

NOT DESIGNATED FOR PUBLICATION

No. 105,224

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

LUCY M. ARIAZ,
Appellant,

and

ADAM C. ARIAZ,
Appellee.

MEMORANDUM OPINION

Appeal from Geary District Court; DAVID R. PLATT, judge. Opinion filed January 6, 2012.

Reversed.

Paul Shipp, of Kansas Legal Services, of Manhattan, for appellant.

No appearance by appellee.

Before BUSER, P.J., MARQUARDT and LEBEN, JJ.

Per Curiam: Lucy M. Ariaz (Lucy) filed a petition for divorce from Adam C. Ariaz (Adam) with a poverty affidavit. The district court granted the divorce and assessed the costs of the action against Lucy. After Lucy failed to pay the court costs, the district court issued a show cause citation regarding this failure, and Lucy appeared before the district court. At the conclusion of the hearing, the district court withdrew the show cause citation but summarily set aside the divorce decree.

We must decide whether the district court had jurisdiction to set aside the divorce decree on its own authority, without either party filing a motion, and without affording the parties notice and an opportunity to be heard. We hold K.S.A. 2010 Supp. 60-260(b) does not authorize a district court to relieve a party of a final judgment on its own initiative, and actions taken under K.S.A. 2010 Supp. 60-260(b) must afford due process of law to the affected parties, *i.e.*, notice and an opportunity to be heard or defend. Accordingly, we reverse the district court's order setting aside the divorce decree.

FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2010, Lucy filed a petition for divorce from Adam with a poverty affidavit in the District Court of Geary County, Kansas. Lucy also filed a domestic relations affidavit detailing her monthly income and expenses.

On August 17, 2010, a final hearing was held on the petition for divorce. The district court granted the divorce and ordered Lucy to pay the court costs. Lucy's counsel then requested that the costs be divided between the parties. The district court explained that, based on the domestic relations affidavit, it found the assessment of costs against Lucy appropriate; however, it proposed to continue the matter in order to give Lucy a chance to present evidence to the contrary. Lucy agreed, however, to pay the costs within the next 30 days. The district court agreed to review Lucy's proposed divorce decree on this basis and it signed and filed the decree later that day. The divorce decree stated: "the cost of this action is to be paid for by the Petitioner [Lucy]."

On September 29, 2010, the district court ordered Lucy to appear before the court to show cause or face contempt of court for failing to comply with the district court's order to pay costs. The district court attached an affidavit, executed by a deputy court clerk. It verified that Lucy was duly notified to pay the court costs within 30 days, as ordered on August 17, 2010, but had not paid the costs.

Lucy appeared before the district court and presented evidence concerning her inability to comply with the order to pay costs. After detailing her monthly income and expenses, Lucy testified that she only had been able to pay a portion of the costs because of her current poverty status. Additionally, both Lucy and her counsel contended they were never notified that the divorce had been granted and were under the impression the divorce would not be approved until the fees were paid in full. Finally, Lucy's counsel questioned the district court's authority to issue a show cause citation and/or a contempt order on its own initiative.

The district court decided to withdraw the show cause citation but summarily set aside the divorce decree. The district court judge explained his decision as follows:

"[THE COURT:] Um, I assume, since the [divorce] decree got filed, that the Court relied on [Lucy's counsel's] assurances that the petitioner would be paying those court costs.

"Um, I don't buy any of the arguments, as far as citations. When the court's made an order, uh, obviously, I think, when that order has not been followed for a number of months, that the Court, certainly, can proceed with citation to show cause.

"But, since you are, obviously, concerned about that, the Court, then, will withdraw the citation to show cause, and will set aside the Court's order of August 17, 2010, and set aside the decree of divorce.

"So, the case is still pending.

"[LUCY'S COUNSEL:] So, Your Honor is setting aside the decree of divorce?

"THE COURT: Did you hear it, somehow, differently than that?

"[LUCY'S COUNSEL:] I just wanted to make sure.

"THE COURT: Yeah. I'll say it twice. I'm setting aside the order of the Court on August 17, granting the divorce. Yes.

"And I set aside the citation to show cause also.

"If you would journalize that, I would appreciate it.

"Thank you."

On October 27, 2010, the district court filed a journal entry, prepared by Lucy's counsel, reflecting its order and returning the case to a pending status. Lucy timely appealed.

JURISDICTION TO SET ASIDE THE DIVORCE DECREE

Lucy contends the district court did not have jurisdiction under K.S.A. 2010 Supp. 60-260 to summarily set aside her final divorce decree without affording the parties notice and an opportunity to be heard.

Whether jurisdiction exists is a question of law over which appellate courts have unlimited review. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 609, 244 P.3d 642 (2010). Additionally, Lucy's argument on appeal involves the interpretation of statutory language, a question of law also subject to de novo review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009).

Before addressing the merits of Lucy's argument, we must first determine whether we have jurisdiction to consider her appeal. Two hurdles potentially hinder our ability to review this matter. First and foremost, the divorce proceeding is still pending, and, subject to certain exceptions not applicable in this case, the appellate jurisdiction of this court may only be invoked in a civil proceeding, as a matter of right, from a "final decision." K.S.A. 2010 Supp. 60-2102(a). Although Lucy acknowledges that she is not appealing from a final judgment, she asserts this court has jurisdiction under a "jurisdictional exception" to the general rule that nonfinal orders are not appealable. We agree. In *Brown v. Fitzpatrick*, 224 Kan. 636, 638-39, 585 P.2d 987 (1978), our Supreme Court held that nonfinal orders issued under the authority of K.S.A. 60-260 are appealable if challenged on jurisdictional grounds. As a result, this issue is properly before this court.

Second, Lucy did not raise her jurisdictional argument before the district court, nor did she object when the district court announced its decision to set aside the divorce decree. Generally, issues not raised before the district court may not be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). Subject matter jurisdiction, however, which is vested by statute, "establishes the court's authority to hear and decide a particular type of action. [Citations omitted.]" *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 92, 106 P.3d 492 (2005). As a result, subject matter jurisdiction may be raised at any time. *State v. Ernesti*, 291 Kan. 54, 60, 239 P.3d 40 (2010). Thus, Lucy's failure to raise this issue below does not preclude appellate review.

With regard to the merits of Lucy's issue on appeal, it is important to note the district court did not cite any statutory authority for its order setting aside the divorce decree, nor did it specify the reasons for its decision. But after a careful review of the record, we agree with Lucy that the district court was attempting to act under K.S.A. 2010 Supp. 60-260(b).

K.S.A. 2010 Supp. 60-260 outlines the grounds upon which a district court can grant relief from a final judgment or order. Although district courts may correct a clerical mistake or a mistake arising from an oversight or omission on its own initiative with or without notice, district courts may only relieve a party from a final judgment for one of the six bases for relief provided in subsection (b) "[o]n motion and just terms." K.S.A. 2010 Supp. 60-260. In *Brown*, our Supreme Court held that because 60-260(b) contemplates the filing of a motion, a district court is not authorized "to grant relief on its own initiative." 224 Kan. at 641; see also *Daniels v. Chaffee*, 230 Kan. 32, 42-43, 630 P.2d 1090 (1981) (reaffirming *Brown*).

The Supreme Court, in *Brown*, further held that actions taken under 60-260(b) must afford due process of law to the affected parties, *i.e.*, notice and an opportunity to be

heard or defend. 224 Kan. at 640-41; see *In re Liquidation of Nat'l Colonial Ins. Co.*, 20 Kan. App. 2d 802, 805, 892 P.2d 926 (1995). Thus, appellate courts are "duty-bound to hold" that actions taken in derogation of this procedure are ineffective and constitute reversible error even if the district court's action was a commendable attempt to correct an error of law. *Darnall v. Lowe*, 5 Kan. App. 2d 240, 242, 615 P.2d 786 (1980); see *Brown*, 224 Kan. at 641.

We hold the district court was without jurisdiction when it summarily set aside the final divorce decree on its own initiative without either party filing a motion. Moreover, the district court erred when it did not afford the parties affected, Lucy and Adam, notice and an opportunity to be heard. Accordingly, we reverse the district court's order setting aside the final divorce decree.

Reversed.