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

REPLY 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

Reply to Issues Raised by Appellee

In Reply to Appellee's Issue One: The Administrative Hearing Officer and District Judge correctly found that limiting child support modification consideration until an arbitrary date in the future was unenforceable. In reply Jaime, states, that she too agrees, did not take that issue on appeal, and clearly stated so in her brief.

In Reply to Appellee's Issue Two: The Administrative Hearing Officer and District Judge correctly found a stipulation to an income of $75,000 for father, without regard to what he actually earned, was not in the best interest of the minor children, and thus was unenforceable against public policy. In reply Jaime states: As set out in Issue 2 of her Brief of the Appellant, the stipulation was one of a disputed fact, approved by the court and not shown to be contrary to the best interests of the children.

In Reply to Appellee's Issue Three: The Administrative Hearing Officer and District Judge correctly found the recordkeeping requirements in the parties' marital settlement agreement was too onerous and expensive and created a chilling effect that was not the best interest of the minor children, and thus was unenforceable against public policy. In reply Jaime states: She holds to her arguments in Issue One of her brief. This particular provision was not found by the court to be contrary to public policy, was not found to have created a chilling effect and was not found to be contrary to the best interest of the minor children.

In Reply to Appellee's Issue Four: The administrative hearing officer and

district judge erred when they arbitrarily imputed $52,500 as father's income for child support purposes. In reply, Jaime states, the court does not have jurisdiction to hear this issue when Thomas did not cross-appeal.

In Reply to Appellee's Issue Five: The Administrative Hearing Officer and the District Judge correctly found that an award of attorney fees was not warranted under the circumstances. In reply, Jaime, states: for the most part, Thomas' arguments in this section depend upon this court upholding the lower court's decision. If either of the two stipulations made by parties or are found by this court to have legal effect, then Thomas owes Jaime attorney fees by contract and court order.

In Reply to Appellee's Issue Six: Mother cannot argue against the use of the extended income formula for the first time on appeal. In reply, Jaime, states: at the hearing neither Thomas nor the court addressed the issue of what the support amount, if any, would be owed above the limits set forth in the child support guidelines charts. The court first used the extended formula without comment in the Hearing Officer's order.

Facts

It is beyond dispute that the parties freely and voluntarily entered into a property settlement agreement and parenting plan. (R.Vol.2, p. 156, 181.) But, contrary to Thomas' assertion, neither party was designated as the primary residential parent, instead,

> "Mother and Father shall have shared residential custody of the minor children, with the Mother's address designates as the children's address for mailing and education purposes, thus the children shall attend school in the Louisburg School district. . . . The parents shall share parenting time on an equal or nearly equal basis with the children. (R.Vol.2, pp. 186, 187.)

Thomas bemoans many components of the agreement he made, claiming he accommodated mother. (Brief of Appellee, p. 3.) Clearly, these were Father's decisions; he was represented by counsel, sought court approval for his agreement which includes the clauses under dispute here, as well as the conditions he found himself in. Namely, residing in a location where the children don't go to school. (Journal Entry and Decree of Divorce, R.Vol.3, p.1.) The record does not show that Thomas ever moved closer to the school to assuage what he claims are crippling inconveniences preventing him from earning a living. Mother's address, 1522 S. 4th St. E. Louisburg, KS 66053. (R.Vol.4, p. 153.) Father's address. 40587 Jingo Rd., LaCygne, KS 66040 (R.Vol.1, p. 37.) (If school buses are not used, this is about a 19-mile journey in open country.) Thomas transports the children Wednesday after school, Thursday and Friday. (R.Vol.6, p. 6.) The paternal grandparents live near to Thomas. (R.Vol.6, p. 11.)

The children were 9 and 11 years old around the time of this litigation. (DRA, Apr. 11, 2016, R.Vol.1, p. 37.)

The parenting plan was adjusted slightly by the Hearing Officer to enable Thomas to fulfill the court's expectation that Thomas should finally work full time. (R.Vol.6, p. 14.)

In other words, Thomas' allegations in his facts, and later in his arguments

that he was somehow forced into a situation which prevented him from working full time is unfounded. Thomas created the situation he now complains of, and it was not the fault of Jaime. Neither Jaime nor their agreement professionally disabled Thomas. After all, he agreed that he could make $75,000 a year.

The following jurisdictional fact demands a response. Thomas states:

> The matter proceeded to hearing before the AHO per Supreme Court Rule 172. On August 5, 2016, the AHO found that the parties' agreement was void and unenforceable as it was against public policy and the best interests of the children. (R. Vol. 4, p. 54). Mother appealed the AHO's decision on September 12, 2016, 38 days after the AHO issued her opinion. (R. Vol. 4, pp. 65-81).

Not so! The Hearing Officer's decision was Sept. 6, 2016, (R.Vol.4, p. 54ff.) Jaime's motion appealing that decision was filed six days later, on Sept. 12, 2016. (R.Vol.4, p. 65.)

Thomas concludes his factual allegations with a final paragraph not cited to the record. Without citations to the record these and other allegations throughout the brief are legally presumed to have no support in the record, and therefore need not be commented on here. (Rule 6.01(a)(4).)

ARGUMENTS AND AUTHORITIES

In Reply to Appellee's Issue One: *The Administrative Hearing Officer and District Judge correctly found that limiting child support modification consideration until an arbitrary date in the future was unenforceable. In reply Jaime, states, that she too agrees, did not take that issue on appeal, and clearly stated so in her brief.*

Standard of Review: This is an odd occurrence where the standard of review is not applicable. There is no review sought.

Arguments and Authority.

Jaime did not appeal this part of the District Court's decision. It does not appear in the issues on appeal in her brief. To the contrary, Jaime directly stated that the provision whereby the parties 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*. (Brief of Appellant, p. 28.)

In Reply to Appellee's Issue Two: *The Administrative Hearing Officer and District Judge correctly found a stipulation to an income of $75,000 for father, without regard to what he actually earned, was not in the best interest of the minor children, and thus was unenforceable against public policy. In reply Jaime states: As set out in Issue 2 of her Brief of the Appellant, the stipulation was one of a disputed fact, approved by the court and not shown to be contrary to the best interests of the children.*

Standard of Review.

The standard of review remains *de novo*.

Arguments and Authority.

Thomas sets forth a number of arguments relating to the imputation of income by the court. However, Thomas does not address that stipulation of fact made on the record, approved by the court, and found to be in the best interest of

the minor children, would not have a binding effect.

The court did state, generally, that agreements to contract away child support is against public policy and against the best interests of the child. (R.Vol.6, p. 2.) But that blanket statement related to jurisdiction. The jurisdictional question was over the provision forbidding modification until July 1, 2016 (R.Vol.3, p. 6) which is a stipulation of law, not fact. The stipulation of Father's imputed income is a stipulation of fact.

Thomas did not cross appeal, and while he argues against the imputation of income, the court eventually did impute income, but did so arbitrarily. It simply split the difference between what Thomas believed he could make and what Jaime argued was the reasonable number already stipulated to, namely, $75,000 year. (R.Vol.6, p. 26.) When the parties disagreed on Thomas' imputed income, the disagreement and ultimate resolution was documented in the decree. Jaime argued Thomas could make $91,874/yr. (R.Vol.3, p. 10.) Thomas countered that he made $75,000/yr. (R.Vol.3, p. 5.)

Thomas complains that Jaime is trying to avoid the burden of child support by contract, forgetting this was not only a contractual provision but a stipulation, engaged in by Thomas voluntarily. (Brief of Appellee, p. 10.)

Thomas complains, "[Thomas'] stipulation to that income to bring conclusion to months of litigation and family upheaval does not forever bar review by the court." (Brief of Appellee, p. 11.) To that, Jaime responds, the issue is not "forever" but to the instant motion to modify support filed just 20 months after the stipulation was made. Further, the stipulation includes provisions for disability or

unemployability due to health reasons. (R.Vol.2, p. 166.)

Thomas then returns to the argument relating to imputations of income by claiming, "at the hearing Mother was unable to prove that Father was "deliberately under employed *for the purposes of* avoiding child-support" (Emphasis added)." (Brief of Appellee, p. 11.) That simply is not so. As mentioned before, Jaime (or Thomas) was able to convince the court that Thomas was underemployed, the court insisted that he work full-time, and the court imputed income accordingly. (Brief of Appellant, p. 25.)

Thomas is more than capable of making the $75,000, as was argued before the trial court. That computes to roughly $37.02 an hour, and his previous employers had billed his services out at $90-$110 an hour. (Brief of Appellant, p. 11.)

The only legal arguments Thomas makes for the imputation of income stipulation are not binding and are only to criticize Jaime's choice of caselaw.

> Her argument that stipulations of facts being binding upon the court is without merit. First, she cites a criminal case, *State v. Weber,* 297 Kan. 805 (2013) in favor of the argument, but then cites a child related case, *In re Adoption of A.A.T.*, 42 Kan. App.2d 1 (2006), that does not support that argument. The adoption case obviously follows the standard of "best interest of the child" and is more persuasive.

Thomas provides no further argument why a valid stipulation would have a different effect in a criminal case than it would in a civil matter. The effects are the same, with the proviso that the court would be far more careful in the criminal matter because of constitutional due process issues.

Jaime's purpose for citing *A.A.T.* was to distinguish between stipulations of

fact and law, but in *A.A.T.* the stipulation at bar was intended to supersede the court's authority to conduct a *Ross* Hearing. The parties can't stipulate a court's duty away. Had they stipulated to paternity, the story might have been different. This stipulation does not supersede the court's authority to set support; the court exercised its authority and found that Thomas' income should be imputed, the imputation of income being the issue of law, the dissonance between the $52,500 and the $75,000 a year was an issue of fact. Note that when Thomas claimed he could make $75,000 a year the presumed support would have been $1,332/mo. But the parties agreed to $900.00/mo. (R.Vol.3, p. 4-5.)

Stipulated income does not quantify the final support order.

In Reply to Appellee's Issue Three: *The Administrative Hearing Officer and District Judge correctly found the recordkeeping requirements in the parties' marital settlement agreement was too onerous and expensive and created a chilling effect that was not the best interest of the minor children, and thus was unenforceable against public policy. In reply Jaime states: She holds to her arguments in Issue One of her brief. This particular provision was not found by the court to be contrary to public policy, was not found to have created a chilling effect and was not found to be contrary to the best interest of the minor children.*

Standard of Review.

The standard of review is set out in Issue One of Jaime's Brief.

Arguments and Authority.

Thomas argues,

> "The AHO agreed [that Thomas could not afford a CPA] and, *reading between the lines*, she found that the expense and burden placed upon him was not beneficial to the children and would take money away from caring for the children if a CPA was employed." (Brief of Appellee, p. 12, *italics added.*)

Thomas fails to explain why Thomas, who had agreed to this record keeping provision including CPA review, had never tried to have his records reviewed or what that cost was. Thomas also fails to explain how the children are affected by the provision. Thomas admits that one has to "read between the lines" to find Hearing Officer support for the claim.

Thomas also fails to explain why keeping business-like records would not make litigation simpler, his business run better, and protect him from IRS audits.

Thomas bases his claim that the court has the ongoing jurisdiction to make orders for the children's support, without regard to what is set out in the agreement. (Brief of Appellee, p. 13.) That premise is true and is a plain reading of K.S.A. §23-2712(b). But what Thomas does not explain is how keeping lawful records for his business is a child support provision, how it affects the children, or if any evidence exists that says it is too onerous beyond his and the Hearing Officer's personal opinions.

Remember, Thomas did not even try to keep records. No receipts are kept. His own counsel argued that what he had were only debit card statements. (R.Vol.6, p. 24.)

Ironically, Thomas closes his argument that his contractual promise can be avoided because his family unit has failed to function and he thinks Jaime's

motives in enforcing his obligation to keep records is "Based upon selfish motives, Mother is trying to enforce an artificial income for Father to avoid paying child support.". (Brief of Appellee, p. 13.)

Keeping in mind that the provision to keep records does not depend on who pays or receives child support. Would not accurate records promote accurate findings of child support owed? Thomas seems to conflate good records to more income on his side.

In Reply to Appellee's Issue Four: *The administrative hearing officer and district judge erred when they arbitrarily imputed $52,500 as father's income for child support purposes. In reply, Jaime states, the court does not have jurisdiction to hear this issue when Thomas did not cross-appeal.*

Standard of Review.

This is a matter of Jurisdiction to which the court has de novo review. 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).)

Argument and Authority.

Thomas did not file a Cross-Appeal.

> When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which such appellee complains, the appellee shall, within 21 days after the notice of appeal has been served upon such appellee and filed with the clerk of the trial court, give notice of such appellee's cross-appeal. (Kan. Stat. Ann. § 60-2103.)

Here, Thomas wishes to contest an adverse ruling made by the trial court,

namely the imputation of income for the purpose of child-support. Thomas cannot bring this issue now.

> We have clearly held that before an appellee may present adverse rulings to the appellate court it must file a cross-appeal. If the appellee does not, we have held that the issue is not properly before the court and may not be considered. (*Cooke v. Gillespie*, 285 Kan. 748, 755, 176 P.3d 144, 148–49 (2008).)

While not waving this objection, holding that it is jurisdictional, Jaime also notes that it appears to be levied for no purpose. Thomas admits that the imputation of income was not an abuse of discretion. (Brief of Appellee, p. 12.) And prays in his conclusion, "Based upon the foregoing arguments, the AHO and District Judge should be affirmed in this case." (Brief of Appellee, p. 19.)

In Reply to Appellee's Issue Five: *The Administrative Hearing Officer and the District Judge correctly found that an award of attorney fees was not warranted under the circumstances. In reply, Jaime, states: for the most part, Thomas' arguments in this section depend upon this court upholding the lower court's decision. If either of the two stipulations made by parties or are found by this court to have legal effect, then Thomas owes Jaime attorney fees by contract and court order.*

Standard of Review. This is an issue of contract for which the court has *de novo* review. (Brief of Appellant, Issue 1, Standard of Review.)

Argument and Authority.

The attorney fee provision is one of contract in the parties' agreement. (R.Vol.2, p. 168, cited in full Appellant's Brief, p. 35-36.)

The provision mandates fees when a party alleges a breach and prevails, at that point the court "shall" award fees but must determine the reasonableness of the award. (Appellant's Issue Four.) Thomas seems to want to draw upon the equity powers of the court, which is inapplicable here. (Brief of Appellee, p. 15.) Thomas does agree that the fee award is not statutorily mandated, which presumably admits that fees are a matter of contract. Fees would be allowed by statute in family law matters where the agreement does not control. (K.S.A. § 23-2715.) It seems unlikely that Thomas and his counsel are unaware of that basic premise.

Thomas claims that Jaime did not request fees. (Brief of Appellee, p. 15.) Jaime did raise the issue of fees from the outset. (Answer to Motion to Modify Child Support on April 11, 2016, R.Vol.3, p. 127.) Jaime requested the fees in her prayer for relief. (R.Vol.3, p. 133.)

Further, the agreement does not mandate anything further than placing the opposing party on notice of a breach. Generally, fees can be requested after the litigation has closed. Attorney fees may be determined after the entry of final judgment for appeal purposes without offending the doctrine of *res judicata.* (*Magstadtova v. Magstadt*, 31 Kan. App. 2d 1091, 1091, 77 P.3d 1283, 1284 (2003).)

The Hearing officer did not address the fees claim in her ruling. (R.Vol.4, p. 55-57.) On appeal to the District Court, Jaime again argued for fees. (R.Vol.4, p. 89, ¶39, 41, 71.)

While Thomas argues that Jaime did not request fees, he also admits that

the Hearing Officer and District Judge both denied the request. (Brief of Appellant, p. 16.)

But most telling, is that Thomas argues that Jaime did not prove that Thomas violated the agreement, because the aggrieving provisions were held void. (Brief of Appellant, p. 16.) This is logical fallacy of circular reasoning or *Begging the Question.*

> Description: Any form of argument where the conclusion is assumed in one of the premises. Many people use the phrase "begging the question" incorrectly when they use it to mean, "prompts one to ask the question." That is NOT the correct usage. Begging the question is a form of circular reasoning. (Bennett, Bo. Logically Fallacious: The Ultimate Collection of Over 300 Logical Fallacies (Academic Edition) (p. 82). eBookIt.com. Kindle Edition.)

Thomas is arguing that he owes no fees because the court found in his favor over an issue currently on appeal.

Jaime's argument is properly structured on appeal. 1) If, on appeal, this court finds the provisions for stipulating Thomas' presumed earnings is a valid stipulation of fact, or, that the court did not have the jurisdiction to avoid the record keeping provision as a matter of contract; then, 2) the contract says Jaime "shall" be awarded reasonable fees.

In Reply to Appellee's Issue Six: *Mother cannot argue against the use of the extended income formula for the first time on appeal. In reply, Jaime, states: at the hearing neither Thomas nor the court addressed the issue of what the support amount, if any, would be owed above the limits set forth in the child support guidelines charts. The court first used the extended formula without comment in*

the Hearing Officer's order.

Standard of Review. The standard of review is abuse of discretion, whether the District Court abused its discretion, while interpreting and applying the Guidelines. *In re Marriage of Thomas*, 49 Kan.App.2d 952, 954, 318 P.3d 672 (2014).

Argument and Authority.

Thomas is arguing that in Jaime's appeal of the Hearing Officer's decision she failed to preserve jurisdiction because she did not argue against the use of the extended formula. (Brief of Appellee, p. 17.)

As stated in her Brief, Jaime argued that there was no discussion before the Hearing Officer about income above the tables or using the extended formula. There was no evidence presented. The Child Support Worksheet the court used simply included the extended formula. (R.Vol.4, p. 59.) And, the court cannot simply apply the formula as it did here. (Brief of Appellant, p. 33.)

It is not the fact that the court went above the chart amount, but that the court failed to take into consideration the factors set out in the caselaw. (Brief of Appellant, Issue 3.)

Jaime raised her objections the instant that the subject arose, in her Motion for Review by District Judge, (R.Vol.4, p. 70, ¶9.q) and further in her Memorandum in Support of Her Motion for Review by District Judge. (R.Vol.4, p. 89ff, 112.)

Thomas concludes his justification for the application of "the extended

formula" with a long list of unsupported allegations, that he admits were not argued to the court. (Brief of Appellee, pp. 17-18.) He then branches into an argument for travel expenses, never plead, for that 19-mile pilgrimage to take his children to school or Mother's home.

Jaime's point on appeal in this issue is best summarized as, the court can issue support beyond what the Child Support Schedules allow but must undertake the analysis and cannot just arbitrability use the extended formula. (Brief of Appellant, Issue Three.)

Conclusion:

Thomas in his response has failed to show that his agreement to keep records was unenforceable or void. Thomas has not explained why the stipulation of fact that Thomas made just 20-months earlier was invalid after the court found that income was to be imputed. At trial and now, Thomas has failed to show evidence of any economic difference between his household and Jaime's, nor has he shown where the court could have had evidence before it to consider what, if any, above-schedule support should be awarded to Thomas. Thomas depends on the fact that the lower court ruled properly as his defense against the mandatory reasonable attorney's fees that must be awarded if this court finds either the provision for record keeping or the fact stipulation of $75,000 income for Thomas was enforceable and Thomas failed to comply with his promise.

RESPECTFULLY SUBMITTED BY:

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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.

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