

NOT DESIGNATED FOR PUBLICATION

No. 90,891

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LISA ANN ARMSTRONG,
Appellee,

and

DAVID MICHAEL ARMSTRONG,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed
August 20, 2004. Reversed and remanded with directions.

Kevin M. P. O'Grady, of Ferree, Bunn, O'Grady & Rundberg, Chtd., of Overland
Park, for appellant.

Angela R. Keck, of Advocacy Group, LLC, of Olathe, for appellee.

Before RULON, C.J., GREEN and MARQUARDT, JJ.

Per Curiam: David Michael Armstrong appeals from a judgment of the trial court denying his motion to modify child support. We reverse and remand for an evidentiary hearing on the issue of whether the trial court should have applied the shared custody adjustment in calculating the child support in this action.

Lisa Ann Armstrong and David Michael Armstrong were divorced on August 30, 2000. In a separation and property settlement agreement which was incorporated into their divorce decree, Lisa and David agreed that they would share joint legal custody of their three minor children. The agreement further provided that David was to pay \$470 per month in child support, while Lisa was to pay "all bills for the children, including school expenses, medical, school activities, and the like."

At some point, Lisa failed to pay all of the children's bills. David paid these bills in addition to his monthly child support obligation. Consequently, on October 31, 2002, David moved to modify child support, arguing that the shared custody adjustment should be used to modify his child support. Later an administrative hearing was held on the motion. Lisa did not appear at the hearing, and an order directing the parties to share the children's direct expenses was entered. Lisa appealed this order to the trial court.

When the trial court heard Lisa's appeal, it found the parties' original agreement regarding the payment of the children's expenses to be unambiguous. Moreover, the trial court declined to apply the shared custody adjustment to modify child support. The court then entered judgment in favor of David in the amount of \$2,038.31 for his payment of expenses that were Lisa's obligation. In denying David's motion to modify child support, the trial court stated that it would not order the application of the shared custody adjustment unless the parties had agreed to such an arrangement in writing. The trial court also found that David failed to allege a material change in circumstances sufficient to support his motion.

Lisa moved to modify child support. The trial court granted Lisa's motion to increase child support because two of the minor children had changed age brackets.

David argues that the trial court wrongly denied his motion to modify child support.

"Upon appeal, we review the district court's determination of child support payments and the determination of whether there has been a material change of circumstances by an abuse of discretion standard of review." *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000). "Judicial discretion is abused when judicial

action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 526, 920 P.2d 450 (1996).

However, interpretation of the Kansas Child Support Guidelines (KCSG) is a question of law subject to unlimited review by this court. *In re Marriage of McCullum*, 30 Kan. App. 2d 651, 652, 45 P.3d 398 (2002). District courts must comply with the KCSG when determining child support. Failure to do so is reversible error, absent findings by the district court justifying its deviation. *In re Marriage of Thurmona*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

David's motion to modify child support was based on the contention that Lisa's failure to pay all the children's bills transformed the parties' arrangement into one of 'shared custody,' as defined by the KCSG. Nevertheless, in denying consideration of the merits of David's motion, the trial court stated:

"It's not my policy to enforce an order of shared residency. I don't think that's what the guidelines call for. I think we do shared residency if the parties agree on shared residency, shared expense, have a plan for how they are going to accomplish it, when they are going to account for the direct expenses, how they're going to pay back, how often they're going to

do it. I think that's what we need, but if he's – if she won't agree to a shared expense rule, he is entitled to a parenting time adjustment."

Later, the trial court stated:

"In denying said Motion, the Court states that it will not order the application of the shared custody adjustment absent the written agreement of the parties. Further, the Court finds that the Respondent has failed to allege a material change in circumstances has occurred since the entry of the parties' Decree of Divorce August 30, 2000, sufficient to support Respondent's Motion to Modify. In particular, Respondent's request for application of the shared custody rule is denied."

Nevertheless, in *In re Marriage of Karst*, 29 Kan. App. 2d 1000, 1002, 34 Kan. App. 2d

1131 (2001), this court stated:

"In determining whether the shared custody provisions of the KCSG should be applied, two elements *must* be considered: Is there a regular sharing of residential custody on an equal or nearly equal basis; and are the direct expenses of the children being shared on an equal or nearly equal basis by the parents. An affirmative finding on both elements is necessary for the shared custody provisions of the child support guidelines to be applicable." (Emphasis added.)

In applying *Karst* to this case, we determine that the trial court erred when it failed to consider whether a sharing of residential custody and direct expenses existed between

the parties sufficient to trigger the application of the shared custody provision. In addition, we determine that the trial court wrongly required the parties to have had a written shared custody agreement before making an order of shared custody. Such a requirement is not contemplated by either the KCSG or the *Karst* decision.

Next, David argues that the trial court erred when it determined that he had failed to establish a material change in circumstances justifying a decrease in child support. David maintains that he was not required to show a material change in circumstances because the issue of child support was not litigated during the divorce proceedings. David cites *Stovall v. Stovall*, 10 Kan. App. 2d 521, 707 P.2d 1082 (1985), as support for his contention. The *Stovall* court stated:

"[W]here a custody decree is entered in a default proceeding, and the facts are not substantially developed and presented to the court, the trial court may later, in its discretion, admit and consider evidence *as to facts existing at the time of the earlier order*, and upon the full presentation of the facts the court may enter any order which could have been made at the initial hearing whether a 'change in circumstances' has since occurred or not." (Emphasis added.) 10 Kan. App. 2d at 522 (quoting *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 [1980]).

Moreover, in *In re Marriage of Jennings*, 30 Kan. App. 2d 860, 50 P.3d 516 (2002), Judge Christel E. Marquardt recently stated: "A trial court abuses its discretion when it finds that the petitioner must prove a change of circumstances when no court hearing had ever been held on the issue of child custody and support." 30 Kan. App. 2d at 863-64. That is exactly what occurred in this case.

Reversed and remanded for an evidentiary hearing on the issue of whether the trial court should have applied the shared custody adjustment in calculating the child's support in this action.