Use of K.S.A. 60-259 in Family Law Cases

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K.S.A. 60-259 contains seven subparts with varying levels of specificity, but this article focuses on the juxtaposition between K.S.A. 60-259(a) and (f) and the trouble they pose for family law practitioners.

Requirements

Following a bench trial in a family law case, a party may move for a new trial under certain conditions. K.S.A. 60-259(a)(1) outlines those conditions and the specific allegations the movant must make, such as abuse of discretion by the court.[1] Such a motion is used when an error has occurred during trial that can be corrected by granting a new trial. This includes everything from misconduct by the opposing party to newly discovered evidence and more.[2]

If the matter has not yet proceeded to trial, or the matter is a new matter that has arisen after the granting of a divorce or other final order in a family law case, the party who believes an error has occurred may find an avenue of relief under K.S.A. 60-259(f).

K.S.A. 60-259(f) states simply, "*Motion to alter or amend a judgment*. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment,"[3] and would seem, based upon a plain-reading

of the language, to provide courts with the opportunity to change previously issued rulings. The statute, however, provides neither the grounds upon which such an amendment may occur, nor any insight into when an amendment may be appropriate. Contrasted against K.S.A. 60-259(a)(1)'s rather lengthy list of opportunities for a party to move for a new trial, this absence of direction in K.S.A. 60-529(f) is all the more glaring.

Turning to caselaw for guidance, we find that although the application of K.S.A. 60-259(f) has a lengthy history, the precise meaning of those 21 words remains somewhat elusive. In *In re Marriage of Willenberg,*[4] we learn that the constraints of K.S.A. 60-259(a)(1) do not apply to K.S.A. 60-259(f) as the two subsections relate to different substantive motions. *Ten Eyck v. Harp* furthered the importance of substance, stating that a Motion for Rehearing was brought under K.S.A. 60-259(f) because it "*stated specifically the alleged error of the district court and the grounds relied upon*, and looking through form to substance, we think it sought to alter or amend the judgment."[5] This interpretation mirrors how the federal courts interpret Federal Rule of Civil Procedure 59(e), after which K.S.A. 60-259(f) is modeled.[6]

Thus, a Motion for "Rehearing" or "Reconsideration" will be construed as Motion to Alter or Amend under K.S.A. 60-259(f), and the classification is based upon the substance of the motion. This leaves open the substance requirements of such a motion and the purpose such a motion serves.

In *Denno v. Denno*, the Kansas Court of Appeals stated, "The purpose of K.S.A. 60-259(f) is to allow the trial judge the opportunity to correct prior errors."[7] While the statute itself does not seem to require any statement of error, both caselaw and common sense tell us that if we want the court to reconsider, alter, or amend something it did in the past, our argument will be more successful if we can point to a specific error and provide a solution.

In reconsidering its decision, though, what a court can actually review depends upon whether the motion is filed under K.S.A. 60-259(a) or K.S.A. 60-259(f). For example, K.S.A. 60-259(a) specifically permits a court to consider newly discovered evidence on a limited basis, under subsection (a)(E).[8] K.S.A. 60-259(f), however, does not permit the court to consider newly discovered evidence. In *In re Marriage of Michel*, the Kansas Court of Appeals specifically stated K.S.A. 60-259(f) "likely was not the proper procedural vehicle" to consider newly discovered evidence,[9] and instead, "the trial court should limit its consideration to matters that were before the court when it entered the original judgment."[10] These limitations seem to permit a "second bite at the apple," however, and possibly a third and fourth.

A practitioner may conclude that attorneys should file K.S.A. 60-259(f) motions on each adverse decision received regardless of whether they believe they are likely to succeed or not. Such practice is ill-advised, inefficient, and potentially unethical.

As there are ostensibly no requirements for a K.S.A. 60-259(f) motion beyond that it address arguments and evidence already presented, there is nothing to prevent a losing party from filing successive K.S.A. 60-259(f) motions. According to *In re Marriage of Hansen*, that is the correct interpretation of the statute's text.[11] There the court issued its Order regarding the initial child support motion and seven days later the husband filed a Motion for Rehearing. Following a hearing on this motion, the court issued its Order and the husband again filed a Motion for Rehearing, this time 10 days following the issuance of the order.[12] The Court stated this was procedurally allowed as parties are free to file a second K.S.A. 60-259(f) motion after their previous motion has been denied.[13]

Tolling

A properly filed motion under K.S.A. 60-259(f) tolls the running of time for filing an appeal under K.S.A. 60-2103(a). Thus, instead of having 30 days from the entry of the trial court's order to file an appeal, the moving party now has 30 days from the filing of the order on their K.S.A. 60-259(f) motion to file an appeal. This follows two veins of logic: 1) if the error is corrected in the K.S.A. 60-259(f) ruling, no appeal need be made, and 2) an appeal (excepting interlocutory appeals) is made on the basis of error in a final judgment and the parties don't have a final judgment while a K.S.A. 60-259(f) motion is pending.

A party, however, cannot toll the appeals clock indefinitely by filing successive K.S.A. 60-259(f) motions. While *Hansen* teaches us a party may file successive motions under K.S.A. 60-259(f), *Hansen* also provides that the clock is only tolled by the first K.S.A. 60-259(f) motion ("Motion A") and the appealing party has 30 days from the entry of judgment on that motion to file their appeal.[14] A mirrored outcome is seen in federal courts. In *United States v. Marsh*, the court explains that such an outcome is necessary because "the opposite interpretation would permit unlimited extensions

of time to appeal. One party could theoretically postpone indefinitely the appeal of his adversary by filing motions for reconsideration, and the adverse party might die before having to pay off the judgment."[15]

Best Practices

From the above and foregoing, a practitioner may conclude that attorneys should file K.S.A. 60-259(f) motions on each adverse decision received regardless of whether they believe they are likely to succeed or not. Such practice is ill-advised, inefficient, and potentially unethical.

Practicing Kansas attorneys are bound by the Kansas Rules of Professional Conduct and specifically Rule 226 which states in part, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[16] The comment to that same rule cautions practitioners that we have a "duty not to abuse the legal procedure."[17] Applied to K.S.A. 60-259(f) motions, this rule would prevent filing the same motion repeatedly for the sole purpose of appeasing a client who was on the receiving end of an unfavorable ruling.

More than the potential ethical violation, which could catch up with you at a later date, is the very immediate consequence of incurring the ire of the court who can impose sanctions for successive K.S.A. 60-259(f) filings. In *L.R. Foy Constr. Co. v. Professional Mechanical Contractors,* the trial court found Foy's second K.S.A. 60-259(f) motion was essentially a reproduction of his first and after denying Foy's second K.S.A. 60-259(f) motion, imposed sanctions against Foy for filing it.[18]

Conclusion

The family law practitioner has many tools available to them through K.S.A. 60-259 in the event they believe an error has occurred during the pendency of a case. Subsection (a)(1) outlines several avenues of relief with specificity as to the error and the relief available to the moving party following a trial. By contrast, the concise language of subsection (f) limits only the date of filing a Motion to Alter or Amend, not the grounds for, or the substance of, said motion. A prudent practitioner, however, would be best served by limiting the filing of K.S.A. 60-259(f) motions to situations in which the practitioner holds a good faith belief that the court has erred in judgment and their motion should outline both the particular error and the relief sought.

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1 K.S.A. 60-259(a)(1)(2010) providing the following reasons: "(A) abuse of discretion by the court, misconduct by the jury or an opposing party, accident or surprise that ordinary prudence could not have guarded against, or because the party was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case; (B) erroneous rulings or instructions by the court; (C) the verdict, report or decision was given under the influence of passion or prejudice; (D) the verdict, report or decision is in whole or in part contrary to the evidence; (E) newly discovered evidence that is material for the moving party which it could not, with reasonable diligence have discovered and produced at the trial; or (F) the verdict, report or decision was procured by corruption of the party obtaining it, and in this case, the new trial must be granted as a matter of right, and all costs incurred up to the time of granting the new trial must be charged to the party obtaining the verdict, report or decision."

2 *Id.*

3 K.S.A. 60-259(f)(2010).

4 *In re Marriage of Willenberg*, 271 Kan. 906, 909, 26 P.3d 684 (2001).

5 *Ten Eyck v. Harp*, 197 Kan. 529, 533, 419 P.2d 922 (1966)(emphasis added).

6 *Honeycutt v. City of Wichita*, 251 Kan. 451, 461, 836 P.2d 1128 (1992)(citing *Bestran Corp. v. Eagle Comtronics, Inc.* 720 F.2d 1019 (9th Cir. 1983)).

7 *Denno v. Denno*, 12 Kan.App.2d 499, 501, 749 P.2d 46 (1988).

8 K.S.A. 60-259(a)(1)(E).

9 *In re Marriage of Michel*, No. 107,867, slip op. at 18, 312 P.3d 398 (2013).

10 *Id*. at 18 (citing *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan.App.2d 932, 939-40, 159 P.3d 215 (2007)).

11 *In re Marriage of Hansen*, 18 Kan.App.2d 712, 714, 858 P.2d 1240 (1993) ("We find no authority upon which to base a conclusion that a party is precluded from filyng (sic) redundant motions.").

12 *Id*. at 713.

13 *Id*. at 715.

14 *Id*. at 715.

15 *United States v. Marsh*, 700 F.2d 1322, 1326 (1983).

16 Model Rules of Prof'l Conduct R. 226 KRPC 3.1 (2007).

17 *Id*. cmt.

18 *L.R. Foy Contr. Co. v. Professional Mechanical Contractors*, 13 Kan.App.2d 188, 193, 766 P.2d 196 (1988).