)

Thomas claimed his income was low because he was working around the children's schedule, about 35 hours a week. When encouraged by the court to argue an imputed income, Thomas suggested he could make $30,000 a year. Currently, Thomas, as "daddy daycare," was making a net of about $2,000 a month. (R.Vol.6, pp. 19-23.)

Jaime insisted that even if the court did not enforce the stipulation, that Thomas' earlier estimation of $75,000 was still appropriate; it coordinated with what he was claiming as a part-time worker as gross receipts on his DRA. Jaime argued that Thomas "whittles" down his income on his tax return to a net of $25,000. Thomas has not kept the records he promised to keep and has not provided supporting documents to substantiate his income or expenses. The

information is so limited that Jaime could not tell if he was truthful or not. (R.Vol.6, p. 23.)

Thomas complained that he simply runs all charges through one debit card, and Jaime could get the record keeping data from the bank statements, and that for a small business, the agreed record keeping was too expensive. (R.Vol.6, p. 24.)

Jaime complained that Thomas remains insistent that he be imputed $15/hr as an electrician—a rate of pay well below a reasonable rate for an experienced electrician. Again, she argued that Thomas himself had stipulated that $75,000 was reasonable. The court responded:

> THE COURT: No, I don't want to know why he agreed to it. I want to know your proof that - like why you think electricians traditionally make if you -- I know there's something you can pull up on employment, blah, blah, blah, [sic] that electricians can make X amount of money per hour. (R.Vol.6, p. 25.)

Jaime responded that Thomas' service by a previous employer had been billed out at $90 to $110 an hour, plus materials. And, Jaime argued, that materials were paid by the client, so much of his business expenses must be personal in nature. The bank statement supports that conclusion. Thomas could work full time. Jaime recalled when the parties were married, Thomas worked for retail entities that wanted him to work weekends and evenings, so his work was more available during those off times where parenting responsibilities did not conflict. Jaime stood by the reasonableness of $75,000 a year or roughly $37.50 an hour. (R.Vol.6, p. 25.) The court then stated:

> THE COURT: All right, this -- this what I'm goin' to do.

MR. REYNOLDS: I -- I -
THE COURT: This is what I'm goin' to do.
MR. REYNOLDS: If I may, Your Honor, one more thing?
THE COURT: No, this is what I'm goin' to do. This is what I and Mr. Jensen knows this is what I do, splittin' the difference. We're puttin' Dad in at $52,500. (R.Vol.6, p. 26.)

Jaime then requested more specific findings on the record keeping promise and why the court was not enforcing that order. Here is that dialogue:

MR. REYNOLDS: Your Honor, when you started off and you said you were finding the - the restriction on modification against public policy of the - the 75,000 against public policy, I didn't you hear say anything about that source record keeping. That -- You weren't addressing that?

THE COURT: I'm not requiring that. I'm not because I - I have one person self employed. I need records. I need you to keep records, but I'm not gain' to require you. I don't know what all the other requirements are, but I'm not going to require you to hire a CPA. All right? I know self employed people and the costs for a CPA to keep all of your records is overwhelming. I need you making money. That's what I need, which of course would (indiscernible) her child support. Right? But I need you to be honest in your record keeping. All right? So step it up. Now you should have some time to be able to do that because you're not going to be transporting children as much. Okay?

THE RESPONDENT: Uh-huh. Right.

MR. REYNOLDS: So the point - point of clarification is he may not have to have an accountant do these things, but he's got to keep the documents for us to track all that?

THE COURT: I -- I'm asking him to try and do a better job at it. All right? I'm not ordering him a specific way to do it, but I need for him to be doing it. All right?
All right, that's it for today. Thank you.

MR. JENSEN: Thank you.

(Whereupon, the hearing was adjourned.) (R.Vol.6, p. 37-38.)

On September 6, 2018, the court, through the Hon. Hearing Officer Christina Cahill, issued its Journal Entry. Jaime's continuance was noted as denied. The court found that the provisions against Thomas' seeking modification before the date established and the default income provisions are against public policy and are unenforceable. (R.Vol.4, p. 55.) The court did impute income at $52,500 to Thomas, expecting Thomas to work full time. The court further found that the provisions relating to Thomas' record keeping were unenforceable. The court did not explain why the first two provisions were unenforceable as against public policy nor why the record keeping provision was just unenforceable. (R.Vol.4, p. 56.) A Child Support Worksheet was filed in support of the order. (R.Vol.4, pp. 59-60.)

Six days later, on September 12, 2016, Jaime filed a Motion for Review by District Judge. (R.Vol.4, p. 65*ff.*) The motion was timely filed under Rule 172(h) and argued that Jaime found the promises made in the MSA were materially relied upon, and that they were reviewed and approved by the court to be in the best interests of the children. Jaime argued that the court erred in several ways: 1) the court should have enforced its own provisions, especially in light of the fact the court imputed income of $52,500/year to Thomas; 2) the court should impute what Thomas had stipulated to just a few months earlier; 3) the equal parenting time credit was inappropriately provided; 3) finding agreed provisions of the MSA as void against public policy; 4) inaccurately setting Jaime's income; 5) the court

should be bound by the stipulations of the parties; 6) not allowing Jaime her continuance and not granting a full hearing on the evidence including cross-examination prejudiced Jaime; 7) not requiring Thomas to fully disclose his income; and finally, 8) the extended formula was applied without supporting evidence to warrant its application. (R.Vol.4, pp. 68-70.)

Thomas objected to Jaime's motion for review. (R.Vol.4, p. 82-84.) He stated that some of the complaints Jaime voiced arose from the court not considering information that Jaime submitted by letter after the close of the hearing. That the court had ruled properly on post-hearing disputes over the proposed Journal Entry. Thomas complained that Jaime had filed her request late, counting 37 days after the hearing (not the filing of the judgment), as well as other arguments. (R.Vol.4, p. 82-84.)

Jaime provided a more fulsome Memorandum in Support of Her Motion For Review by District Judge. (R.Vol.4, p. 89-119.). The Memorandum began with the following summary:

> The District Court approved an agreement and joint stipulation in 2014 that required Father to maintain records in a manner agreed to by the parties, the stated purpose was to efficiently establish Father's Domestic Gross Income as a self-employed parent in later child support modifications. Additionally, Father's income would be imputed at a rate of $75,000/yr; unless Mother could prove he earned more, or Father could show he was unable to earn $75,000 due to illness or injury. The Hearing Officer found the provisions to be void as against public policy and unenforceable. Mother asserts that the agreement and stipulation are already court approved and the matter is res judicata. Further, neither the recordkeeping nor the stipulated gross domestic income are against public policy or invalid stipulations. As such, the child support should be recalculated to include the $75,000 imputed income for Father and Father

be responsible for all reasonable attorney fees as agreed to in their Agreement, in the alternative the motion to modify support should be retried. (R.Vol.4, p. 89.)

The full memorandum need not be repeated here, but Jaime supported her arguments with extensive research, and she argued the hearing office abused their discretion as follows:

- The Provisions of the Agreement Relating to Father's Income and Recordkeeping Are Valid Contractual Provisions. (R.Vol.4, p. 99.)
- The Provision Relating to Record Keeping Is a Valid Contractual Agreement Non-Modifiable by the Court (R.Vol.4, p. 101.)
- The Court's Denial of Mother's Request for A Continuance Prejudiced Mother in Light Of The Fact That She Could Not Reasonably Rely Upon The Parties' Agreement For Father To Keep Business Records (R.Vol.4, p. 104.)
- The Agreement and Stipulation that Father's Income (Domestic Gross Income) Would Be Presumed to be Imputed At $75,000 is an Enforceable Agreement, It does not Limit the Court's Authority to Set or Modify Support; The Provision Setting a Presumed Income for Husband Sets a Minimum Presumed Amount of Income; and, Encouraging Husband to Increasing Husband's Income, Increases Support for the Children (R.Vol.4, p. 106.)
- Arguing That Father's Court-Approved Stipulation Is Against Our Social Policy Is Wrong. Insisting That Father Meet An Agreed Income Goal Benefits The Children (R.Vol.4, p. 110.)
- Extended Formula Was Used Without a Rational Basis (R.Vol.4, p. 112.)

Jaime wanted the court to either enforce the stipulation of fact that Thomas' income was $75,000 or allow her further discovery in light of Thomas' breach of the record keeping promise, as well as the fees which were owed her by the terms of the agreement. (R.Vol.4, p. 111-112.)

The court held a telephonic status conference on January 30, 2017. (R.Vol.7.) The purpose was just to determine next steps and the court, from the outset, stated it would not make any substantive decisions. Regarding this appeal from the hearing officer's decision, the court noted that there were legal questions and a factual portion. The former being the issues over whether the decree controls or are those provisions void—that is a legal question; the latter factual issues would be in determining incomes of the parties and the like. (R.Vol.7, pp. 1-3.) Jaime's counsel phrased the issues this way:

> MR. REYNOLDS: I believe that -- I believe that the issue of what the parties contracted to, both in terms of an obligation of the Respondent to give certain basic minimum records and being an accountant function for purposes of (indiscernible) legal issue for the Court to determine the enforceability of that. Also the separate issue of whether or not he may be factual could be an issue, I guess. And that a minimum basic amount of income should be imputed to him in other work. The 75,000, is that a factual stipulation that he made in that year (indiscernible) or continue to be bound by? Also probably a legal conclusion what (indiscernible). If the Court found that as legally enforceable, then I think the factual issue there is really about is his income earning capacity greater than 75 and, if he wants to say it's less, then I think the contractual language would control what his ability is to rebut that factual stipulation, Your Honor. (R.Vol.7, p. 3.)

The court acknowledged that it had not reviewed the record and that Thomas still had time to respond. The court continued that it would proceed in this bifurcated fashion and determine, after the legal issues are resolved, if a hearing is found necessary, then it would be scheduled. This plan was found by counsel for both parties to be agreeable. (R.Vol.7, p. 4.) Jaime's counsel

complained that the court failing to grant the continuance and not upholding Thomas' record keeping promise could be rectified by supplementing the record. He also complained that the hearing officer's calculations erred by calculating Jaime's income about $10,000 over actual earnings. (R.Vol.7, pp. 5-7.) All agreed that the court had, under Rule 172, the responsibility to review the file and transcript and rule under the abuse of discretion standard. (R.Vol.7, pp. 8-12.)

The court then volunteered:

> You know, Mr. Reynolds, I'm not ruling substantively today, but imbedded in your client's position seems to be some implication, you know, I mean, the whole argument about the decree was approved by district court judge, it should be *res judicata*. Imbedded in that whole argument, if you take it to the logical progression, seems to be the idea that if some shyster lawyer can sneak one over and sneak somethin' into an order that a judge - district court judge would sign and that's not appealed, that we're just sort of stuck with it and -- Let's take out the shyster lawyer element out of that analysis just for a second. Is that really what you're arguing? (R.Vol.7, p. 12-13.)

Jaime's counsel returned to two issues: 1) the record keeping where Thomas agreed to adhere to IRS standards, and 2) the stipulation of fact on income. Jaime asserted her right to contract and the recent *Frazier* case was cited in support. (R.Vol.7, pp. 13-14.)

Other matters were discussed. Then the court indicated that he would alert the Guardian ad Litem (GAL) that some of the financial issues may impact her clients, and if the GAL feels she needs to be involved, the court will hear her. (R.Vol.7, pp. 25-26.)

Thomas filed a response to Jaime's memorandum on February 14, 2017. (R.Vol.4, pp. 137-150.) Thomas focused on the child support proceedings being the right of the child not the parents, and he emphasized case law supporting that public policy constrains the court's power to modify support amounts. (R.Vol.4, p. 139-140.) His complaint was that by agreeing to a higher income amount for Thomas, it would lower the total support. (R.Vol.4, p. 147.) Thomas questioned that he may not be able to make $75,000 a year even if he worked "24 hours per day/seven days per week." (R.Vol.4, p. 147.) Thomas' complaint about his record keeping agreement was that his self-employment business was too small and keeping to his promise would be too burdensome. (R.Vol.4, p. 141.) Thomas did not promote a public policy argument against the court enforcing his agreement to keep the business records as he originally promised.

Jaime filed a rebuttal to Thomas' response on February 28, 2017. (R.Vol.5, p. 13.) She first commented that Thomas' child support arguments were antiquated and preceded modernized child support provisions. Jaime argued that their stipulation did not bind the court's power to award support as it was a stipulation of fact of one of many elements of a Child Support Worksheet. She continued, stating that stipulations are an important part of legal process. This stipulation is rightly placed, especially in light of the fact the court had to impute income for Thomas, the exact matter that the parties stipulated to. (R.Vol.5, p. 14-16.) Jaime again complains that Thomas never met his burden to prove either provision was

against public policy; and in fact, had not even argued how the record keeping provision was void as against public policy. (R.Vol.5, pp. 15-16.)

A status conference was held on October 23, 2017. (R.Vol.9.) Jaime's counsel suggested the court had earlier decided to rule on the legal issues relating to the support but had yet to rule. (There were parenting time issues discussed as well.) (R.Vol.9, pp. 1-5.) The court indicated that it thought the GAL was told by the parties that they were engaged in conciliation and that it should not rule. (R.Vol.9, p. 6.) After hearing from counsel, the court stated that it was waiting to rule on support until the interrelated issues of parenting were resolved as well. (R.Vol.9, p. 10.)

On December 13, 2017, the court issued a Journal Entry. (R.Vol.5, p. 44ff.) This order included a stipulation that the parties had submitted their arguments and the court may rule. (R.Vol.5, p. 45.) An earlier proposed Journal Entry found the court would undertake a bifurcated approach to the Motion for Review, first ruling on the legal issues at hand; then if further action was necessary, a hearing would be scheduled. (R.Vol.4, p. 123.) It does not appear that the order submitted for review under Rule 170 was ever signed by the court and filed with the clerk.

A status conference was held on January 8, 2018; however, that conference dealt with other matters. (R.Vol.8.)

On April 20, 2018, the court filed its judgment, Journal Entry Affirming Child Support Ruling by Administrative Hearing Officer. (R.Vol.5, p. 86-92.) The court drew from the transcript of the hearing officer and drawing on *In re.*

Marriage of Schoby, 269 Kan. 114, *syl.*3, 4 P.3d 604 (2000), as "quite clear" and quoting *Schoby* public policy statement that ". . . parents cannot legally reduce child support or terminate the obligation by a contractual agreement or otherwise . . ." Further, the court drew on the unpublished case *Marriageof* for agreements by parents to modify support. The court then looked to the law in other jurisdictions such as Wisconsin, Indiana, and New York, each stating that parties cannot contract away child support obligations. (R.Vol.5, pp. 89-91.)

The court found that Jaime was not prejudiced by the hearing officer's denial of the continuance in light of Thomas' motion of March 18, 2016. The hearing was held five months after the motion was filed and served on Jaime. (R.Vol.5, pp. 91-92.) Jaime's business record requests were filed in July of 2016, late in the process. (R.Vol.5, p. 92.) The court made no comment on the record keeping portion of the agreement, beyond adopting the hearing officer's findings in their entirety. (R.Vol.5, p. 91.)

Jaime filed her timely notice of appeal on May 16, 2018, 26 days after the judgment was filed.

ARGUMENTS AND AUTHORITIES

Issue One: The court erred when it refused to enforce the parties' agreement that Thomas would keep competent business records. The court initially characterized the promise as invalid; the court asserted that it was too hard or expensive for Thomas' "tiny" business, then urged him to do better record keeping.

Standard of Review

Jurisdiction is an issue of law, and appellate courts have *de novo* review. Whether jurisdiction exists is a question of law subject to unlimited review. Regardless of the construction given a written contract by the trial court, the Court of Appeals has *de novo* review over the question of whether a trial court had jurisdiction to reopen a parties' property division that was incorporated into a Decree. (*In re Marriage of Boldridge,* 29 Kan.App.2d 581, 582; *rev. denied* 272 Kan. 118 (2001).)

> The district court has jurisdiction to consider the enforceability of any agreement. A separation agreement "is subject to the same rules of law applicable to other contracts." *Drummond v. Drummond*, 209 Kan. 86, 91, 495 P.2d 994 (1972). "The fact that a separation agreement is incorporated into a divorce decree does not extinguish those contractual aspects." *In re Marriage of Hudson*, 39 Kan. App. 2d 417, 426, 182 P.3d 25 (2008). (*Matter of Marriage of Williamson*, 386 P.3d 930 (Kan. Ct. App. 2016).)

Jurisdiction is limited when interpreting and enforcing a court approved MSA.

> **K.S.A. § 23-2712(b)** Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to subsequent modification by the court except: (1) As prescribed by the agreement; or (2) as subsequently consented to by the parties. (K.S.A. §23-2712(b).)
>
> Property settlement agreements incorporated into a divorce decree are not easily modified. As a general rule, issues settled in a separation agreement that are incorporated into a divorce decree "are not subject to subsequent modification except as provided for in the agreement or as mutually agreed to by the parties. (*In re Marriage of Guthrie-Craig*, No. 113,410, 2016 WL 3128692, at *3 (Kan. Ct. App. June 3, 2016) see appendix p, 1, Rule 7.04 Citations omitted.)

For the court to proceed beyond its jurisdiction is an abuse of discretion; it is an error of law. (*Kaelter v. Sokol,* 301 Kan. 247, 250, 340 P.3d 1210, 1212 (2015).) Further, an appellate court may construe a written contract and determine its legal effect. (*Frazier v. Goudschaal,* 296 Kan 730 *syl* 2 & 8; 295 P.3d 542 (2013).)

When the issue of an obligation arising from an MSA involves interpretation of the parties' settlement agreement, it is subject to normal rules regarding contract interpretation, which require *de novo* review. (*In re Marriage of Strieby*, 45 Kan. App. 2d 953, 961, 255 P.3d 34, 41 (2011).) The appellate court does not review the construction given a written contract by the district court; rather, an appellate court independently construes written contracts to determine their legal effect. (*Estate of Draper v. Bank of Am., N.A.*, 288 Kan. 510, 517–18, 205 P.3d 698, 706 (2009).)

Arguments and Authority.

Here, the parties' agreement included the following:

> **Stipulations as to Husband's Record Keeping:** In an effort to help reduce the conflict as to the determination of Husband's income from self-employment for future support modification purposes, the Husband has agreed and stipulated that he will maintain proper financial records, financial reports, and source documents what is common for a business which has implemented generally accepted account methods and practices. Furthermore, the Husband shall employ a certified public accountant ("CPA") to assist Husband with his bookkeeping and accounting practices for the business. The Husband shall at a minimum have said CPA prepare quarterly (Jan-Mar; April-June; July-Sep; and Oct-Dec) financial reports[1] as well as year-end financial reports. Husband shall provide to the CPA the various source documents[2] for review by the CPA in preparation of the financial reports reflecting the Husband's business related income, expenses, assets and/or liabilities, etc. The Husband shall maintain said financial records, financial reports and supporting sources documents for a minimum of three (3) full calendar years, as well as the year-to-date. For example, if we were in calendar year 2019 when Husband sought modification, then Husband would need complete financial records, reports, and source documents for calendar years 2016, 2017, and 2018 plus the year-to-date information for 2019. (R.Vol.2, p. 165-166, the footnotes are *supra* at p. 4.)

The court approved that stipulation and agreement in its Decree. (R.Vol.3, p. 6 ¶27a, *supra* p. 5.)

The Hearing Officer refused to enforce this provision. When asked what public policy considerations prevented enforcement, the Hearing Officer simply stated "I'm not requiring that. I'm not because I-I have one person self employed." (R.Vol.6, p. 37.) Essentially, the Hearing Officer was faced with a breach of the MSA and simply determined the obligation had no value to the court.

But the promise was not to the court; it was *for* the court, between the parties, and intended for better efficient enforcement of the children's support.

The stated purpose was in the agreement, that was to stave off any conflict akin to what the parties suffered before the agreement was consummated. (R.Vol.2, p. 164-165.)

The court seemingly missed the obvious counterpoint: the diminutive stature of Thomas' part-time business would have rendered proper accounting and CPA review as proportionally smaller task as well. Accounting in a tiny business would be child's play for a CPA to review and report upon.

Parties are free to engage in agreements that do not limit the court's ability to award support under K.S.A. §23-3001 and the Kansas Child Support Guidelines (KCSG). Unless that agreement allows for modification and it is incorporated into the court's decree, the court does not have jurisdiction to modify it. (*In re Marriage of Roth*, 26 Kan. App. 2d 365, 369–70, 987 P.2d 1134, 1138–39 (1999), where the court did not have jurisdiction to alter the MSA between the parties relating to income tax exemptions.)

> Separation agreements are subject to the same rules of law applicable to other contracts. *Drummond v. Drummond,* 209 Kan. 86, 91, 495 P.2d 994 (1972). It has long been held that contracts, including those governing property settlement rights in a divorce, are to be liberally interpreted to carry out the intention of the persons making them. *Ranney,* 219 Kan. at 431, 548 P.2d 734; *Dunsworth v. Dunsworth,* 148 Kan. 347, 352, 81 P.2d 9 (1938). (*In re Marriage of Traster*, 301 Kan. 88, 105, 339 P.3d 778, 790 (2014).)

> Public policy forbids enforcement of an illegal or immoral contract, but it equally insists that those contracts which are lawful and which contravene none of its rules shall be enforced, and that they shall not be set aside or held to be invalid on a suspicion of illegality. A contract is not void as against public policy unless injurious to the interests of the public

> or contravenes some established interest of society . . . Illegality from the standpoint of public policy depends upon the facts and circumstances of a particular case . . . and it is the duty of courts to sustain the legality of contracts where possible . . . There is no presumption that a contract is illegal, and the burden of showing the wrong is upon him who seeks to deny his obligation thereunder. The presumption is in favor of innocence and the taint of wrong is a matter of defense . . . (*Frazier v. Goudschaal*, 296 Kan. 730, 749, 295 P.3d 542, 554–55 (2013) citations omitted.)

In this agreement Thomas promised to follow IRS regulations for business record keeping and retention, with the additional promise by Thomas that he would use a CPA for financial reports and assure the accuracy. (R.Vol.7, p. 14.)

The court had to impute income for several reasons, just one of which was that it was difficult to discern what of Thomas' total income of about $66,500 were reasonable business expenses. Thomas had refused to follow the record keeping agreement but claimed that he should have his gross IRS reported income of about $66,500 reduced by $40,000 of claimed business expenses. (R.Vol.6, p. 21.) Almost $17,000 of which were "other expenses." (Thomas' Schedule C, R.Vol.4, p. 191.) Jaime complained that the record keeping was suspicious and so vacant of data that no one could tell if Thomas was even being truthful to the IRS. (R.Vol.6, p. 23.)

Perhaps there were other reasons Thomas avoided professional review of his allegedly part-time business, other than Thomas' failure to thrive?

Compounding the problems is that when Jaime was unable to get Thomas to provide the records he agreed to, or even anything similar to those records, Jaime then had to reconnoiter and seek information by business record subpoenas.

(R.Vol.4, pp. 28-29.) Jaime complained that she was prejudiced by the court's denial of the continuance. (R.Vol.4, pp. 104-105.)

It was Thomas' burden to show that his business expenses were "reasonable" pursuant to the KCSG, by showing those were actual expenditures reasonably necessary for the production of income. (KSCG, II.E.2.) Thomas did not show the expenditures were 1) actual, or were 2) reasonably necessary for him to produce income. Following the agreement would have resolved this conflict.

The matter should be remanded for rehearing, allowing Jaime to conduct full discovery, present the business record subpoena materials and other evidence found in discovery, and require Thomas to show why his $40,000 were reasonable business expenses incurred to make less than $25,000 at a part-time job.

This request is made with full understanding that the court imputed income. The court not only recognized that Thomas was not working full time, it also admonished him for not keeping proper records—even under the lower standard imposed by the court who refused to make Thomas keep his promise. (R.Vol.6, p. 37-38.) Essentially, Jaime cannot show that Thomas' purported business expenses are reasonably necessary; and frankly, no one can tell if Thomas reported his gross income properly either. Thomas' part-time income is unknown.

Issue Two: The court erred when it failed to apply the stipulation of fact that Thomas' income be imputed at a minimum of $75,000 a year. This stipulation had been made by the parties and approved by the Court in the Decree. The stipulation did not take from the Court its lawful ability to set a child support amount under the KCSG.

Standard of Review.

The standard of review remains *de novo* as described above.

Arguments and Authority.

The Public Policy Restricting Agreements Relating to Child Support

The court never specifically found the record keeping provision void.

The public policy concerns arise when the parties attempt to constrain the courts' continuing jurisdiction to set support. The District Court primarily relied upon the following case:

In re Marriage of Schoby 269 Kan. 114, 118, 4 P.3d 604 (2000). (R.Vol.1, p. 156.) In *Schoby* the agreement that violated public policy was to terminate child support upon the child's marriage.

A portion of the *Schoby* opinion recites the law on the matter:

> It is well established that parties to a divorce cannot alter, by agreement, the amount of child support to be paid to the parent with primary custody of the children. In *Brady v. Brady,* 225 Kan. 485, 592 P.2d 865 (1979), we stated:
>
> "[C]hild support may be modified at any time circumstances render such a change proper, but the modification operates prospectively only...] Divorced parents cannot legally reduce child support or terminate the obligation by a contractual agreement or otherwise. It is a right of the child and can only be reduced or terminated by court order." 225 Kan. at 488-89, 592 P.2d 865.

> See also *Thompson v. Thompson,* 205 Kan. 630, 633, 470 P.2d 787 (1970) (noting that there can be no contractual agreement with the mother which would legally reduce or terminate a father's continuing obligation to support his minor children).
>
> In *Grimes v. Grimes,* 179 Kan. 340, 295 P.2d 646 (1956), the divorcing parties had entered into a contract unduly limiting the divorcing father's child support obligations. This court stated:
>
> "Plaintiff could not relieve himself of his common law or statutory obligation to support his child by entering into an agreement with a third person to assume that responsibility. [Citations omitted.]
>
> "It is beyond the power of a father to deprive the court by private agreement of its right to make provisions for the support of the minor children, as the children's welfare requires." 179 Kan. at 342-43, 295 P.2d 646. (*Schoby*, 269 Kan. at 117.)

Admittedly the parties' provision stating that Thomas could not seek an increase in child support until after July 1, 2016 is a prime example of an agreement which would be void *ab initio*.

It is likely that the odious prohibition against the modification created, as Jaime's counsel argued below, a "domino effect" causing the court to consider the remaining provisions tainted by association. (R.Vol.7, p. 5.)

Each provision stood individually.

It is well established that the parties cannot bind the court with agreements relating to support or custody of children; it is equally true an agreement or stipulation reducing the amount of child support is enforceable without court approval; finally, any order pertaining to the amount of child support is modifiable. This is because the support ordered is a right of the child, not the respective parties. (Elrod, 2 Kan. Law & Prac., Family Law § 14:30; K.S.A. § 23-2712(a).)

This prohibition is supported in part by K.S.A. § 23-2712(b) where the court loses jurisdiction to modify an agreement, except for those matters *pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children.*

This agreement and stipulation are not necessarily reducing the support to the children.

This is an Enforceable Contract and a Stipulation of Fact to Which the Court is Bound.

As Jaime argued below, (. . . Memorandum in Support . . . R.Vol.4, pp. 89-115) and then raised the issue on appeal to the District Court (R.Vol.4, p. 69): The stipulation seems to have made a tacit presumption that the court would be imputing income. (KCSG, §II.F.1, *Imputed Income.*) In this case, the presumption is not rebutted. Father worked less than 40 hours a week. (KCSG § II.F.1.a . . .) The Hearing Officer did impute income; however, she was just at a loss as to the appropriate imputation. In the end, the Hearing Officer ignored Thomas' stipulation and simply averaged the positions of the parties on the amount of imputed income. She did this knowing that Jaime had held fast to the stipulation as reasonable and acknowledging that Thomas' attorney knew full well the court was likely to average Jaime's and Thomas' respective positions. (R.Vol.6, p. 26.) The KCSGs set imputation levels by presumption at previous wages, federal minimum wage, in-kind payments, and *potential earnings*. (KCSG § II.F.) (R.Vol.4, p. 107.)

By stipulating to the $75,000 annual income, Thomas' admitted that he has that earning potential. In addition, that stipulated amount was less than what he agreed to have as an income for the agreed child support order. (R.Vol.3, p. 10.)

This provision is not only an agreement between the parties under the law outlined in Issue 1 above, this is a matter of stipulation, and stipulations of fact are binding on the court and parties. These provisions, set both in the agreement and approved by the District Court, are binding. (*In re Geisler,* 4 Kan.App.2d 684, 686, 610 P.2d 640, rev. denied 228 Kan. 806 (1980).) Supreme Court Rule 163 is expressed in the negative, effectively showing a bias which encourages parties to enter stipulations: *Stipulations, in order to be effective, must be in writing and signed by counsel or otherwise made part of the record.* These were signed under oath by both the parties in the Agreement (R.Vol.2, pp. 170-171), and by Counsel in the Decree. (R.Vol.3, p. 9.) These were also found in the Decree to be stipulations approved by the Court. (R.Vol.3, p. 6-7.)

The stipulation of Father's income at $75,000 per year was reasonable. At the hearing to modify support, had Thomas honored his agreement and agreed with Jaime's allegation that his Domestic Gross Income be set at $75,000, then the court would have agreed in this hearing as well. So, the amount stipulated was not contrary to the evidence or offensive to the court. But the court decided differently openly averaging the incomes argued by the parties.

Only because Thomas reneged on the stipulation do problems arise.

The court refused to honor the stipulation only because it was made in the initial decree just 20 months earlier.

Again, we have the interplay between the fact that Father is bound by his stipulation regarding his earnings without removing from the court its lawful authority to set child support. The former is a factor while the latter is the consequential determination of what the court would do with that stipulated fact to which the parties and the court are bound. Consider the recent discussion of the matter in *State v. Weber* 297 Kan. 805, 304 P.3d 1262 (2013), where a stipulation to defendant's prior conviction was binding on the court and defendant, but the court was not bound by the legal effect of that prior conviction on sentencing. And again, in *In re Adoption of A.A.T.*, 42 Kan.App.2d 1, 210 P.3d. 640 (2006), *rev'd on other grounds*, 291 Kan. 424, 242 P.3d 1168 (2010), where the court noted that it was not bound by a stipulation regarding a *Ross* hearing being required. Whether to conduct a *Ross* hearing is a matter of law.

The *Weber* court expressed the limits of stipulations as follows:

> But we do not permit parties to stipulate " 'as to the legal conclusions from admitted facts.' " Urban Renewal Agency v. Reed, 211 Kan. 705, 712, 508 P.2d 1227 (1973) (quoting 50 Am. Jur., Stipulations § 5). The legal question of whether Weber's admitted criminal history was sufficient to meet the requirements of K.S.A. 2009 Supp. 21–4642(c)(1)(B), so as to define him as an aggravated habitual sex offender subject to enhanced sentencing, " 'must rest upon the court, uninfluenced by stipulations of the parties.' " Urban Renewal Agency, 211 Kan. at 712, 508 P.2d 1227 (quoting 50 Am. Jur., Stipulations § 5). (*State v. Weber*, 297 Kan. 805, 814–15, 304 P.3d 1262, 1269 (2013).)

Thomas' stipulation bound the court as well as Thomas, and the stipulation is valid. No public policy prohibits parties from agreeing they will make a minimum amount of income.

Underlying this discussion is the assumption that imputing $75,000 somehow reduces Jaime's support obligation. It is then that the immediate conclusion is that the child suffers.

A logical problem belies that initial assumption.

The court is quite familiar with the method used to calculate support. Simply stated, the Child Support Worksheet makes no assumption who the obligor is. Instead, it uses points of fact, like predictions of future wages, to establish the *respective* obligations of both parties. In short, the presumptive child support obligation is calculated by the applicable chart amounts in the KCSG Appendix II Child Support Tables. The tables are found by the parties combined incomes, then health insurance, after which they are adjusted, and work-related daycare costs are then added to the total obligation. (Child Support Worksheet, ln, D.9.)

The distribution of the presumptive support obligations of each party is controlled by line D.2.

Other adjustments may apply, and all are discretionary with the court.

The Child Support Worksheet sets the presumptive obligation for *both* parents. It is the resulting child support order that effectively finds the costs do or shall rest with one party (the obligee), and therefore the other party becomes the obligor of the resulting purporting of the ordered support.

Here the parties share very similar amounts of parenting time, while it did not amount to equal or nearly equal parenting time for this modification, one cannot assume that Thomas will always have a greater proportion of parenting time or be responsible for direct expenses. Making Jaime responsible for direct expenses would be reasonable as well. (KSCG, § III.B.7.b.)

Issue Three: The Court erred when it applied the extended income formula without arguments in support, supporting facts or competent evidence. In short, the court failed to apply the proper analysis as required under Kansas law.

Standard of Review.

The standard of review is as stated under issue one above.

Arguments and Authority.

The hearing officer issued a Child Support Worksheet that included the extended formula. (R.Vol.4, pp. 59-60.) It did so without any comment on the issue in the Journal Entry. (R.Vol.4, pp. 55-57.) Nor was there any evidence taken regarding the children's lifestyle at the hearing. (R.Vol.6.)

Jaime raised this issue when taken to the District Court on appeal. (R.Vol.4, p. 70.)

The court cannot automatically apply the extended formula. It must calculate the formula and consider the circumstances of the parties and the

children by averaging support with and without the extended formula. (See, Elrod, 2 Kan. Law & Prac., Family Law § 14:12, Income Beyond Schedule.)

> Kansas Sup. Ct. Admin. Order #284 indicates that if the combined child support income exceeds the highest amount shown on the schedules ($15,500 a month), the court should exercise its discretion by considering what amount of child support should be set in addition to the highest amount on the schedule. The language was in response to a Kansas case which indicated that the guidelines are presumptive to the amount on the chart. Beyond that, the amount is discretionary with the judge. While the judge or administrative hearing officer should consider the extrapolation formula, it does not establish a rebuttable presumption as to the level of support when income exceeds the schedules. (*Id.* citing *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 530 920 P.2d 450, 457 (1996), rev denied.)

The issue for the court to consider is not simply the incomes of the parties. KCSG § III.B.3 requires the court to consider exercising its discretion by considering what amount of child support should be set in addition to the highest amount on the schedules. The formula is provided for the convenience of the parties. But that is not the end of the analysis. Our law has pressed further standards on trial courts:

> The district court has discretion to set the amount of child support when the combined incomes exceed the highest amount shown on the child support schedule. Guidelines § III.B.3. (2006 Kan. Ct. R. Annot. 109). There are balancing concerns, the standard of living the child would have enjoyed absent parental separation and dissolution and also to ensure adequate support for upbringing the child without allowing windfalls. *Patterson*, 22 Kan.App.2d at 528–29, 920 P.2d 450. . . (*In re Marriage of Leoni*, 39 Kan. App. 2d 312, 323, 180 P.3d 1060, 1067 (2007).)

The most recent case from our courts discussing the extended formula and the considerations the court must undertake when setting child support in

wealthier situations is *In re Marriage of Wilson,* unpub, #104,830, 160 P.3d 1249 (Kan. App. 2011) (Rule 7.04(f), see appendix, p. 7). In *Wilson,* the courts held it must consider the extended formula when setting support and consider the "child's standard of living at the home of the parent who is less affluent and any ill effects a great disparity between the two households would have on the child." (*Wilson* at *4.)

The matter should be remanded for the court to consider what, if any, additional support should be awarded above the amount shown on the schedules.

Issue Four: The court erred when it refused to grant Jaime fees as allowed by the parties' Marital Separation Agreement (MSA) when Thomas breached the agreement by not following the stipulation of fact as well as Thomas' failing to keep competent business records.

Standard of Review.

Again, this is a matter of abuse of discretion and the enforcement of a court-approved MSA, the contents over which the court has plenary review.

Argument and Authority.

The parties agreed that upon breach of the agreement the aggrieved would be afforded fees provided they serve formal notice. (R.Vol.2, p. 168.) It says:

> **D. Breach of this Agreement and Attorney Fees.** In the event that either party to this Agreement brings an action for failure to perform any of the obligations imposed by the Agreement on him or her, or for enforcement or clarification of the Agreement, the prevailing party in such action shall have the right to recover his or her reasonable attorney's fees and litigation

> costs reasonably expended in prosecuting or defending the action. However, no attorney's fees shall be so recovered by a party filing an action unless that party seeking to recover said attorney's fees and costs shall have mailed to the breaching party written notice of the alleged failure to perform and said alleged failure was not cured within ten (10) days after the date of mailing of said notice by certified mail to the alleged breaching party's business or residence address. This provision of the Agreement is both contractual in nature and an expression of the parties' Agreement as to any sums authorized to be awarded under provisions of K.S.A. Chapter 60. No fees or costs authorized by this paragraph shall be recovered except as determined and awarded by the Court in an action brought for enforcement, breach or clarification of the Agreement. (R.Vol.2, p. 168.)

The agreement anticipates certified letter as the mode of service, but Jaime placed Thomas on notice in substantial compliance with the parties' agreement by formally serving her Answer to Motion to Modify Child Support on April 11, 2016 and filing that document with the Clerk of the Court that same day. (R.Vol.3, p. 127.) That document placed Thomas on notice both in regard to his anticipated breach of the stipulation of income and the record keeping provision. (R.Vol.3, p. 129-130.) This was necessary because Jaime only became aware of the breach by Thomas' motion to modify.

The provision is contractual; therefore, the court has discretion to determine the reasonableness of fees but not whether an award would be made.

Jaime requested the fees in her Answer. (R.Vol.3, p. 133.)

At the hearing before the hearing officer, Jaime was confronted with a court that refused to recognize a breach and instead found the stipulation void or simply ignored the record keeping provision.

A fee award in Jaime's favor is mandatory, and the matter should be remanded for consideration of attorney fees.

Conclusion:

The District Court reviewed the proceedings conducted by the Hearing Officer under Rule 172(h) applying the abuse of discretion standard and affirmed the decision. Jaime took her appeal from that District Court affirmation.

The hearing officer erred in no less than four ways, but the overarching error was to fail to enforce an MSA earlier found to be valid, just and equitable. This agreement included a provision requiring Thomas to keep those records customary and required by the IRS, to have the records reviewed by a CPA, and to be retained. Record keeping of a diminutive business is, obviously, a small task for Thomas and his CPA. This provision was designed to eliminate conflict between the parties as they managed their respective support obligations. Thomas failed to follow that set of requirements, complaining that it was too hard and expensive to do proper accounting of his small business. Thomas did, however, claim on his taxes that nearly two-thirds of the income he generated was consumed by business expenses and used his raw bank statements and tax returns in support. Thomas made no attempt to do anything more to show that the ~$40,000/year expenses were reasonably necessary for him to earn his $26,086 a year. The court simply chose to ignore the obligation, finding it unnecessary.

Thomas' failure to keep proper records and failure to properly respond to discovery requests necessitated business records subpoenas. The court refused to grant a continuance because, while Jaime did not know the extent of Thomas'

failure to keep proper records until later, Jaime was blamed for not requesting this set of discovery until late in the process.

Many of the ill effects of Thomas' vapid record keeping practices would have been mitigated by the parties' joint stipulation of fact and agreement to impute $75,000 a year in income to Thomas. But the court found that provision to be void as against public policy. The court errantly found that stipulating to an imputed minimum income deprived the court of its authority pertaining to the children's support or education. The error rests in the obvious distinction between agreeing to terminate, or limit or set support amount (all of which are impermissible); as opposed to the enforceable nature of a party stipulating to a fact, here annual income, income is but one of many considerations for the court to undertake when setting child support. The court never claimed the earlier stipulation was an inappropriate for this modification, but it rather simply averaged the parties' position, noting that Thomas' counsel would predict that the court would do so.

When the court did apply its discretion to the modification of child support, it applied the extended income formula without argument, supporting evidence, or discussion—presumably applying the full extended formula as though it were presumptive. The formula is set out in the guidelines as a convenient consideration for the parties and the court. But the court has to do more; it must consider the product resulting from the application of the formula and look to the circumstances of the parties and the children, as well as the lifestyle the children

enjoy in each respective home, all while avoiding granting the obligee of the support a windfall. Here then, the court failed to take evidence or consider those factors.

Finally, this conflict was preventable. Thomas promised to competently keep his business records and stipulated to the minimum of $75,000 of annual income. He breached both promises and an onslaught of litigation ensued. When served with notice that Jaime was offended by the breach, he had the opportunity to cure that breach and did not. The court is obliged to determine the reasonableness of attorney fees and the agreement mandates that Jaime is owed her fees.

As such, the matter should be remanded for a full evidentiary hearing, to include the fruits of Jaime's discovery propounded on Thomas and those he does business with. Thomas should be required to assemble his business records as agreed, and the court must establish a presumptive income at a minimum of $75,000 after reasonable business expenses. If the resulting combined income is above the chart amount, then the court should avoid Thomas getting a windfall and determine what, if any amount above the extended formula is in the best interests of the children and preserves their lifestyle. On appeal and below, Thomas must be held responsible for the breaches of the agreement and fees awarded as the agreement dictates. When appropriate, Jaime will make a proper application for fees before this court.

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Notice of Electronic Filing

Service by notice of electronic filing under Rule 1.11 (b)(2) on the dates reflected in the file stamp hereupon as having been filed with the Clerk of The Appellate Courts.

Steven A. Jensen
Counsel for Appellee
Who entered his appearance
in this court for Thomas Whildin on 9/5/18

/S/Joseph W. Booth

Joseph W. Booth #17100

2016 WL 3128692
Unpublished Disposition
Only the Westlaw citation is currently available.
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF Tamara Lynn GUTHRIE–CRAIG (now Patterson), Appellee,
and
Charles "Lee" Craig, Appellant.

No. 113,410.
|
June 3, 2016.

Appeal from Sedgwick District Court; Harold E. Flaigle, Judge.

Attorneys and Law Firms

Jennifer A. Wagle, of Cleary, Wagle & West, of Wichita, for appellant.

Robert D. Wiechman, Jr., of Wichita, for appellee.

Before GARDNER, P.J., LEBEN, J., and HEBERT, S. J.

MEMORANDUM OPINION

PER CURIAM.

***1** Charles "Lee" Craig appeals from a district court order which denied his motion to terminate his child support payments for his adult daughter and increased the amount of his child support payments for his minor daughter. The district court found that Charles was contractually bound to pay child support beyond the age of 18 and that the court lacked jurisdiction to modify that contract. We agree.

Procedural background

Tamara Lynn Guthrie–Craig (now Patterson) petitioned for divorce from Charles "Lee" Craig in 2009. At that time, the couple had two minor children, Ca.C., born in 1994, and Cl.C., born in 2000. Tamara submitted a child support worksheet which was incorporated in the divorce decree. The district court made a $1,043 upward adjustment to the rebuttable presumption amount based on the overall financial condition of the parties.

Prior to the divorce, Charles and Tamara had entered into a property settlement agreement which provided in part:

> "[Charles] shall pay to [Tamara] the sum of $1,250.00 every two weeks beginning on September 3[ ], 2010 and continuing in a similar amount every two weeks thereafter as and for child support through May 31, 2022. Said support shall be paid to the Kansas Payment Center ... until the minor child, [Cl.C.'s] eighteenth birthday.... After [Cl.C.'s] eighteenth birthday, said

child support obligation of $1,250.00 every two weeks shall be paid directly to [Tamara] ... and shall terminate upon May 31, 2022."

The effect of this agreement was that Charles would continue to pay child support until the younger daughter was 22 and the older daughter was 28.

The agreement acknowledged its contractual nature and provided that it would not be easily set aside.

> "This agreement is absolute, irrevocable and is not conditioned upon the parties being divorced or upon approval of the Court. It shall be considered to be contractual between them and binding upon the parties, their executors, administrators, heirs, devisees, beneficiaries, assigns or other legal representatives where applicable for the purpose of carrying out the terms thereof. It may be set aside only should the Court see fit and upon good cause being shown not to approve it.
>
> ....
>
> "The provisions of this agreement replace any and all other agreements and understandings either written or oral or Court ordered between the parties. Any modifications hereto shall be done in writing, dated and signed and shall be made only by the mutual consent and agreement of the parties except for further orders of the court."

The district court approved the property settlement agreement after finding it "fair, just and equitable to both parties," and the property settlement agreement was incorporated into the divorce decree issued in December 2010.

In 2013, when Ca.C. was 19 years old and Cl.C. was 13 years old, Charles filed a motion to terminate his child support payments as to the older daughter and to modify them as to the younger daughter. Charles argued the child support provision in the divorce decree failed to comply with the Kansas Child Support Guidelines and should be set aside to the extent it required him to pay child support past the age of majority.

***2** At the evidentiary hearing, the parties agreed it had been Charles' idea to pay support in the amount of $1,250 every 2 weeks through May 31, 2022, to help pay for college and medical expenses. Charles testified to the following: child support was not enforceable by the court after the child reached the age of majority, but he assumed child support could be modified once the child turned 18; he had spoken to an attorney but had decided not to hire one; he had read and understood the terms of the divorce decree before signing it; and he had never agreed to pay child support through May 31, 2022, but had signed the property settlement agreement "to get it over with." Charles was also asked about the child support worksheet. After testimony regarding various W–2's from several employers, Charles admitted that for 2013 his gross annual income was higher than he had reported.

Following the hearing, the district court issued a written decision denying Charles' motion. As to the oldest child, the district court found that because she had reached the age of majority, Charles remained "liable for support for that child until May, 2022, by his agreement." As to the minor child, the district court found it had authority to modify child support until the child reached 18 years of age. The district court found a material change in circumstances, so ordered a recalculation of the child support payments. The district court then increased the amount of child support, ordering Charles to pay $1,667 per month for the minor child from July 1, 2013, until she reached the age of majority, at which time the support Charles agreed to in the property settlement agreement would revive.

Charles then filed a motion to reconsider. Tamara also filed a motion due to the district court's misstatement of child support amounts; she asked the court to correct its ruling. Following a hearing on the motions, the district court denied Charles' motion to reconsider and granted Tamara's motion. The court modified the language and ordered Charles to pay $1,250 every 2 weeks as originally agreed upon. Charles timely appeals.

I. *Did the district court err by finding the property settlement agreement was valid, just, and equitable?*

Charles first argues that the district court should have vacated the child support orders in the decree because they are not fair, just, or equitable. He asks this court to find the property settlement agreement was not valid, just, and equitable and contends the district court erred by incorporating the agreement into the divorce decree without making the requisite findings. Charles concedes that he is not challenging the division of property but only the amount of child support payments.

We address below Charles' argument that the district court erred by failing to modify his child support payments. That issue is determined by the Kansas Child Support Guidelines, which does not measure the amount of child support payments by a "fair, just and equitable" standard. See Guidelines § I (2015 Kan. Ct. R. Annot. 111.) (noting the calculation in the child support worksheet is a rebuttable presumption of a reasonable child support order and any deviation must be made in the best interest of the child).

***3** K.S.A.2015 Supp. 23–2902(a) states the court may award *maintenance* "in an amount the court finds to be fair, just and equitable under all of the circumstances." But maintenance was not awarded in this case. Instead, Charles and Tamara agreed to extend child support payments past the age of majority and the district court found the agreement to be "fair, just and equitable to both parties." The correct standard to apply to property settlement agreements, however, is that they must be "*valid,* just and equitable." (Emphasis added.) See K.S.A. 60–1610(b)(3) recodified in K.S.A.2015 Supp. 23–2712(a); *In re Marriage of Schmeidler,* 2015 WL 5613151, at *2 (noting that separation agreements are often called property settlement agreements).

When an appellant challenges the district court's findings regarding the "valid, just and equitable" nature of a separation agreement, our review is limited to determining whether such factual findings are supported by substantial competent evidence. *In re Marriage of Takusagawa,* 38 Kan.App.2d 401, 403, 166 P.3d 440, *rev. denied* 285 Kan. 1174 (2007).

Property settlement agreements incorporated into a divorce decree are not easily modified. As a general rule, issues settled in a separation agreement that are incorporated into a divorce decree "are not subject to subsequent modification except as provided for in the agreement or as mutually agreed to by the parties. See *In re Marriage of Hedrick,* 21 Kan.App.2d 964, 967, 911 P.2d 192 (1996); [K.S.A. 60–1610(b)(3)]." *Schmeidler,* 2015 WL 5613151, at *2.

To justify modification of his property settlement agreement, Charles relies on *In re Marriage of Kirk,* 24 Kan.App.2d 31, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997), claiming the requisite level of scrutiny was not met when the district court incorporated the property settlement agreement. He argues: "Had any such scrutiny been performed in this case, the District Court would have found the parties' agreement regarding child support was inequitable, invalid and unjust."

We agree that a certain level of scrutiny is required before a district court can incorporate the agreement into the decree. See K .S.A. 60–1610(b)(3); *Kirk,* 24 Kan.App.2d 31, Syl. ¶¶ 1–2. In *Kirk,* the parties filed a domestic relations affidavit but no property values were listed in the separation and property settlement agreement and no testimony or other evidence of value of the parties' businesses was reviewed by the district judge before he approved the separation and property settlement agreement. 24 Kan.App.2d at 33. We determined that based on the record, the district court had failed to review the separation agreement as required by K .S.A. 60–1610(b)(3).

But this case is distinguishable from *Kirk.* Here, the property settlement agreement specified amounts of assets and debts. The property settlement agreement also contained a specific provision regarding the support of the children—Charles agreed to pay $1,250 every two weeks beginning September 3, 2010, until May 31, 2022. And the parties provided a child support worksheet that echoed this amount. The parties followed Sedgwick County Local Rule 420, which provides: "If [a final hearing for an uncontested or default case] is ordered, the testimony of one of the parties, either directly before the Court under oath or through written interrogatories, shall be submitted to the Court at the hearing." Tamara submitted a default affidavit and the parties did not appear before the district court to argue the divorce. The district court reviewed the record and found the property settlement agreement to be valid, just, and equitable and incorporated it into the divorce decree.

***4** Charles fails to provide any evidence to support his contention that the property settlement agreement was not valid, just, or equitable. As the party claiming an error occurred, Charles has the burden of designating a record to support his claim; without such a record, the claim of error fails. *Friedman v. Kansas State Bd. of Healing Arts,* 296 Kan. 636, 644–45, 294 P.3d 287 (2013). We therefore find substantial evidence supporting the district court's determination that the property settlement agreement was valid, just, and equitable.

II. *Was Charles entitled to relief pursuant to K.S.A. 60–260(b)?*
Charles next contends the district court erred in not relieving him of the child support provisions of the decree pursuant to K.S.A. 60–260(b). In support, Charles relies on *Richardson v. Richardson,* 3 Kan.App.2d 610, 599 P.2d 320 (1979). Charles concedes that as a general rule, property settlement agreements may not be modified by the district court. Yet he contends the district court is not deprived of the "authority to grant relief from a final judgment under K.S.A. 60–260(b) merely because the judgment is a divorce decree incorporating a property settlement agreement." 3 Kan.App.2d at 612.

We agree. But to say that a court retains the authority to do an act does not mean that the court erred in not doing that act. We find the facts in *Richardson* to be clearly distinguishable. In *Richardson,* the wife sought a nunc pro tunc order in the original divorce proceeding to have a *newly discovered* piece of land set aside to her. The district court liberally construed her motion as one seeking relief under K.S.A. 60–260(b). 3 Kan.App.2d at 611. In contrast, Charles presents no newly discovered evidence, relying instead on the statute's catch-all provision, but showing no facts warranting relief under K.S.A. 60–260(b). We find no error in the district court's denial of his 60–260(b) motion.

III. *Did the district court err by failing to comply with the Kansas Child Support Guidelines?*
Charles next contends the child support provisions of the divorce decree were not based on a child support worksheet and did not comply with the Kansas Child Support Guidelines. He claims the district court failed to make specific written findings when it indicated its reason for the overall financial adjustment of $1,043 per month. We disagree.

Parental child support obligations in a divorce action are governed by statute and guidelines established by our Supreme Court. See generally K.S.A.2015 Supp. 23–3001 *et seq.* (governing court's obligation and authority to make provisions for child support); K.S.A.2015 Supp. 20–165 (mandating Supreme Court to adopt rules establishing child support guidelines; Kansas Supreme Court Administrative Order No. 261, effective April 1, 2012). " 'The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the Kansas Child Support Guidelines are subject to unlimited review.' [Citation omitted.]" *In re Marriage of Thomas,* 49 Kan.App.2d 952, 954, 318 P.3d 672 (2014).

***5** In the absence of specific findings, a district court's failure to follow the Guidelines is reversible error. See *In re Marriage of Thurmond,* 265 Kan. 715, 716, 962 P.2d 1064 (1998). A court can deviate from the amount of child support determined through use of the Guidelines but must justify any such deviation through specific written findings in the journal entry. The deviations must serve the best interests of the children. *In re Marriage of Vandervoot,* 39 Kan.App.2d 724, 732, 185 P.3d 289 (2008). Such findings are generally reviewed for substantial competent evidence and to ensure they are sufficient to support the district court's conclusions of law. *In re Marriage of Atchison,* 38 Kan.App.2d 1081, 1089, 176 P.3d 965 (2008). Here, the district court made sufficiently specific findings supported by sufficient evidence, as detailed below.

At the time the district court issued the journal entry and divorce decree in this case, the 2008 Guidelines were in effect. See Guidelines § I (2010 Kan. Ct. R. Annot. 113). They provide:

> "The calculation of the respective parental child support obligations on Line D.9 of the worksheet is a rebuttable presumption of a reasonable child support order. If a party alleges that the Line D.9 support amount is unjust or inappropriate in a particular case, the party seeking the adjustment has the burden of proof to show that an adjustment should apply. If the court finds from relevant evidence that it is in the best interest of the child to make an adjustment, the court shall complete Section E of the Child Support Worksheet. The completion of Section E of the worksheet shall constitute the written findings for deviating from the rebuttable presumption." Guidelines § I (2010 Kan. Ct. R. Annot. 113).

The parties acted in accordance with Sedgwick County District Court Local Rules when Tamara filed a domestic relations

affidavit with the divorce decree. That affidavit, stating the value for all of the assets, including the residence and the vehicles, was relevant evidence, as was the evidence presented at the hearing in 2013 on Charles' motion to modify his child support payments.

The amount on line D.9 of the child support worksheet attributed to Charles is $1,665. Charles does not attempt to rebut that amount but disputes the district court's adjusted amount, which increased that amount of child support by $1,043. The district court indicated it did so because of the overall financial condition of the parties, as provided in Section E of the worksheet, and that line E.6 was its reason for making the adjustment. The completion of that section "shall constitute the written findings for deviating from the rebuttable presumption." Guidelines § I (2010 Kan. Ct. R. Annot. 113).

We find that the district court made the requisite findings for deviating from the Guidelines and that those findings are supported by substantial competent evidence. The district court thus did not abuse its discretion in determining $2,708 was Charles' net parental child support obligation.

IV. *Did the district court err by denying Charles' motion to modify child support?*

***6** Charles next challenged the district court's finding that it did not have authority to modify the child support once the children reached the age of majority; those payments were considered part of a contractual agreement. However, the district court found it did have authority to modify the child support of the minor child. Using the Guidelines, the district court recalculated Charles' child support payment as to the minor, Cl.C., until she reached 18. After 18, the district court ordered the payments to revert back to the parties' original agreement.

Charles argues that because the payments are for child support and district courts have jurisdiction over child support amounts, the district court has authority to modify the amounts even after the age of majority. He also argues the district court cannot claim to lack authority as to the oldest child but have authority as to the minor child to modify the payments until the child reaches the age of majority. Charles claims he initially agreed to extend the payments to help the children pay for college or further education, but his oldest daughter has chosen not to pursue higher education. Therefore, he contends, the continued child support payments are actually disguised maintenance payments.

This issue presents a matter of statutory interpretation—a question of law over which we have unlimited review. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Neighbor v.. Westar Energy, Inc.,* 301 Kan. 916, 918, 349 P.3d 469 (2015). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Cady v. Schroll,* 298 Kan. 731, 738–39, 317 P .3d 90 (2014). We do so here.

Charles argues the district court has authority to modify child support based on K.S.A. 60–1610(b)(3), even if the property settlement agreement was incorporated into the divorce decree. That law stated:

> "If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree.... The provisions of the agreement on all matters settled by it shall be confirmed in the decree *except that any provisions relating to ... support or education of the minor children* shall be subject to the control of the court in accordance with all other provisions of this article ." (Emphasis added.) K.S.A. 60–1610(b)(3).

Charles contends this language means that provisions relating to child support remain subject to the control of the district court and cannot be settled merely by the agreement of the parties. But the statute refers to support of a *minor* child; payment to a child after the age of 18, although referred to as "child support" in the agreement, is not support of a minor child. The plain language of the statute defies an interpretation that a district court has control over a party's child support obligations *ad infinitum.*

***7** Next, we look to K.S.A. 60–1610(a)(1), which addressed child support and education of minor children. This statute provided: "The court shall make provisions for support and education of the *minor children.* The court may modify or change

any prior order ... when a material change in circumstances is shown...." (Emphasis added.) Thus as to the minor child, the district court had authority to modify the child support payments while the child was a minor.

The statute further provided:

> "Regardless of the type of custodial arrangement ordered by the court, the court may order the child support and education expenses to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless: (A) The parent or parents agree, by written agreement approved by the court, to pay support beyond the time the child reaches 18 years of age...." K.S.A. 60–1610(a)(1).

That exception squarely applies here.

We note that at the time of the parties' divorce, K.S.A. 60–1610(a)(1) provided that the obligation to pay child support shall terminate when the child reaches 18 unless any one of three events occur: (1) the parents have agreed otherwise in a court-approved writing; (2) the child reaches 18 before completing high school, in which case child support continues to June 30 of that school year; or (3) a motion is filed to continue support through the school year in which the child, held back by mutual parental consent, becomes 19. Only the first of these exceptions applies here and neither our discussion nor our holding relates to exceptions 2 or 3. *Cf. Matter of Marriage of Bunting,* 259 Kan. 404, 409–10, 912 P.2d 165 (1996) (interpreting K.S.A. 60–1610(a)(1)(C) as giving the district court jurisdiction to continue child support for a student, although the motion was filed after June 30 of the school year during which she became 18).

Reviewing the statutes as a whole, we find legislative intent that child support is for minor children only. Furthermore, the district court has inherent authority to modify child support payments made for minor children. Once a child turns 18 years of age, the obligation to pay child support pursuant to the statute terminates, as does the court's inherent authority to modify the support. See 2 Elrod, Kansas Law and Practice, Kansas Family Law § 14:27 (2014–2015 ed.). Parents may contractually agree to extend the payments in a written agreement, but such an agreement between the parties does not extend the court's authority to modify the agreements. See *Bartlett Grain Co. v. Kansas Corporation Comm'n,* 292 Kan. 723, 726, 256 P.3d 867 (2011) ("[P]arties cannot confer subject matter jurisdiction by consent.") (quoting *Padron v. Lopez,* 289 Kan. 1089, 1106, 220 P.3d 345 [2009]). If the parents have a written agreement for post majority support incorporated into the decree of divorce, the trial court has no jurisdiction to modify the periodic support payments after the child has attained the age of 18. *Morrison v. Morrison,* 14 Kan.App.2d 56, 60–61, 781 P.2d 745, *rev. denied* 245 Kan. 785 (1989).

***8** Charles and Tamara both entered into the property settlement agreement and neither party provided any conditions to the contractual obligation to pay child support through May 31, 2022. Property settlement agreements are written contracts and are governed by contract law, *In re Ketter,* No. 93,993, 2006 WL 1379584, at *6 (2006 Kan.App.) (unpublished opinion), and Charles does not raise any claims regarding the contract.

Accordingly, we find the district court did not err by modifying the child support payments as to the minor child or by finding the property settlement agreement controlled once the children reached the age of majority. Therefore, Charles is required to make the payments through May 31, 2022, as he agreed to do.

Affirmed.

260 P.3d 1249 (Table)
Unpublished Disposition

Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF Shannon WILSON, Appellee,
and
Bruce Wilson, Appellant.

No. 104,830.
|
Oct. 7, 2011.
|
Review Denied June 13, 2012.

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed October 7, 2011. Affirmed in part and remanded with directions.

Attorneys and Law Firms

Frederick K. Starrett and Matthew K. Corbin, of Lathrop & Gage LLP, of Overland Park, for appellant.

Robert S. Caldwell, of Caldwell & Moll, L.C., of Overland Park, for appellee.

Before HILL, P.J., GREEN and BRUNS, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** This case presents the question of what a district court should do when ordering child support in a situation where the income of one of the parties exceeds the largest amount found in our guidelines. Bruce Wilson contends the trial court ordered him to pay too much child support, $5,717 per month. Because, as found by the trial court, there is more than a $2 million difference between mother and father's income and the court used the extended-income formula found in the Kansas Child Support Guidelines and followed those guidelines in making adjustments to the parties' incomes, we find no abuse of discretion and approve the court's approach to making this support calculation. However, as the parties have pointed out to us, the court used an incorrect age bracket and the actual support figure must be recalculated. We remand that matter to the court for redetermination.

We have addressed the issue of child support in this case before .
In 2010, this court reversed the district court's order to Bruce Wilson to pay $6,000 per month to Shannon Wilson as child support. See *In re Marriage of Wilson,* 43 Kan.App.2d 258, 261, 223 P.3d 815 (2010) (*Wilson I*). The *Wilson I* court ruled the district court had no authority to exceed the statutory age limit for support obligations and order Bruce Wilson to pay support

to Shannon Wilson to be put into an account for the education of their son, Finley, past the age of majority. Three-thousand and five-hundred dollars of the ordered amount was to be placed in a trust fund that could have been used to provide for the educational needs of Finley *after the age of majority.* Our court remanded the matter to the district court to determine, from the date support was initially awarded, the proper amount. Our court expressly rejected Bruce Wilson's request to simply strike the $3,500 trust contribution, leaving a child support award of $2,500, because our court did not know if the district court considered $2,500 per month an adequate amount. 43 Kan.App.2d at 261. Once the case returned to the district court, it entertained argument by the parties but did not take additional evidence and limited its ruling to the original facts of the case as determined at the time of the original order. This appeal arises from the district court's response to our remand order.

The district court made a modest reduction in the amount to be paid as child support.

To correct its error in providing for post-majority support, the court reduced Bruce Wilson's monthly child support obligation by $283 per month and ordered a corresponding reduction in any arrearages, as well as a refund for any support payments Bruce Wilson had made in excess of $5,717 per month. The court then made several other findings that are pertinent to the resolution of this appeal:

> • The evidence presented at trial established that the difference between Shannon Wilson's income, which was limited to spousal maintenance of $99,996 per year, and Bruce Wilson's income, which was $2,169,134 per year at the time of the trial, is drastic.
>
> ***2** • The drastic difference in incomes is likely to have a long-term negative effect on Finley's relationship with both parents, with one parent having superiority over the other in regard to financial ability. Finley is likely to enjoy the benefits that a father who earns over $2,000,000 per year can provide. These benefits can include better living conditions, more travel opportunities, and more educational and recreational opportunities. Shannon Wilson should not be placed in a situation in which Wilson can provide everything and she can only provide the minimum.
>
> • Failure to use either the extended-income formula or to make an overall financial condition adjustment would leave the parents in dramatically different economic positions and would likely lead to conflict between the parents and place undue pressure on Finley.
>
> • It is in Finley's best interests that the extended-income formula be applied and to consider $1,500,000 of Bruce Wilson's income and to exclude $669,134 of his total income in establishing child support.
>
> • Because the child support is to be expended on direct and indirect expenses incurred during the child's minority, no spendthrift trust will be required, and the order requiring that a portion of the support payments be placed in a spendthrift trust is set aside.

It is well established that child support orders are matters of district court discretion.

This court reviews a district court's order determining child support under the highly deferential abuse of discretion standard. In re Marriage of Branch, 37 Kan.App.2d 334, 336, 152 P.3d 1265, rev. denied 284 Kan. 945 (2007). We will find an abuse of discretion only if we can say the challenged judicial action is arbitrary, fanciful, or unreasonable. Thus, if reasonable persons could differ as to the propriety of the action taken by the district court, then we will not find the district court abused its discretion. The party asserting the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Hair,* 40 Kan.App.2d 475, 480, 193 P.3d 504 (2008).

When the sufficiency of the evidence to support a child support award is challenged, this court will review the district court's findings of fact only "to determine if the findings are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. Substantial evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion." *In re Marriage of Atchison,* 38 Kan.App.2d 1081, Syl. ¶ 3, 176 P.3d 965 (2008).

This court will not weigh conflicting evidence, pass on witness credibility, or redetermine questions of fact. 38 Kan.App.2d at 1085. Finally, if we are asked to review the district court's interpretation and application of the child support guidelines, our review of such questions of law is unlimited. *Branch,* 37 Kan.App.2d at 336.

The parties' arguments reflect two different approaches to the determination of child support.
***3** Bruce Wilson complains the child support award was not based on any evidence regarding Finley's *actual* reasonable needs and really is a windfall to Shannon Wilson. Or, in his view, this figure amounts to a maintenance award in disguise. On the other side, Shannon Wilson contends there is sufficient evidence to support the district court's findings in regard to the parties' income and its subsequent application of the extended-income formula. She supports the district court's use of the extended-income formula to arrive at the $5,717 per month child support award.

Beginning with the statute, we will now review some general principles of law dealing with child support obligations. K.S.A.2010 Supp. 60–1610(a)(l) requires a district court to "make provisions for the support and education of the minor children," which means the court must consider "all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child." There is no express provision in the statute that limits child support to the actual needs of the child. Such needs are but one factor for the court to take into account.

As directed by our legislature in K.S.A. 20–165, the Kansas Supreme Court has established guidelines that govern how a district court must generally calculate the amount of child support due. The guidelines include schedules adopted by our Supreme Court that take into account various data regarding income and expenditures to aid in properly assessing the nature of the income and expenditures involved in calculating child support. See, *e.g.,* Administrative Order No. 216, Kansas Child Support Guidelines § II.B. and C. (2010 Kan. Ct. R. Annot. 113–14); § IV (2010 Kan. Ct. R. Annot. 122–33). Proper use of these guidelines creates a *presumed* amount of support to be paid that is rebuttable. A district court must follow the guidelines in calculating child support unless it supports a deviation by written findings in the journal entry. See *In re Marriage of Thurmond,* 265 Kan. 715, 716, 962 P.2d 1064 (1998). This need to make written findings includes cases where a deviation *above* the amounts listed in the guidelines is contemplated.

Obviously, in our society, there are case exceptions to the income amounts found in our guidelines. The 2010 version of the guidelines governs the child support award at issue here. The guidelines expressly provide that if the combined child support income exceeds the highest amount reflected in the schedules, "the court should exercise its discretion by considering what amount of child support should be set *in addition* to the highest amount on the Child Support Schedule." Guidelines § III.B.3 (2010 Kan. Ct. R. Annot. 117–18). (Emphasis added.) To assist the court in this discretionary task, the guidelines include a specific formula at the end of each child support schedule showing how to compute the income amount not reflected in the schedules. See, *e.g.,* Guidelines, Appendix VIII, Example 2 (2010 Kan. Ct. R. Annot. 175–76). This usually involves determining the child support of the child at the highest age bracket (12–18) and then multiplying the support by a factor, in this case, 0.76, and then adding that product to the child support number found in the highest age bracket.

***4** This method for calculating child support where parental monthly income exceeds the amounts provided for in the guidelines is commonly referred to as the extended-income extrapolation formula. This court has considered the use of this formula in two cases. The first was *In re Marriage of Patterson,* 22 Kan.App.2d 522, 920 P.2d 450 (1996), and *In re Marriage of Leoni,* 39 Kan.App.2d 312, 180 P.3d 1060 (2007), *rev. denied* 286 Kan. 1178 (2008), was the second. Those authorities teach us that when a district court is confronted with a case such as this, it must, in the exercise of its discretion, consider the extended-income formula and balance several factors, such as the needs of the child with the expected standard of living for children of families with very large incomes, and avoid awarding windfalls to the parent receiving child support.

In *Patterson,* the district court held it would not award child support higher than the highest amount in the support schedules unless the mother of the children was able to show special needs of the minor children. Our court reversed and remanded the question to the district court, holding: "Although discretionary, the Kansas Child Support Guidelines extrapolation formula *must* be considered by the trial court when income exceeds the child support schedules." (Emphasis added.) Patterson, 22 Kan.App.2d 522, Syl. ¶ 2. Also pertinent to our case, the court in Patterson stated:

"[I]n fixing the child support obligation of a high-income parent, the trial court must balance competing concerns. On the one hand, the trial court should not limit the amount of child support to the child's "shown needs," because a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury. [Citation omitted]. The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution. [Citation omitted.] On the other hand, child support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of the children. [Citation omitted.]' " 22 Kan.App.2d at 528–29 (quoting *In re Marriage of Lee,* 246 Ill.App.3d, 628, 643–44, 615 N.E.2d 1314 [1993]).

Clearly, in this type of high-income case, the *Patterson* court rejected the contention raised by Bruce Wilson here, that child support must be limited to a child's demonstrable needs. Further, a court must consider the extrapolation formula when fixing the amount of child support. We find *Patterson* persuasive.

Almost 12 years later, this court addressed similar issues in *Leoni.* The district court in that case used the extended-income formula to calculate support but also imposed a cap on the total child support obligation for almost a 2–year period. The district court made specific written findings explaining its deviation from the guidelines. Our court approved the actions of the district court and recognized a district court's decision to use the extended-income formula requires it to balance several factors in order to determine "the standard of living the child would have enjoyed absent parental separation and dissolution and also to ensure adequate support for upbringing the child without allowing windfalls." *Leoni,* 39 Kan.App.2d at 323. Clearly then, the court has to consider the child's standard of living at the home of the parent who is less affluent and any ill effects a great disparity between the two households would have on the child. That is what the district court did in *Leoni.*

***5** Given this legal framework, we now look at the actions taken by the district court here. We look first at the amount of support. The district court, in its findings made after our remand order, reflected upon its determination of the original $6,000 award and the implicit concerns about Finley's needs:

> "The Court's initial intent was to establish a trust account to be used by the parents for [Finley] during his minority for special needs, special education, future education during minority, educational camps, athletic camps, recreational camps, summer school, tutoring, educational materials, musical instruments, musical training, educational and recreational equipment, and other direct expenses; and, if any funds remained at the time of the child's age of majority, the balance could be applied to college."

This language clearly illustrated the factors the district court was taking into account when it was deciding the original support order. The district court displayed the same concerns about Finley's needs after the remand order. All of these considerations are allowed by our statutes, the guidelines, and *Patterson and Leoni.*

Bruce Wilson's arguments are not persuasive.

We group Bruce Wilson's arguments that the district court abused its discretion into five different claims.

- *First,* he maintains the district court failed to make adequate findings about Finley's actual needs and the evidence did not show that Finley's current actual and reasonable needs warranted such an exorbitant amount of child support.

- *Second,* the district court's after-the-fact justification for the amount of child support based on the parties' disparate incomes lacks evidentiary support and improperly amounts to a disguised maintenance award.

- *Third,* the district court arbitrarily determined his gross income while computing child support, which varied significantly from the income figure the court used in calculating his maintenance obligation.

- *Fourth,* the district court improperly calculated his child support obligation using a 6–11 age bracket because Finley was in the 0–5 age bracket during the period between September 2007 and March 2009.

- *Fifth,* the court abused its discretion in abandoning the trust, and this court should remand with directions to reinstate a trust to ensure the funds are used for Finley's support.

We note that both parties agree the district court used the improper age bracket when it computed the child obligation here. For this reason, we will remand the matter to the district court for a proper calculation.

A child's needs are not the sole focus in determining a child support obligation in Kansas.
We now look at the first two arguments raised by Bruce Wilson, where he basically contends the approach taken by the district court here amounts to income sharing and has little to do with his son's needs.

The authorities cited by Bruce Wilson from other states on this issue are not helpful because the cited jurisdictions either do not recognize or allow the use of an extended-income formula as we do in Kansas, or they recognize degrees of discretion and methods for computing child support obligations for high-income parents that substantially vary from the tools used by Kansas courts under Kansas law. For example, the case *In re Marriage of Van Inwegen,* 757 P .2d 1118, 1120 (Colo.App.1988), shows that the Colorado Legislature provided for use of extrapolation for combined gross income amounts falling between those shown in the schedule, but did not provide for use of extrapolation when combined gross incomes fell above or below their schedule. Then, in *Battersby v. Battersby,* 218 Conn. 467, 470–73, 590 A.2d 427 (1991), the court held the Connecticut Legislature did not allow for extrapolation in high income cases. In *Downing v. Downing,* 45 S.W.3d 449, 455–56 (Ky.App.2001), the court rejected a " 'share the wealth' " approach because, "[w]hile to some degree children have a right to share in each parent's standard of living, child support must be set in an amount which is reasonably and rationally related to the realistic needs of the children." Finally, in *Stringer v. Brandt,* 128 Or.App. 502, 508, 877 P.2d 100, *aff'd* 320 Or. 109, 881 P.2d 141 (1994), the court held any decision to set child support above Oregon's guidelines cap must, at a minimum, be based primarily on a child's actual needs, not an obligor's greater income.

***6** Moving on, Bruce Wilson asks us to apply the "Three Pony Rule." Here, he refers to an argument heard frequently in the wealthier parts of our state that "no child, no matter how wealthy the parents, needs to be provided more than three ponies." *Patterson,* 22 Kan.App.2d at 528. While the court in *Patterson* did glibly refer to the "Three Pony Rule" in dicta, such a rule is not the law in Kansas as demonstrated in the *Patterson* case itself. *Patterson* recognized that Kansas law does not focus solely on a child's demonstrable needs to guide a district court's discretionary application of the extended-income formula. 22 Kan.App.2d at 528–29. Kansas law, K.S.A.2010 Supp. 60–1610(a), allows courts to also consider the financial resources and needs of both parents, the financial resources of the child, and the physical and emotional condition of the child when setting child support. See *Leoni,* 39 Kan.App.2d at 323.

Despite Bruce Wilson's insistence to the contrary, the district court's written findings demonstrate that the court did not take a pure income-sharing approach in setting the amount of child support. Rather, the district court considered the financial resources and needs of both parents to conclude their dramatically different economic positions would likely lead to conflict. That is, the court found that without use of the extended-income formula, Shannon Wilson would only be able to provide for Finley's minimum needs while Bruce Wilson would be able to provide Finley with superior living conditions and more travel, educational, and recreational opportunities. The district court also considered Finley's emotional condition, finding that the likely conflict between Bruce Wilson and Shannon Wilson in the absence of application of the extended-income formula would place undue pressure on Finley. These are all appropriate considerations under Kansas law.

Bruce Wilson further insists the court's findings about the potential effects of the " 'drastic income' " difference of the parties is nothing more than a blind assumption that cannot serve as "a substitute for the appropriate analysis, nor the requisite fact-finding with evidentiary support." In support, he points out the parties never testified during the trial about any conflicts, undue pressures, or physical or emotional conditions. He also suggests this court owes no deference to the district court's decision concerning Finley's needs and other factors discussed by the court in applying the extended-income formula, because the parties' domestic relations affidavits were the only evidence from which the court could derive its findings, and this court is just as capable as the district court at reviewing documentary evidence.

We disagree with these sufficiency arguments. The domestic affidavits were not the only evidence considered by the court. Both parties testified at trial and offered numerous other documents for the court to consider. (We acknowledge some are not in the record on appeal.)

***7** Looking deeper into the issue, one commentator has recognized that the exact problems anticipated by the district court here while applying the extended-income formula could indeed result if a court did apply the three-pony rule in shared custody situations. Specifically, the author recognized that in shared custody cases:

> "Sometimes courts determine child support obligations of high-income parents that are not sufficient for the lower-earning parent to maintain the children in a lifestyle even minimally comparable to that of the high-earning parent. In such cases, the child must live a dual life in order to conform to the differing socio-economic classes of his or her parents, and may experience distress or other damaging emotional responses as a result of such instability." Raatjes, *High–Income Child Support Guidelines: Harmonizing the Need for Limits with the Best Interests of the Child,* 86 Chi.-Kent L.Rev. 317, 318–19 (2011).

We do not think the district court acted upon blind assumptions when applying the extended-income formula here; rather, it drew reasonable inferences from the evidence. *Cf. Yount v. Deibert,* 282 Kan. 619, Syl. ¶ 1, 147 P.3d 1065 (2006). This court will not second-guess any credibility determinations or the weight afforded the evidence by the district court. See *Unruh v. Purina Mills,* 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

Finally on this point, Bruce Wilson argues the cases cited by Shannon Wilson that approved the use of the extended-income formula are distinguishable because their purpose is to prevent a *noncustodial* parent from enjoying a luxury lifestyle while the child lives at a minimal level of comfort, and Bruce Wilson is a *custodial* parent.

This argument ignores the plain language of the statute governing child support awards in Kansas as well as the guidelines. For example, K.S.A.2010 Supp. 60–1610(a) provides: "*Regardless of the type of custodial arrangement ordered by the court, the court* may order the child support and education expenses to be paid by either or both parents." (Emphasis added.) Guidelines § IV.E.2.C. (2010 Kan. Ct. R. Annot. 129), requires a 20 percent reduction of a parent's child support obligation in shared custody situations. This 20 percent parenting time adjustment "is given in recognition that the parent has the child ... in their care approximately half of the time during which they are assuming substantial additional costs and the other parent is relieved of a substantial amount of additional costs." Guidelines § IV.E.2d.C (2010 Kan. Ct. R. Annot. 129). Bruce Wilson did receive this 20 percent parenting time adjustment, which reduced his support obligation by more than $1,400.

In our view, when computing this support figure, the district court followed the extended-income formula found in the guidelines. We cannot say that when a district court follows the guidelines it is an abuse of discretion, even though in this case the computation yielded a large amount of support. We now look at the income figures used by the district court when computing child support.

The district court averaged Bruce Wilson's income but not to the extent he wanted.

***8** Some background information helps give this issue a context. Bruce Wilson is an independent commodities trader at the Board of Trade in Kansas City, so his yearly income fluctuates depending on various, often unpredictable, factors that drive the commodities market. At the close of the January 8, 2008, trial, the district court highlighted the evidence concerning the history of fluctuating earnings when discussing how it would approach the need for maintenance. For example, the court pointed out that prior to their marriage, Bruce Wilson had Medicare earnings including "1995, [$]137 plus; 1996, [$]234,000; 1997, [$]87,000 plus." But from the time of their marriage in 1998 through 2001, Bruce Wilson had "four years of zero income." Then, after they moved to Kansas City in 2002, "he then returned to [$]424,000 plus; in 2002, almost [$]400,000; 2003, the off year, [$]55,000, 2004, [$]294,000; 2005, and this indicates [$]386,000 in 2006," although Bruce Wilson's domestic relations affidavit indicated even more than that. After discussing these income fluctuations, the court asked the parties to submit proposed maintenance figures and took the issue under advisement. In its subsequent decision on Shannon Wilson's request for maintenance, the district court highlighted Bruce Wilson's intentional deception in withholding details of his significant income in 2007 (as discussed in *Wilson I*), Shannon Wilson's needs, and the court's ability to rectify an economic imbalance in earning power and the parties' standard of living. The court then adopted Shannon Wilson's request to calculate maintenance based on an annual income of $500,000, resulting in a total maintenance obligation of $8,333 per month.

Despite that ruling, the district court set Bruce Wilson's income at $1.5 million for purposes of calculating child support. The

court did not elaborate anywhere in the record how it arrived at this figure, but Bruce Wilson appears to be correct when he contends the district court arrived at this amount by averaging his income for 2007, 2008, and 2009. He then argues such a narrow focus on his highest earning years to calculate child support "highlights the excessive and arbitrary nature" of the district court's child support award.

Our research has revealed no authority requiring a district court, as a matter of law, to use the same income figures when calculating maintenance and child support. In Kansas, maintenance awards, governed by K.S.A.2010 Supp. 60–1610(b)(2), must be fair, just, and equitable under all the circumstances. The purpose of spousal maintenance is to provide for the future support of the divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other party to pay. *Hair,* 40 Kan.App.2d at 484. District courts may consider several factors in considering requests for maintenance, including: (1) the age of the parties; (2) the parties' present and prospective earning capacities; (3) the length of the marriage; (4) the property owned by the parties; (5) the parties' needs; (6) the time, source, and manner of acquisition of property; (7) the family ties and obligations; and (8) the parties' overall financial situation. There are no fixed rules governing the amount of a maintenance award. *Williams v. Williams,* 219 Kan. 303, 306, 548 P.2d 794 (1976).

***9** On the other hand, unlike maintenance, there are fixed rules for determining the amount of child support. Granted, the guidelines take into account the possibility that a court may need "to consider historical information and the seasonal nature of employment" when determining an obligor's domestic gross income. Guidelines § II.D. (2010 Kan. Ct. R. Annot. 115.) *In re Marriage of Brand,* 273 Kan. 346, 356, 44 P.3d 321 (2002), held that § II.D. allows the use of historical information to "be considered when determining when regular income is received for purposes of calculating domestic gross income under the guidelines." In *In re Marriage of Cox,* 36 Kan.App.2d 550, 552–54, 143 P.3d 677 (2006), the court found no abuse of discretion in the court's averaging of a self-employed obligor's fluctuating annual rental income.

The fact remains that in this case, the district court did average Bruce Wilson's income over a period of years when computing the child support. It just did not use the greater number of years when averaging his income when computing maintenance. We note that the average figure used, $1.5 million, is $500,000 less than the greater figure of $2,000,000, which was Bruce Wilson's approximate income for 2007. Even though the district court offered no real explanation for its use of different income figures when calculating maintenance and child support obligations, our only task is to determine if no reasonable person would have agreed with the court's use of the $1.5 million figure to calculate child support on remand. We cannot say that was an abuse of discretion.

The court had discretion not to impose a trust upon remand.

In his final issue on appeal, Bruce Wilson suggests that even if we affirm the child support award, we should find the court abused its discretion in abandoning the trust and remand with directions for the court to reinstate a trust to ensure the funds go toward Finley's support. Shannon Wilson responds that the court's abandonment of the trust was consistent with our directions on remand in *Wilson I* and does not amount to an abuse of discretion.

Indeed, after our remand in *Wilson I,* the district court determined no trust was necessary after it lowered the amount of child support to comply with our directions. However, when considered in light of the court's oral comments at the hearing on remand about its initial intent in establishing the trust—*i.e.,* the court hoped funds placed in the trust might take care of Finley's needs during any periods in which Bruce Wilson experienced fluctuations in his income—we cannot say that no reasonable person would agree with the district court's decision to abandon the trust. The court's comments reveal that it never believed the trust was necessary to prevent Shannon Wilson from misusing funds meant for Finley's support, a view that Bruce Wilson urges us to adopt, but rather it was used as a method for weathering the lows in the fluctuations of a commodities trader's income. This is not an abuse of discretion.

***10** We affirm the method for computing child support employed by the district court, except for its use of an incorrect age bracket. We remand the issue to the district court for recalculation.