

NOT DESIGNATED FOR PUBLICATION

No. 91,146

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

DENNIS M. JURKOVICH,
Appellee,

and

TERESA L. JURKOVICH,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL, judge. Opinion filed July 30, 2004. Reversed and remanded with directions.

Teresa L. Jurkovich, appellant pro se.

No appearance by appellee.

Before JOHNSON, P.J., LARSON, S.J., and GLENN D. SCHIFFNER, District Judge, assigned.

Per Curiam: Teresa L. Jurkovich appeals the district court's rulings that established child support and split the income tax deductions for the two children between her and Dennis M. Jurkovich. Finding that the district court erred in modifying the income tax deduction allocation, we reverse and remand for reinstatement of the original deduction allocation and for a recalculation of child support.

The 1995 divorce decree incorporated the parties' separation and property settlement agreement, which provided, *inter alia*, that Dennis would be primary residential custodian, that Teresa would pay monthly child support of \$85, and that Dennis would be entitled to claim both children as exemptions for income tax purposes. Teresa became delinquent on her child support payments. After she obtained new employment, the district court modified her support obligation to \$281 per month and further ordered that she pay \$100 per month toward the delinquency. Shortly thereafter, the amount was increased to \$292 to reflect Dennis' medical insurance contributions.

In August or September 2002, Teresa filed a motion for temporary custody based upon Dennis' apparent abandonment of the children. The motion was granted, and the court temporarily suspended Teresa's child support obligations. Within a month, the district court overturned the temporary custody order, reinstated Teresa's support obligation, and ordered the parties to mediation concerning child custody.

Approximately a month later, Teresa filed another motion for change of custody, alleging that Dennis maintained inadequate living conditions and frequently left the children unattended. Teresa advised the court that the children had left their placement with Dennis and were living with her. Again, the district court granted Teresa temporary custody and terminated her support obligation. A court-appointed special advocate was assigned to the case.

On May 23, 2003, following a custody hearing, the children's primary residential custody was granted to Teresa. Subsequently, Teresa filed for a child support modification, asking for \$605 per month. The court calculated the monthly support at \$759. Later, Dennis moved the court to reconsider its calculations, Teresa filed a notice of appeal, and the district court ordered a reduction to \$562 per month.

CHILD SUPPORT PAYMENTS

Teresa has filed a form which is apparently provided by the Tenth Circuit Court of Appeals to be used by pro se appellants in lieu of a brief. The document is of little or no help to us. We perceive that Teresa is not challenging the district court's child support calculations, but rather that she is upset with the district court's failure to make the award

retroactive. Apparently, Teresa believes she should have received support during the periods of temporary custody.

"A district court has continuing jurisdiction to change or modify an order made in a divorce action concerning the custody and support of minor children when the facts and circumstances made modification proper. Such matters rest in the sound judicial discretion of the trial court. [Citations omitted.] On appellate review the order of a trial court determining the amount of child support should not be disturbed absent a showing of manifest abuse of discretion." *In re Marriage of Schoby*, 269 Kan. 114, 121, 4 P.3d 604 (2000) (quoting *Thompson v. Thompson*, 205 Kan. 630, 631, 470 P.2d 787 [1970]).

In *In re Marriage of Peak*, 244 Kan. 662, 772 P.2d 775 (1989), the Kansas Supreme Court considered whether a parent was entitled to an abatement of child support payments during an extended visit. The court opined:

"Whereas we recognize, as did the trial court, that there are equitable considerations weighing in the mother's favor herein, to affirm the trial court and the Court of Appeals would open up the already difficult problem of child support collection to endless litigation as to whether child support for a particular week or month should be abated. We must further recognize that the temporary absence of a child from the custodial parent has no effect on the amount he or she must pay for utilities, house

payments, car payments, etc., all of which necessarily continue during the child's temporary absence. Provision for the prospective abatement of child support during temporary changes in residence can be made a part of the applicable orders of support and the parties thereto will then know their respective financial obligations and expectations. The rule that accrued unpaid child support payments may not be modified is harsh under some circumstances, but it promotes at least a degree of stability in the difficult area of child custody and support." 244 Kan. at 665-66.

In *Peak*, the applicable period in which the noncustodial parent had temporary custody of the child was 2 1/2 months, and the noncustodial parent was required to pay child support during that period. Here, the period of temporary custody was only 15 days, and the district court suspended Teresa's support obligations during that brief period. There was no abuse of discretion.

The period for which the respondent seeks retroactive child support, however, extends beyond the September 19, 2002, hearing. Teresa presented evidence that, following the district court's transfer of custody to Dennis, the children returned to Teresa's residence on their own. Nevertheless, at the September 19th hearing, the district court had clearly granted custody to Dennis and ordered Teresa to pay child support. Dennis continued to have legal custody of the children until October 17, 2002, order of temporary custody. A permanent change in residential custody did not occur until May

23, 2003. More importantly, Teresa failed to file a motion for modification of the child support until June 3, 2003. See *Strecker v. Wilkinson*, 220 Kan. 292, 295-96, 552 P.2d 979 (1976).

"The court may modify or change any prior order, including any order issued in a title IV-D case, within three years of the date of the original order or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstance need not be shown. The court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed with the court." K.S.A. 2003 Supp. 60-1610(a).

Statutorily, the district court could have made Dennis' child support obligation retroactive to May 3, 2003, rather than commencing the payments on July 1, 2003. While the statute permits a limited retroactive application of a modification in child support, the decision to apply such a modification is clearly discretionary. See *Barnett v. Cusimano*, 30 Kan. App. 2d 680, 681, 46 P.3d 568 (2002). The district court did not abuse its discretion.

INCOME TAX DEDUCTIONS

As a secondary issue, Teresa contends that the district court should not have allocated one of the dependent income tax deductions to Dennis. We agree that the district court erred, but the error was in allocating a deduction to Teresa.

The question of which party may claim a dependent income tax deduction is not a question of child support; thus, the district court does not retain jurisdiction to modify the agreement of the parties pursuant to K.S.A. 2003 Supp. 60-1610(b)(3). *In re Marriage of Roth*, 26 Kan. App. 2d 365, 370, 987 P.2d 1134 (1999). Here, the separation agreement which was incorporated into the divorce decree, allocated the deduction for both children to Dennis. The district court exceeded its authority when it modified the terms of the settlement agreement without the consent of the parties. Therefore, we reverse the district court's order splitting the income tax dependent deductions and remand for an order consistent with the parties' settlement agreement.

However, where the dependent deductions are not shared, the Kansas Child Support Guidelines mandate that the district court adjust the child support obligations of the parties accordingly. See Kansas Child Support Guidelines, Administrative Order No. 128, Appendix V.A. (2003 Kan. Ct. R. Annot. 138) (discussing a district court's obligation to

consider the effect of unshared tax deductions and tax credits on divorced parties' respective child support obligations). Therefore, upon remand, the district court is directed to recalculate child support, based on an adjustment for Dennis receiving the tax deduction on both children.

Reversed and remanded for further proceedings.