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

and

THOMAS M. WHILDIN
RESPONDENT-APPELLEE

BRIEF OF APPELLEE THOMAS M. WHILDIN

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

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Oral Argument Requested

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STANDARD OF REVIEW

According to Supreme Court Rule 172(h), the District Court sits as an appellate court for review of AHO matters. It specifically states "The district judge will review the transcript or a recording of the hearing and admitted exhibits and, applying an abuse of discretion standard, may affirm, reverse, or modify an order". Only if a transcript is not available, will the district judge conduct a *de novo* proceeding. Because there was a transcript the District Judge reviewed the

record and determined the issues on that basis.

It is Mother's burden to show that the AHO's decision was an abuse of power. *In re Marriage of Larson,* 257 Kan. 456 (1995). Appeals are to be viewed under the "highly deferential" abuse of discretion standard. *In re Marriage of Branch,* 37 Kan.App.2d 334, 336, *rev. denied* 284 Kan. 945 (2007). Further, the party asserting an abuse bears the burden of showing such abuse. *In re Marriage of Hair,* 40 Kan.App.2d 475, 480 (2008). In this case Mother simply cannot meet that burden.

"The district court is vested with wide discretion in adjusting financial obligations of the parties in a divorce action and its exercise of that discretion will not be disturbed on appeal in the absence of a showing of clear abuse." *Stayton v. Stayton,* 211 Kan. 560, 561 (1973). *Stayton* went on to find that "Judicial discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion...". *Id.* at 562.

FACTS

The parties entered into a Marital Settlement Agreement (MSA) and parenting plan as part of a lengthy and contentious divorce action. (R. Vol. 2, pp. 156-180; and 181-200). During the process, the Court appointed not only a guardian *ad litem* (GAL), but also a mediator/conciliator. (R. Vol. 1, pp. 70-71; and Vol. 3, pp. 65-66). By all accounts the end result was unusual as it granted Father residential placement (his most concern), but limited Mother's child support obligation (her most concern), by calling the schedule "shared placement" even though the parties' parenting time schedules were not equal or nearly equal.

(R. Vol. 2, pp. 76-77). This was acknowledged in Mother's appellate brief and was also found by the Administrative Hearing Officer (AHO). (R. Vol. 4, p. 57; and Vol. 6., p. 27).

In an unheard-of move, the GAL recommended that the children continue to reside primarily with Father in LaCygne, but change school districts to attended school in Mother's (the non-residential parent's) city of residence, Louisburg, which was incorporated into the parties' parenting plan. (R. Vol. 2, pp. 76-77; and footnote 1, p. 77). The parenting schedule was drafted around Mother's work schedule without regard to Father's work schedule or the children's school and activities. (R. Vol. 2, pp. 77-78). The end result was that Father and the children spend many more hours on the highway to accommodate Mother, who moved away, and the children have been separated from their friends and previous teachers.

In keeping with the accommodate Mother theme, the child support was set up to: (1) figure support on a fictitious representation of shared placement; (2) precluded Father from seeking modification until a fixed date regardless of the circumstances; (3) required the use of a fictitious income imputed the Father whether he made that income or not; and (4) if Father wanted to challenge the fictitious wage he had to comply with onerous record keeping requirements. (R. Vol. 2, pp. 162-166).

Because the primary residence of the children was out of district, the school bus would not pick up the children from Father's house in LaCygne and transport them to school in Louisburg. (R. Vol. 6, pp. 5-6). According to Father the parties also agreed that the children would not be in daycare. (R. Vol. 6, p. 5). This required Father to transport the children to school at 8:00 a.m. and then retrieve them from school at 3:00 p.m. (R. Vol. 6, pp. 6-7). By the time Father dropped the children off at school at 8:00 a.m., got to the jobsite and unpacked his tools, around 9:00 a.m. – 9:30 a.m., then collect his tools around 2:00 p.m. so he could be at the

school to pick up the children by 3:00 p.m., his workday was limited to approximately 4 hours with a ½ hour lunch. (R. Vol. 6, pp. 6-7). Under the schedule and constraints of this case, it was impossible for Father to work 40 hours per week as contemplated by the Kansas Supreme Court Child Support Guidelines, Administrative Order No. 284, Effective January 1, 2016 (guidelines).

When Mother's maintenance obligation was terminating it became necessary to recalculate her child support obligation even though the triggering time period of July 1, 2016, had not yet arrived. (R. Vol. 3, p. 93). In doing so, Father requested that the Court find that: (1) the parties did not have shared placement and that the shared support calculation was not applicable; (2) that the provision prohibiting a modification before July 1, 2016, was not enforceable due to the CSG and accompanying case law; and (3) the provision requiring Father's income to be $75,000.00 and certain record keeping practices for modification purposes was void as against public policy. (R. Vol. 3, pp. 162-163).

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).

At the same time the parties were embroiled in a parenting time dispute with Mother trying to get to "shared" parenting time for support purposes and Father trying to correct the schedule to meet the children's needs rather than Mother's work schedule. (R. Vol. 4, pp. 127-136; and Vol. 5, pp. 29-42). The Court reappointed a GAL, the parties went back to mediation, and the support issue was put on hold. (R. Vol. 5, pp. 1-3).

The parties were able to arrive at a limited solution to the parenting schedule and both parties then requested a decision by the Court on the support issue. (R. Vol. 5, pp. 49-64). The District Court issued its decision on support, affirming the AHO. (R. Vol. 5, pp. 86-92). Mother then appealed the decision. (R. Vol. 5, pp. 97-98).

During the appeal process the parties have continued to experience difficulties with the parenting schedule based upon claims of abuse by Mother and the desire of at least one child to go back to her school in LaCygne, resulting in continued involvement of the GAL, calls to the police, daughter refusing to visit Mother, and now recently counseling expenses to address the parent-child relationship. This is pointed out to support Father's position that even now he is unable to work a full 40 hours; in addition to the school transportation, he now has to transport the child(ren) one hour each way for counseling, and incur counseling expenses, to address the issues between Mother and daughter.

ARGUMENTS AND AUTHORITY

1. THE ADMINSTRATIVE HEARING OFFICER AND DISTRICT JUDGE CORRECTLY FOUND THAT LIMITING CHILD SUPPORT MODIFICATION CONSIDERATION UNTIL AN ARBITRARY DATE IN THE FUTURE WAS UNENFORCEABLE.

Mother argued that the court was without jurisdiction to modify support until July 1, 2016. "Child support may be modified at any time circumstances render such a change proper..." *Brady v. Brady,* 225 Kan. 485 (1979). According to K.S.A. §23-3005(a), child support can be modified upon: (1) the expiration of three years from the date of the original order for support; or (2) showing a material change in circumstances. A material change of circumstances is defined under the Kansas Child Support Guidelines, Administrative Order No. 284, Effective January 1, 2016, pp. 25-26. These changes can be unrelated to income, or based upon income or various other financial factors affecting the support obligation to an extent that

the amount in Line F.3. of the Child Support Worksheet would change (increase or decrease) by 10% or more. (*Id.* at pp. 26-26; V.B.1., p. 26).

The court is charged with the obligation to verify that the appropriate amount of support is paid on behalf of the children. K.S.A. §23-3001(a) states in part that "the court shall make provisions for the support and education of the minor children". K.S.A. §23-3002 requires the court to follow the above referenced guidelines, and further it requires the court to consider the parties' domestic relation affidavits in arriving at the appropriate amount of support. *See also* Supreme Court Rule 139. Judges are bound to follow the guidelines when determining child support obligations. The parties cannot by agreement divest the Court from the continuing jurisdiction over custody and child support of minor children. *Thompson v. Thompson,* 205 Kan. 630, 633 (1970). An order that does not set forth reasons for deviating from the guidelines is erroneous and will be reversed. *In the Matter of the Marriage of Schletzbaum,* 15 Kan.App.2d 504, 507 (1991). Use of the guidelines is mandatory and a failure to follow the same is reversible error. *In the Matter of the Marriage of Vandertvoort,* 39 Kan.App.2d 724, 725 (2008). With these principals in mind the AHO correctly reviewed and modified Mother's support obligation according to the guidelines.

While Mother argues that matters settled in their settlement agreement are binding and not modifiable, she cites cases addressing property issues. Children's issues can be reviewed at any time until the children reach the age of majority and graduate high school. K. S.A. §23-2712(b). Said statute clearly carves out an exception for child related matters when it says, "other than matters pertaining to the legal custody, residency, visitation, parenting time, *support,* or education of the minor children..." (emphasis added). Mother's argument that the Court was without jurisdiction to review support in the best interest of the minor children due to limiting,

non-binding, language in their settlement agreement is without merit. Further, Mother's argument that the agreement and stipulation "are not necessarily reducing the support to the children", and therefore it should be upheld, is without merit. There is nothing in the above statute that allows modification or review *only if* the agreement serves to reduce a support obligation.

In fact, the quote cited by Mother in her fact recitation corroborates the usual manner in which this comes before the Court. That is, due to the volume of cases judges will not look for issues or areas of disagreement unless the issue is brought before them. If an agreement is placed before the court as a settlement of all issues, signed by both parties and/or their attorneys, the court will approve the same, most often without scrutiny as required by statute. K.S.A. §23-2712(a). However, if there later becomes a disagreement or request to review the same, the district court can and should review the agreement in light of the best interest of the children when reviewing child issues; public policy requires courts to act in the best interests of the child when determining the legal obligations. *In the Matter of the Marriage of Ross*, 245 Kan. 591, Syl. ¶ 2 (1990).

In denying the argument that the settlement controls and that the court was without jurisdiction to modify the same, the district judge stated:

> "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 something 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...". (R.Vol.7, p. 12-13).

The purpose of the above laws and rules is to avoid undue pressure being applied by one party against the other; for example, to prohibit one party from only agreeing to a property resolution if he/she does not have to pay child support. It is well settled law that the right to child

support belongs to the child, not the parents. *Lawrence v. Boyd,* 207 Kan. 776, 778-779 (1971); See also, *In re Welch*, 31 B.R. 537, 539 (1982)(a bankruptcy case holding that "under Kansas law child support is a chose in action belonging to the child"). As such, it has been found on numerous occasions that parties cannot avoid their support obligation and contract away the child's right to support. *Id.* at 779; See also, *Myers v. Anderson,* 145 Kan. 775 (1937). Divorced parents cannot legally modify or terminate the support obligation by a contractual agreement or otherwise; this can only be done by court order. *In re Marriage of Schoby,* 269 Kan. 114, Syl. ¶1 (2000). Therefore, it is clear that the parties' agreement prohibiting Father from reviewing child support prior to July 1, 2016, was void and unenforceable.

Mother correctly points out that a contract is void as against public policy if it is injurious to the interests of the public or contravenes some established interest of society. *Frazier v. Goudschaal,* 296 Kan. 730, 749 (2013). However, in the area of child related issues the legislature and appellate courts have found a public interest in protecting children and the well-established rule is that all decisions relating to children must be viewed in the best interest of the children. (*numerous citations omitted).* Clearly to do otherwise would contravene an established interest and be injurious to the children, thus against public policy.

Mother's argument was addressed over 70 years ago in *Phillips v. Phillips,* 163 Kan. 710 (1947) and it remains the controlling law in this case. There the parties agreed to a set amount of child support, $40.00 per month, and Father successfully sought to lower the support to $25.00 per month. On appeal, Mother in that case argued (as in our case here) that the Court had no authority to modify the terms of their contract, previously approved by the Court and incorporated into the decree. The court there denied Mother's argument and found that the

parties had no authority to contract amongst themselves to deprive the trial court of the jurisdiction that it has under the statute. *Id.* at 712.

Assuming *arguendo* that Father's income was not an issue, there would still be changes to the Child Support Worksheet because of the termination of Mother's maintenance obligation; this would affect Line C.3. and D.2. and the ultimate support obligation in Line F6. In addition, Mother's income had significantly increased, from $124,912.00 to $162,750.00, and the children's age categories had changed, thus affecting D.3. (R. Vol. 4, pp. 59-60). The AHO and the District Judge correctly reviewed Mother's support obligation and modified the same in the best interest of the minor children. Delaying any action until an arbitrary date of July 1, 2016, was not in the best interest of the children nor the public.

Finally, the Court made no findings as to why it deviated from the guidelines when the divorce was granted August 8, 2014. As set out above Courts are required to follow the guidelines and, thus, the original amount was wrong from the beginning and the court had a duty to correct its error. According to Mother's own worksheet presented at the time she should have been paying $1,332.00 instead of the $900.00 amount the parties presented to the Court in the settlement documents. (R. Vol. 3, pp. 12-13). Thus, the best interest of the children demands that the Court actually determine Mother's support obligation after a hearing and presentation of evidence, which was done for the first time in front of the AHO, August 5, 2016. (R. Vol. 6, pp. 1-40).

2. THE ADMINSTRATIVE HEARING OFFICER AND DISTRICT JUDGE CORRECTLY FOUND THAT A STIPULATION TO AN INCOME OF $75,000.00 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.

As set out above, the district court is statutorily bound to determine child support based upon accurate information then existing. The guidelines only allow the court to consider imputation of income under certain circumstances. (Kansas Supreme Court Child Support Guidelines, Administrative Order No. 284, II.F., pp. 5-6). These are:

a. Absent substantial justification, otherwise the court can impute federal minimum wage for a party at 40 hours, or $15,084.00 per year;
b. When a parent is capable of work but is deliberately unemployed;
c. When a parent is terminated from employment for misconduct;
d. When a parent receives "in-kind" benefits in addition to or in lieu of income; and
e. When a parent is deliberately underemployed for the purpose of avoiding child support.

In our case, none of the above circumstances allow Mother to meet her burden. Father's tax return showed that he made more than federal minimum wage (R. Vol. 3, pp. 168 and 177), making "a" above irrelevant. No one argued that Father was deliberately unemployed, had been terminated from a job, or was receiving "in-kind" benefits, making "b, c, and d" above non-applicable.

The only possible reason to impute a wage above his reported income is "e" above. However, Mother did not provide proof to the AHO or district judge that this was the case. Instead, she tried to avoid that burden by contract, which has been addressed above as being void

and unenforceable. During the marriage Father was "Mr. Mom" and took care of Mother and the children. While it is true that Father does have training and experience as an electrician he was not working in that field full time during the marriage due to his family obligations. (R. Vol. 6, pp. 5-7). Father never earned $75,000.00 during the marriage. His stipulation to that income to bring conclusion to months of litigation and family upheaval does not forever bar review by the court.

At the hearing Mother was unable to prove that Father was "deliberately underemployed *for the purpose of* avoiding child support" (emphasis added). As set out above, the changing of schools for the convenience of Mother, and the parties' agreement not to have daycare for the children, significantly affected the ability of Father to work full time. The parties' continued litigation and counseling further inhibits Father's ability to work full time. Being self-employed if he does not work, he does not get paid; whereas Mother is employed in a government position with paid time off.

In addition, Father never had a history of earning that amount of income. The contractual provision imputing a $75,000.00 wage to him, whether he was earning the same or even capable of earning that amount, was clearly inserted to have a chilling effect on Father and prevent him from seeking the correct amount of child support. It also does not consider the drop in the economy after entering the agreement and how it might affect Father's earning capacity and ability to care for the children. The AHO and district judge correctly found that this was against public policy.

Mother does not want the court to review the parties' stipulated income for Father because she is well aware that she could not possibly prove that income; she is fighting hard to keep her support obligation as low as possible. 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.

By its very definition Mother is prohibited from making the argument that the AHO's decision was an abuse of this discretion; it is not one that *all* reasonable persons would disagree with. The AHO could have picked $75,000.00, $25,000.00, or any other rationally supported income and reasonable persons would have agreed with her. In the end, the AHO selected $52,500.00 as Father's income. It cannot be said that not one person would have picked $52,500.00. Her ruling was not arbitrary, fanciful, or unreasonable and, thus, it is not an abuse of discretion. *In re Marriage of Bradley,* 282 Kan. 1, 7 (2006).

3. THE ADMINSTRATIVE HEARING OFFICER AND DISTRICT JUDGE CORRECTLY FOUND THAT THE RECORD KEEPING REQUIREMENT IN THE PARTIES' MARITAL SETTLEMENT AGREEMENT WAS TOO ONEROUS AND EXPENSIVE AND CREATED A CHILLING EFFECT THAT WAS NOT IN THE BEST INTEREST OF THE MINOR CHILDREN, AND THUS WAS UNENFORCEABLE AGAINST PUBLIC POLICY.

The AHO found that the record keeping requirements were over burdensome and not economically feasible in this case. She correctly characterized the business as "tiny". (Vol. 6, pp. 24, 37). Father argued that he could not afford to pay a CPA to submit monthly, quarterly, and annual reports as required in their settlement agreement. (Vol. 6, p. 24). The AHO agreed 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.

A contract is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, or tends to interfere with the public welfare. 17 C.J.S. Contracts § 211, 272, 12 Am.Jur., Contracts, §167, cited in *Hunter v. American Rentals, Inc.* 189 Kan. 615, 618 (1962). It is well established that parents have a duty to support their children, and the Court has a duty to review support and make sure that it is in the best interest of the children, not the parties. (Numerous citations omitted).

To allow Mother to escape her obligation under the support statute would be defeating the purpose of the legislature. *See, Hunter* at 618. No action may be maintained by Mother, either in equity or in law, to enforce a contract or agreement made in contravention of the law. *Murray v. Brown*, 177 Kan. 139 (1954). Such an agreement is void and unenforceable. *Hunter* at 619.

Mother previously cited several "property" cases in support of her positions that the Court cannot modify the parties' agreement. It is well established that matters of property are settled with the final decree of divorce. See e.g., *Rasure v. Wright,* 1 Kan.App.2d 699, 701-702 (1978). However, the Court maintains jurisdiction to review support throughout the child's minority without regard to any contract provisions to the contrary. *Id.* at 701; See also, K.S.A. §23-3005.

Petitioner cites no case law in the domestic arena that prohibits the AHO and district judge from taking the action they took in this case. In fact, "after a family unit fails to function, the child's interests become a matter for the State's intrusion in order to avoid jeopardizing the child if a parent's claim ... is based solely or predominantly on selfish motives". *In re Frazier v. Goudschaal,* 296 Kan. 730, 747 (2013)(citing *In the Matter of Ross,* 245 Kan. 591, 602 (1989)). Based upon selfish motives, Mother is trying to enforce an artificial income for Father to avoid paying child support. The *Goudschaal* court went on to say that "public policy in Kansas

requires our courts to act in the best interest of the children when determining the legal obligations to be imposed..." (emphasis added). *Goudschaal* at 747.

4. THE ADMINSTRATIVE HEARING OFFICER AND DISTRICT JUDGE ERRED WHEN THEY ARBITRARILY IMPUTED $52,500.00 AS FATHER'S INCOME FOR CHILD SUPPORT PURPOSES.

Father is well aware of the notion that he might sound hypocritical if he argues that the AHO's determination of his income was incorrect. However, because the matter is on appeal and being reviewed, he would point out that Father argued that he could only earn $25,000.00 to $30,000.00 because the parties' parenting plan prohibits him from working 40 hours per week due to the parties' agreement that the children would not be in daycare. (R. Vol. 6, p. 7). He simply cannot work 40 hours per week and earn $75.000.00. Father presented tax returns and a domestic relations affidavit (DRA) to support his argument. Even so, the AHO made findings about daycare in the future, and thus imputed that Father could work 40 hours per week, and imputed Father's income at $52,500.00 per year. (R. Vol. 6, p. 13 and 26).

The guidelines only reference to a 40-hour work week is in reference to imputing the federal minimum wage, or $15,084.00 per year. The guidelines do not suggest that all persons are capable of working 40 hours at a wage above minimum wage. They also require Mother, in this case, to prove that Father was purposefully underemployed *for the purpose of* avoiding his support obligation. Mother never made that argument, rather she argued that the court should be bound by their prior stipulation to $75,000.00.

Because Mother failed in her burden to show that Father was purposefully underemployed to avoid child support then the AHO and court should have accepted the only evidence presented, his 2014 income tax return showing an adjusted gross income of $24,243.00 and his 2015 income tax return showing an adjusted gross income of $28,353,00. With no

rhyme, reason, or explanation the AHO simply "split the baby" and selected $52,500.00 as Father's income, half way between $75,000.00 Mother suggested, and $30,000.00 Father suggested. If there was any error committed by the AHO and district court it was in finding an arbitrary income for Father rather than what the evidence presented.

5. THE ADMINSTRATIVE HEARING OFFICER AND DISTRICT JUDGE CORRECTLY FOUND THAT AN AWARD OF ATTORNEY FEES WAS NOT WARRANTED UNDER THE CIRCUMSTANCES.

Mother never argued for reimbursement of attorney fees at the hearing in front of the AHO and it cannot be raised for the first time here. *Dalmasso v. Dalmasso,* 269 Kan. 752, 765 (2000)(a party is prohibited from raising arguments of attorney fees and costs when they failed to address those arguments with the trial court). Issues not raised before the trial court will not be heard for the first time on appeal. *Ripley v. Tolbert,* 260 Kan. 491 (1996).

In addition, attorney fees in this case are not statutorily mandated but rather must be based upon an equitable argument. To make such an argument Mother must come with "clean hands". As set out in *Green v. Higgins,* 217 Kan. 217 (1975),

> "the clean hands doctrine is based upon the maxim of equity that he who comes into equity must come with clean hands. The clean hands doctrine in substance provides that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct. It is difficult to formulate a general statement as to what will amount to unclean hands other than to state it is conduct which the court regards as inequitable... The clean hands doctrine has been recognized in many Kansas cases. (*Brooks v. Weik*, 114 Kan. 402, 219 Pac. 528; *Scott v. Southwest Grease & Oil Co.*, 167 Kan. 171, 205 P.2d 914; *Browning v. Lefevre*, 191 Kan. 397, 381 P.2d 524; Seal v. Seal, 212 Kan. 55, 510 P.2d 167; and *Anderson v. Anderson*, 221 Kan. 387, 520 P.2d 1239.)"

Therefore, Mother cannot argue the enforcement of a void and unenforceable contract and then ask for attorney fees when not successful.

Assuming *arguendo* that Mother had properly raised the issue of attorney fees below, she ignores the most important provision in their agreement regarding attorney fees wherein it states "the *prevailing* party in such action shall have the right to recover his or her *reasonable* attorney's fees". She also ignores the last sentence of the attorney fee provision, which she drafted and should be held against her (*numerous cites omitted)*, wherein it states "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).

Therefore, she must meet three requirements: (1) be the prevailing party; (2) convince the court that her request is reasonable; and (3) convince the court to actually award attorney fees. Mother cannot possibly meet these requirements because she failed the first one; she lost below. Because she did not prevail at the hearing before the AHO there was no reason for the court to determine if an award of attorney fees was appropriate for Mother; if anything it would have been appropriate for Father under the circumstances.

Both the AHO and district judge correctly denied Mother's request for attorney fees. Mother did not prevail and never argued for reimbursement of attorney fees at the hearing in front of the AHO and cannot be raised for the first time here.

6. MOTHER CANNOT ARGUE AGAINST THE USE OF THE EXTENDED INCOME FORMULA FOR THE FIRST TIME ON APPEAL.

As set out above, appeals from the AHO are controlled by Supreme Court Rule 172. According to Supreme Court Rule 172(h), the District Court sits as an appellate court for review of AHO matters. It specifically states "The district judge will review the transcript or a recording of the hearing and admitted exhibits and, applying an abuse of discretion standard, may affirm,

reverse, or modify an order". Only if a transcript is not available, will the district judge conduct a *de novo* proceeding. Because there was a transcript the District Judge reviewed the record and determined the issues on that basis.

In other words no new evidence is considered on appeal. It is improper for Mother to challenge the use of the extended income formula now by claiming that the court did not comment on it in the journal entry, nor was there evidence taken on the issue. She created the situation by not raising the issue or objecting contemporaneously at the hearing to the use of the extended formula used by Father in his Child Support Worksheets.

This is the first time this has been raised by Mother and is not properly in front of the Court. Issues not raised before the trial court will not be heard for the first time on appeal. *Ripley v. Tolbert,* 260 Kan. 491 (1996). In ¶74 of her Memorandum in Support of Her Motion for Review by District Judge, Mother agrees that it was not raised. (R. Vol. 4, p. 109). Had she raised it we could have addressed it down below and have direction from the AHO. Had it been raised Father could have argued that during the marriage Mother was (and continues to be) the "bread winner" and he was (and continues to be) "Mr. Mom"; he did all of the housework, cleaning, laundry, meals, transported the children to their activities, transported the children to/from school, and provided all other facets of care for the children.

After the divorce was granted this pattern has continued with Mother's acquiescence. The children are involved in rodeo, guitar, horseback riding, and other costly activities that the parties historically agreed that the children should participate in, and that Mother now refuses to contribute to the costs. Further if Mother ever paid for anything (such as a school field trip fee of $5.00, a few dollars for cupcakes for the class on a child's birthday, or a $10.00 birthday gift for a child's party the kids were attending) she demanded reimbursement from Father. These

arguments were set out in Father's response in support of his motion to modify and were available to the AHO. (R. Vol. 3, pp. 161-162). Although not specifically argued, the Court stated on the record that she had reviewed the documents and pleadings prior to the hearing. (R. Vol. 6, p. 2). Clearly this is a case for the extended formula given the kids' involvement in activities and Mother's refusal to assist financially.

In addition, as pointed out previously, Father has to transport the children to/from school daily because they live in LaCygne and attend school in Louisburg at Mother's insistence. Father also does the great majority of transportation for parental exchange so that Mother can maximize her time with the children. All this transportation and travel costs Father and has to be paid for somehow. Given the court's extensive history and numerous filings in this case, which has just recently caused the court to seek the assistance of a case manager, the court was well aware of the parties' situation and whether the extended formula should apply.

CONCLUSION

Mother's main concern in this case has always been the amount of support she is paying. Unfortunately the parties' resources could better be spent on repairing the Mother/child relationship than litigating support. The support amount was wrong from the beginning when the divorce was granted in 2014 as the parties never presented the Court with an order for approval of the correct amount of support under the guidelines; instead they presented an order for $900.00 rather than $1,332.00.

Mother's continued litigation and attempts to avoid her obligation is harmful to the children and not in their best interest. The AHO correctly found that her attempts to prohibit review for a set period of time, regardless of the circumstances, and her insistence on using an arbitrary income for Father, without consideration whether he was earning the same, could earn

the same, or was purposefully underemployed, and her onerous bookkeeping provisions, were void against public policy and not enforceable.

Finally, Mother's request for attorney fees is without merit because she was not the prevailing party as required by their settlement agreement. Her requests for fees and the review of the extended income formula should not be addressed for the first time on appeal.

Based upon the above and foregoing arguments, the AHO and District Judge should be affirmed in this case.

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ATTORNEY FOR APPELLEE

CERTIFICATE OF ELECTRONIC SERVICE

I, Steven A. Jensen, do hereby state that I delivered a true and correct copy of the above and foregoing document via electronic mail to Joseph W. Booth, Attorney for Appellant, at joe@boothfamilylaw.com, this 21st day of December, 2018.

In addition thereto, service upon Appellants' counsel, Joseph W. Booth, was made by electronic filing under Rule 1.11 (b) (2) on the date reflected in the file stamp hereupon, having been filed with the Clerk of the Appellate Courts this 21st day of December, 2018, as Mr. Booth is shown as the attorney of record this date.

/s/ Steven A. Jensen
Steven A. Jensen, #13713