

Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF Stephanie L. KELLEY, Appellee,
and
Carl K. Kelley, Appellant.
No. 97,651.
May 16, 2008.

Appeal from Sedgwick District Court; Rebecca L. Pilshaw, Judge.
Shannon A. Kelly, of Kelly Law Offices, of Wichita, for appellant.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellee.

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

MEMORANDUM OPINION

PER CURIAM.

*1 In this child support appeal, Carl Kevin Kelley contends the trial court should not have counted as his income some personal expenses paid by his corporations. Kevin is the majority stock owner in one corporation and the sole stock owner in the second. The companies paid for Kevin's home phone, Internet service, his car and its associated expenses, and a time-share lease in Branson, Missouri. According to our child support guidelines, when a parent receives significant in-kind payments that lessen personal living expenses because of employment, the court should add the value of such payments to gross income when deciding child support amounts. Because the trial court followed that rule in this case, we hold its determination of child support is correct and affirm.

The case history reveals the postdivorce disagreement.

When Stephanie L. Kelley and Carl Kevin Kelley divorced, they agreed that Kevin would pay monthly child support of \$612.56 for their three children and provide them with health insurance. When one of the children turned 18 in 2005 and graduated high school, Kevin moved to adjust his child support payment.

After Kevin filed his motion, the parties disagreed about Kevin's income. To decide the matter, the district court held an evidentiary hearing. At the hearing in September 2006, Kevin testified that his income came from two sources: Kelley Cast Stone and M & K Enterprises. We have reviewed the record about both companies.

Kelley Cast Stone. Kelley Cast Stone is a family corporation that makes

architectural cast stone products. Kevin manages and is the majority stockholder in Kelley Cast Stone. According to Kelley Cast Stone's 2005 tax return, Kevin received \$36,625 in compensation. As well as his compensation, Kevin admitted that he charged \$1,000 of personal expenses to the company's Lowe's credit card. Payments on this credit card were made by Kelley Cast Stone and not Kevin.

M & K Enterprises. M & K Enterprises earns its income by renting a building to Kelley Cast Stone. Kevin is the sole stockholder of M & K Enterprises. M & K Enterprises is physically found in Kevin's home, and its business phone is also Kevin's home phone. There is no listing for M & K Enterprises' business number in the phone book. According to M & K Enterprises' 2005 tax return, Kevin received \$6,000 in compensation for that year. As well as his 2005 income, M & K Enterprises also paid several other expenses for Kevin. It covered \$723 of the expenses for Kevin's home phone. M & K also paid for Kevin's Internet service, which totaled \$450. It supplied Kevin with a vehicle and paid for its insurance, tags, taxes, tires, body repair, and part of Kevin's gasoline charges, which all amounted to \$14,814.83. But the company only took off automobile expenses of \$2,358 on its tax return, thus, paying a total of \$12,456.83 in Kevin's personal expenses. M & K paid a \$593 maintenance fee for Kevin's time-share lease in Branson, Missouri. Also, M & K Enterprises' accounts revealed that Kevin had, for personal use, written two checks (\$200 each) for cash.

*2 The district judge decided that Kevin had masked his income through his ownership of both companies:

“I do believe that Mr. Kelley has been taking advantage of his corporate status and is reaping many benefits from the corporation especially M & K, that don't show up as personal income for purposes of income tax and most important here today for purposes of child support calculations. M & K is, in essence, just a building and a man, really. I tried to fathom a reason why you would need a car for a business like that. Obviously you don't, but it becomes a business expense and therefore you get tax benefits from that. But the fact remains that you do not get to use that as a reason to not count that as income for purposes of child support.... *So all I am doing here is imputing income to you based on your spending habits for your personal use.* I do find that we are going to base child support on the \$36,624.92 from the Kelley Cast Stone W-2, plus the \$6,000.00 for the M & K W-2. I'm going to skip the tax refund right now.... I am going to count the \$593.00 that was characterized as a management fee, that is going to be included in his yearly income. I'm going to stick just with the car expenses not deducted on the M & K return as income for the year, the whole amount there, I'm not going to reduce it by the \$2,500.00. I am going to include his phone, one hundred percent of it, the \$722.76 as income for the year. I will also add in the \$400.00 there as income for the year. I will also add in the \$499.50, even though it's not requested officially, I am including that as income for the year. I am going to, at this time I am simply going to add in \$1,000.00 from the

Lowe's as income for the year. That will add an additional \$15,671.26 to his income. So if you add the \$36,624.92 plus the \$6,000.00 that equals \$58,296.18 that I'm going to count as his income."

Using that income amount, the court calculated that Kevin's monthly child support payment would be \$801 for the months of November 1, 2005, to May 2006, and then, beginning June 1, 2006, his monthly child support payment would be \$741.

We thin out some of the appellant's issues because they were not raised before the trial court.

Stephanie points out that Kevin's briefed issues were not raised before the district court. It is significant that Kevin does not respond to this allegation. Generally, issues not raised before the trial court cannot be raised on appeal. *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007). This general rule also applies in cases about child support. See, e.g., *State ex rel. Secretary of SRS v. Mayfield*, 25 Kan.App.2d 452, Syl. ¶ 1, 966 P.2d 85 (1998) (finding that because obligor's argument was raised for the first time on appeal, the Court of Appeals would not address whether the district court failed to consider obligor's financial circumstances and ability to pay when it ordered partial reimbursement to SRS).

*3 The record discloses two issues were raised before the district court, both focusing on the amount of Kevin's income for child support determination purposes. The first is whether Kevin's income from Kelley Cast Stone should be \$23,000, not \$36,625, because of his alleged reduction in pay. The second was whether Kevin hid or masked his income through his self-employment at both Kelley Cast Stone and M & K Enterprises.

But Kevin's appeal brief raises the following arguments, and our response follows:

- **Subchapter S pass-through loss.** The district court should have offset Kevin's W-2 income from Kelley Cast Stone with his corresponding Subchapter S pass-through loss. This argument was not made to the district court and, therefore, we cannot consider it.
- **W-2 income offset by loss.** The court should have offset Kevin's W-2 income from M & K Enterprises with M & K Enterprises' "loss." Kevin did not challenge the district court's use of his income figure from M & K Enterprises' W-2 tax return. Therefore, Kevin failed to preserve the issue for appeal.
- **Future child support could increase with retained earnings .** The court should not have ordered that future child support payments could be increased if significant increases occurred to the retained earnings of M & K Enterprises. Kevin failed to object to the district court's order and did not file any posttrial motion about this. He has failed to preserve the issue for appeal.

- **Imputation of income.** The court should not have imputed Kevin's employer-covered expenses because they were not "regularly and periodically received." Kevin did not make this argument to the district court, instead he claimed these amounts were loans. We view the argument now as an admission that the payments are "other income" as contemplated under the child support guidelines. Under the first exception to the general rule described below, we will review this issue.

There are three exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal. First, the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case. Second, consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights. Third, the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or assigned a wrong reason for its decision. *Smith v. Yell Bell Taxi, Inc.*, 276 Kan. 305, 311, 75 P.3d 1222 (2003).

We find no abuse of discretion in the district court's order setting child support.

The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the Kansas Child Support Guidelines (KCSG) (2005 Kan. Ct. R. Annot. 103) is subject to unlimited review. *In re Marriage of Cox*, 36 Kan.App.2d 550, 553, 143 P.3d 677 (2006).

*4 The KCSG define self-employment gross income to be "income from self-employment and *all other income including that which is regularly and periodically received* from any source excluding public assistance and child support received for other children in the residency of either parent." (Emphasis added.) KCSG, § II, E. 1 (2005 Kan. Ct. R. Annot. 105). Reasonable business expenses for self-employed persons are "those actual expenditures reasonably necessary for the production of income." KCSG, § II, E. 2 (2005 Kan. Ct. R. Annot. 105). Therefore, domestic gross income for the self-employed is "self-employment gross income less reasonable business expenses." *In re Marriage of Brand*, 273 Kan. 346, Syl. ¶ 5, 44, 44 P.3d 321. P.3d 321 (2002); KCSG, § II, E. 3 (2005 Kan. Ct. R. Annot. 106).

In addition, the KCSG also states that income may be imputed to the parent not having primary residency in appropriate circumstances. Those circumstances are:

- “a. Absent substantial justification, it should be assumed that a parent is able to earn at least the federal minimum wage and to work 40 hours per week.
- “b. When a parent is deliberately unemployed, although capable of working full-

time, employment potential and probable earnings may be based on the parent's recent work history, occupational skills, and the prevailing job opportunities in the community.

“c. When a parent receives significant in-kind payments that reduce personal living expenses as a result of employment, such as a company car, free housing, or reimbursed meals, the value of such reimbursement should be added to gross income.

“d. When there is evidence that a parent is deliberately underemployed for the purpose of avoiding child support, the court may evaluate the circumstances to determine whether actual or potential earnings should be used.” (Emphasis added.) KCSG, Section II, F (2005 Kan. Ct. R. Annot. 106).

The district court considered Kevin's employer-covered expenses to be imputed income under circumstance “c.” The district judge stated:

“I tried to fathom a reason why you would need a car for a business like that. Obviously you don't, but it becomes a business expense and therefore you get tax benefits from that. But the fact remains that you do not get to use that as a reason to not count that as income for purposes of child support. We impute income all the time. We impute minimum wage to women who are unemployed, we impute income to people who remain underemployed. So all I am doing here is imputing income to you based on your spending habits for your personal use.”

In reviewing the trial transcript, the evidence also supports the district court's findings that Kevin's employer-paid expenses, especially those by M & K Enterprises of which he is the sole owner, qualified as imputed income. First, M & K Enterprises paid for \$14,814.83 of Kevin's vehicle expenses; yet, it only claimed \$2,358 of those costs on its W-2 tax return. This means over \$12,000 of expenses were not related to M & K business. Second, M & K Enterprises' phone and Internet services, which Kevin used in his home, failed to have a commercial purpose, for its business is solely involved in being a landlord to Kelley Cast Stone. Third, Kevin admitted that the \$593 management fee found on M & K Enterprises' W-2 tax return was used to pay for the maintenance fee on his time-share lease. Fourth, the cash withdrawal of \$400 went directly to Kevin. Fifth, Kevin testified that the \$1,000 charges to M & K Enterprises' Lowe's credit card charge were used to cover the remodeling of his home and other personal expenses. We believe this is ample evidence that supports the district court's conclusion that these payments reduced Kevin's personal living expenses; thus, there was no abuse of discretion when the court imputed these amounts as income.

*5 We do not think this is a frivolous appeal and deny Stephanie's motion for attorney fees.

Affirmed.