NOT DESIGNATED FOR PUBLICATION

No. 104,925

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MELODIE L. WILLIAMS,
Appellee,

and

EDWARD L. WILLIAMS,
Appellant.

MEMORANDUM OPINION

Appeal from Coffey District Court; RONALD D. INNES, judge. Opinion filed June 15, 2012. Affirmed in part and reversed in part.

Edward W. Dosh, of Parsons, and *Robert Forer*, of Lawrence, for appellant.

Melissa Johnson and *Randy M. Barker*, of Kansas Department of Social and Rehabilitation Services, of Topeka, for appellee.

Before STANDRIDGE, P.J., MARQUARDT and ARNOLD-BURGER, JJ.

Per Curiam: Edward L. Williams appeals the district court's dismissal of his motion to modify child support and the district court's denial of a credit towards his child support arrearage for social security disability insurance (SSDI) lump-sum payments paid to his children. We find that the district court did not abuse its discretion when it dismissed his motion to modify child support for failure to file Child Support Worksheets (Worksheet) prior to the hearing, contrary to Supreme Court Rule 139 (2011 Kan. Ct. R. Annot. 228). However, we find that the district court did err in failing to give credit

against Williams' child support arrearage for lump-sum SSDI back benefits payments made to his children. Affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL HISTORY

In 2001, Melodie Williams filed a petition for divorce against Edward Williams. An ex parte temporary order was filed ordering Edward to pay $665 per month in child support during the pendency of the divorce action. Several months later, the district court granted the divorce and restored Melodie to her maiden name but left all other remaining issues to be resolved at a later date.

For the next 8 years, the case proceeded on a tortuous path of attorneys (five for Edward, three for the Secretary of Social and Rehabilitation Service [SRS], two for Melodie, and two guardian ad litems), judges (three, with two of them recusing), and continued hearings regarding custody, child support, and contempt with few decisions being made. We will examine only the facts that are pertinent to the issues raised on appeal.

Just days before Melodie filed for the divorce, Williams resigned from his job as an over-the-road truck driver due to physical disabilities related to his prior job. At some point during the divorce proceedings he applied to the Social Security Administration (SSA) for SSDI benefits. He also made several requests to reduce his child support obligation in consideration of his lack of income.

Williams' first motion to modify child support was filed on March 8, 2002, before the divorce was final; in support, he subsequently filed a Worksheet. The matter was set for hearing along with other issues related to custody of the parties' two children. Due to numerous continuances, over 2 years passed during which no hearing was held, despite

the fact that Melodie filed a motion for a contempt citation due to Williams' failure to pay child support.

On June 30, 2004, Williams filed a second motion to modify child support. He requested both retroactive as well as a prospective reduction and noted that his application for disability was still pending. He contended that the temporary order of child support, which was still in effect, had been calculated based on his income as a truck driver from which position he had resigned before the divorce was filed. Almost 2 1/2 more years passed, and there was still no hearing. The record is riddled with various other motions, orders, and continuances, but no hearing on the child support issue was ever held.

On November 1, 2006, a hearing was held on Melodie's contempt motion. The attorney who had been representing SRS was out on maternity leave, and a substitute attorney appeared. The substitute attorney did not object when Williams' attorney raised the issue of modifying child support at the hearing. The district court found that because Williams had not had annual earnings equal to or greater than minimum wage, his child support obligation should be recalculated accordingly. He was ordered to prepare a new Worksheet, and he was required to pay a minimum of $222 per month in child support until child support was further modified.

When the journal entry of the November 1 hearing was circulated, Melodie, who was pro se at this point, filed an objection and asked for reconsideration. She alleged that the hearing was supposed to be limited to contempt and the substitute SRS attorney did not adequately review Williams' documentation regarding disability. The "original" SRS attorney filed a motion in support of Melodie's request for reconsideration contending that the hearing was only scheduled as a contempt hearing. In addition, the attorney for SRS pointed out that Williams had failed to file a Worksheet or the Domestic Relations Affidavit (DRA) required by Supreme Court Rule 139. She further contended that the

medical information provided at the hearing was inadequate to support a finding of current work restrictions. The motion to reconsider was granted and the November 1, 2006, orders were set aside.

Nine more months passed before a new hearing was held on Melodie's motion for contempt for Williams' failure to pay child support. The district court found Williams in contempt for knowingly and willfully failing to pay child support. In order to purge himself of the contempt, among other things, Williams was ordered to pay $272 each month toward his child support, although the court noted that it was not modifying the prior order of $665 per month. The court specifically declined to address Williams' motion to modify child support, finding that "[t]he Court believes that if child support is modified, Respondent will not pursue his Social Security claim." The court's order was not appealed. Williams continued to neglect filing a Worksheet.

Finally, after an additional 2 years, on June 23, 2009, Williams received a letter from the SSA that the decision to grant him SSDI benefits was fully favorable. The SSA determined that Williams was disabled since September 16, 2001. Williams was informed that he was entitled to benefits beginning in March 2003. Both of Williams' children were given a lump-sum payment from the SSA for back benefits in the amount of $17,319 each. Subsequently, the contempt action against Williams was dismissed, as his children began receiving a monthly payment from Williams' disability claim that exceeded his child support obligation. The issue then became the arrearage, which was just under $50,000.

On February 5, 2010, Williams filed a "Motion to Redetermine Temporary Child Support Ab Initio, to Determine Current Support, and to Determine Current Arrearages and/or Credits" which reasserted his 2004 motion to modify child support and he also requested a credit toward his arrearages for the lump-sum amount paid to his children for their associated SSDI benefits. On March 19, 2010, in its response to Williams' motion,

SRS pointed out that Williams had still not filed a DRA and a Worksheet as required by the Kansas Child Support Guidelines.

On June 24, 2010, a hearing was held in order to discuss Williams' motion to modify child support and his request for a credit toward his arrearages. Williams had yet to file a Worksheet. SRS conceded that a DRA had been filed in 2007, but no Worksheet had been filed. However, at the hearing, after SRS moved to dismiss his motion for failure to file the necessary documents in advance of the hearing, Williams' attorney indicated he had the documents with him to submit to the court. The district court denied him the opportunity to file the documents at the hearing. After the hearing, Williams filed a DRA and Worksheets for the years 2001 to 2009.

On July 26, 2010, the district court filed its journal entry dismissing Williams' motion to modify child support for failing to file the appropriate documents according to Supreme Court Rule 139. In addition, the district court filed an order overruling Williams' request for credit toward his child support arrearages.

Williams filed a timely notice of appeal.

DISMISSAL OF WILLIAMS' MOTION TO MODIFY CHILD SUPPORT

Williams contends that the district court erred when it dismissed his motion to modify child support for failing to abide by Supreme Court Rule 139.

Standard of Review

Any motion that is filed with the court is an application to the court for an order, indicating that a party is requesting the court to use its discretion to either grant or deny the motion. See K.S.A. 60-207(b). Therefore, we review the dismissal of the motion to

modify child support in this case under an abuse of discretion standard. See *In re Marriage of Atchison*, 38 Kan. App. 2d 1081, 1085, 176 P.3d 965 (2008) (standard of review in determining the amount of child support is whether district court abused its discretion). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). An action is arbitrary, fanciful, or unreasonable if no reasonable person would have taken the action of the trial court. *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009).

The interpretation of the Supreme Court Rules, on the other hand, involves issues of law over which an appellate court has unlimited review. *In re Marriage of Jones*, 45 Kan. App. 2d 854, 856, 2010 WL 5490758 (2010).

Analysis

We first examine the language of Supreme Court Rule 139(f) and (g) (2011 Kan. Ct. R. Annot. 229), which state as follows:

> "(f) A party filing a motion to modify an existing order of support shall serve a copy of the Domestic Relations Affidavit along with the motion on the adverse party. Any person challenging a motion to modify an existing support order or the facts contained in the movant's affidavit shall file and serve a similar affidavit prior to the hearing on the motion to modify.
>
> "(g) Where child support is required, a Child Support Worksheet shall accompany the Domestic Relations Affidavit."

Williams filed a DRA on January 25, 2010. On February 5, 2010, he filed his motion to determine child support. However, he did not file a Worksheet. The record on

appeal does not reveal any Worksheets were filed, by either party, after April 5, 2002, nor does Williams allege any were filed until after the hearing on June 24, 2010. After the hearing, Williams filed a current DRA and Worksheets covering the years from 2001 to 2009. SRS contends the failure to file a Worksheet with a motion to modify child support presents an evidentiary question. In this instance, when a movant has failed to file a Worksheet before the hearing begins on the motion, the district court is well within its discretion to dismiss the motion for failing to abide by Supreme Court Rule 139.

In dismissing Williams' motion to modify child support, the district court made the following findings and conclusions at the hearing:

> "[I]t's the judgment of the Court that the rule means what it means that if you're going to seek a modification of the order, even a temporary order, then it's necessary to file the accompanying affidavit and worksheet. Until that is filed, there is no issue before the Court notwithstanding the fact that there may be a motion to modify filed."

In its journal entry dismissing Williams' motion to modify child support, the district court wrote: "The Court dismisses the Motion to Modify Child Support in its entirety for failure to file the appropriate documents."

Williams relies on *Jones*, 45 Kan. App. 2d 854, to support his position that the district court erred when it dismissed his motion to modify child support. In *Jones*, the father filed his motion to modify child support, but neglected to file the DRA or the Worksheet with it. However, the father did file both documents at a later date, but before the hearing. The mother argued that a motion to modify child support was not completely filed until all of the required documents under Supreme Court Rule 139—the motion to modify, the DRA, and the worksheet—had been filed. As such, the retroactive application of a child support modification under K.S.A. 2009 Supp. 60-1610(a)(1) did not begin until all of the documents were on file. Our court declined to accept the

mother's argument. Our court held that "it is only the motion that is necessary to confer jurisdiction on the court to modify child support." 45 Kan. App. 2d at 858. It further found that failure to comply was not an issue, because Jones did file the DRA and worksheet. 45 Kan. App. 2d at 859.

In the present case, the district court did not dismiss Williams' motion to modify child support on jurisdictional grounds. The district court simply found that Williams failed to file a DRA and Worksheet prior to the hearing. Without these documents provided to the district court and opposing counsel before the hearing, opposing counsel was unprepared to argue against the motion, and the district court was unprepared to make an effective ruling on the motion. Even though Williams' counsel indicated he had them available to present to the court, opposing counsel is entitled to receive copies before the hearing in order to adequately prepare. The purpose of the filing requirements of Supreme Court Rule 139 is to facilitate the efficiency and effectiveness of the proceedings regarding motions to modify. If the district court were not allowed to dismiss a motion to modify when the documents are not on file at the time of the hearing, Supreme Court Rule 139 would be rendered meaningless.

Although we certainly understand Williams' frustration with his inability to get the district court to listen to him regarding child support and we do not condone the curtness with which his attempts were met, he did have plenty of time to get the appropriate documents on file prior to the hearing. Accordingly, we cannot find the court's action of dismissing the motion when it was not provided with the required documentation in advance of the hearing, to be arbitrary, fanciful, or unreasonable under the circumstances.

APPLICATION OF THE CHILDREN'S LUMP-SUM SSDI PAYMENTS TO FATHER'S CHILD SUPPORT ARREARAGE

Williams argues that the district court erred when it denied him a credit against his accrued child support arrearages for the time between March 2003 and June 2009. The request for credit was for the lump-sum SSDI back benefits made to Williams' children for the time frame when he became eligible for disability benefits but had yet to receive any payments. During the period covered by the disability payments, Williams was $49,618.42 behind in child support, apparently because he was unable to work due to his disability.

This is a question of law for which review is de novo. *In re Marriage of Williams*, 21 Kan. App. 2d 453, 454, 900 P.2d 860 (1995).

Our court, along with the majority of other courts in the country which have considered this issue, has recently held that lump-sum SSDI benefits received by Mother on behalf of her minor child because of Father's disability may be credited toward Father's child support arrearage that accumulated during the months covered by the lump-sum payments. *In re Marriage of Hohmann*, 47 Kan. App. 2d 117, Syl., 274 P.3d 27 (2012), *pet. for rev. filed* April 16, 2012 (pending).

However, SRS contends that our decision in *Hohmann*, and the majority view are wrong for three distinct reasons. We disagree and stand by the reasoning of *Hohmann*. We will, however, address each claim made by SRS.

The children's need is current and must be met monthly.

SRS argues that parents are obligated to support their children on a timely basis as ordered by the court. If the courts allow lump-sum payments to result in credit toward

arrearages, even if only for the months covered by the lump-sum payment, it encourages obligors to delay any payment until their SSDI claim is decided, leaving the nonobligor parent to shoulder the entire cost of childrearing. This argument fails for several reasons.

First, the custodial nonobligor parent always has the ability to call upon the court's contempt powers to enforce child support payment orders. In fact, Melodie did so in this case, resulting in payments being made as ordered by the court, including a temporary reduction to account for Williams' financial ability to pay. Therefore, any failure to pay child support is at the obligor parent's own risk and subjects him or her to the court's broad powers to punish for contempt.

Second, there is no dispute that Williams receives credit for current monthly SSDI payments toward current monthly child support. This is clear from *Andler v. Andler*, 217 Kan. 538, 544, 538 P.2d 649 (1975). So in this case, Williams' current child support obligation is erased because his children receive more in SSDI payments ($819 per month) than he is required to pay in child support ($665 per month), and the monthly excess inures to the benefit of his children. Further, the receipt of a lump-sum payment for previously earned SSDI benefits is entirely due to the inherent delay in navigating the federal SSA process. Had a timely decision been made by SSA, Williams would have received credit in those months that are now covered by the lump-sum award. There is no allegation presented by the parties here that the delay in receiving benefits was due to any actions on Williams' part. If we hold that Williams should not receive credit, we penalize him for the SSA's delay.

Finally, it is clear that even though a nonobligor parent or others may be supporting the child, the remaining parent's obligation is not reduced. *Thompson v. Thompson*, 205 Kan. 630, 633, 470 P.2d 787 (1970). But the sole reason a parent applies for SSDI benefits is because he or she is unable to work and provide personal or family support. When a disability befalls one parent, the burden of support, at least temporarily,

unfortunately falls upon the other parent. This same burden exists whether the parents are married or divorced. SSDI payments are not considered gratuitous but are instead insurance benefits paid on the condition of disability, a condition that was met in this case. See *Andler*, 217 Kan. at 542.

Federal regulations prohibit the nonobligor parent from applying lump-sum payments to anything other than current maintenance.

The SSDI benefits payable to Williams' children are payable through Melodie as the "representative payee" under federal regulations. SRS argues that federal regulations, specifically 20 C.F.R. § 404.2040 (2011), prohibit Melodie from reimbursing herself from the lump-sum SSDI back benefits payment received for child expenses she incurred and paid while Williams was in arrears.

However, the regulation cited does not support this position nor is SRS able to cite to any legal authority in support of its position. The regulation upon which SRS relies simply states that SSA "will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance." 20 C.F.R. § 404.2040 (2011). It does not address lump-sum back payments. SRS directs us to the SSA website and a brochure entitled "A Guide for Representative Payees" http//www.ssa.gov/pubs/10076.html in support of its position. Although this brochure has no legal effect and would certainly not be adequate authority upon which to grant or deny Williams credit for lump-sum SSDI payments, it states, in pertinent part:

> "How to handle a large payment of past benefits
>
> "Sometimes benefits take awhile to be approved. When this happens, back benefits may be paid all at once, in a large payment. First, you must spend the money on the

> beneficiary's current needs such as rent and a security deposit, food or furnishings. After these expenses are paid, you may spend the money to improve the beneficiary's daily living conditions, or for better medical care. It is important that you spend the money wisely. You should keep in mind that the money must be used in the beneficiary's best interests. If there is money still left over, it must be saved . . . ."

We find nothing in this language that would prohibit Melodie from reimbursing herself for actual childrearing expenses incurred and paid during the months for which the lump-sum benefits are received, as long as she could document the expenditures to the satisfaction of the SSA.

The brochure then goes on to state that the money could be used for a variety of things including medical and dental expenses, wheelchairs, insurance premiums, houses, cars, furniture, home improvements, movies, concerts, and magazine subscriptions. It concludes this topic with the following: "If you are not sure whether it is okay to use the money for a specific item (for example, paying a bill the beneficiary owed before you became payee), contact your local Social Security office before you spend the money."

This language leaves open the possibility that paying a bill incurred before the money was received by the representative payee may be appropriate, but further discussion with the SSA is necessary. So, although this argument is at first blush compelling, SRS presents no legal support for its position. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

When there is no arrearage, crediting a lump-sum payment would result in a requirement that the nonobligor parent reimburse the obligor parent for the child support paid.

Finally, SRS argues that if a child support obligor has timely paid his or her child support, and subsequently the child receives a lump-sum payment covering months already paid by the obligor, the nonobligor parent will have to repay the obligor for the "overpayment." This issue was also raised in *Hohmann* and although we declined to address it, we did note, as we do here, that the majority of courts take the view that no reimbursement is required and deem the excess to be a voluntary overpayment that inures solely to the benefit of the child. See, *e.g.*, *Child Support Enforcement Agency v. Doe*, 92 Hawaii 276, 285-86, 990 P.2d 1158 (Hawaii App. 1999); *Brown v. Brown*, 849 N.E.2d 610, 616 (Ind. 2006); *Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990), *Holmberg v. Holmberg*, 578 N.W.2d 817, 827 (Minn. App. 1998), *aff'd* 588 N.W.2d 720 (Minn. 1999); *Keith v. Purvis*, 982 So. 2d 1033, 1038-39 (Miss. App. 2008); *Steel v. Hartwick*, 209 W. Va. 706, 708-09, 551 S.E.2d 42 (2001). Our Supreme Court also addressed this issue in *Andler*. Andler made four child support payments after his SSDI payments started. So for 4 months, Mother received both the child support payment and the SSDI payment. The Supreme Court found that those four child support payments "must be regarded as gratuities for the children." 217 Kan. at 545. We believe this reasoning to be sound, and we can find no basis to depart from it.

Therefore, because Williams' children's lump-sum SSDI back benefits payment covered the timeframe when he became eligible for benefits but had yet to receive them—March 2003 to June 2009—he should be given a credit towards his child support arrearages for those months, in an amount equal to the amount SSA provided the children in each specific month. For any month in which the SSDI payment exceeds the amount Williams owes for that month, the excess inures to the benefit of the children.

Affirmed in part and reversed in part.