NOT DESIGNATED FOR PUBLICATION

No. 94,924

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

DIANE ELAINE MARGOLIES,
Appellee,

and

JONATHAN ADAM MARGOLIES,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court. JANICE D. RUSSELL, judge. Opinion filed August 11, 2006. Affirmed.

Alleen C. VanBebber and *R. Pete Smith,* of McDowell, Rice, Smith & Buchanan, P.C., of Kansas City, Missouri, for appellant.

Allan E. Coon and *Scott H. Kreamer,* of Norton, Hubbard, Ruzicka & Kreamer, L.C., of Olathe, for appellee.

Before MARQUARDT, P.J., ELLIOTT and PIERRON, JJ.

Per Curiam: Jonathan Adam Margolies appeals the trial court's determination that he failed to qualify for shared residential custody of the parties' minor children under the Kansas Child Support Guidelines (KCSG), Supreme Court Administrative Order No. 180 (2005 Kan. Ct. R. Annot 103). We affirm.

Jonathan and Diane Elaine Margolies married in 1992. Two children were born of the marriage. Diane petitioned for divorce in September, 2001. The trial court entered temporary orders for child support of $1,550 per month and maintenance of $2,500 per month. Jonathan filed an answer to the petition and filed a motion to modify the temporary support orders. On October 31, 2001, the trial court heard Jonathan's motion and found that all temporary support had been paid to that date. The trial court further modified the child support to $1,276 per month and the maintenance to $1,712 per month.

On June 30, 2003, the trial court issued a decree of divorce incorporating the parties' property settlement and separation agreement (agreement), which granted the parties joint custody of the children with Diane as the primary residential parent. In the agreement, Jonathan was to pay Diane $1,276 per month for child support, maintain medical insurance for the children, and the parties were to evenly divide the cost of school books and supplies.

The trial court referenced payment of school lunches and summer camp, but it was silent with respect to the allocation of other expenses associated with the children.

The parties both filed motions to modify child support. A hearing was held before a hearing officer on March 24, 2005. Jonathan was ordered to pay monthly child support of $2,092 effective March 1, 2005. The hearing officer denied Jonathan's request to find "shared parenting time" but allowed a 15 percent visitation adjustment. Both parties requested review of the hearing officer's decision by the trial court. On June 22, 2005, the trial court affirmed the hearing officer's increase of Jonathan's monthly child support to $2,092. Further, the trial court affirmed the hearing officer's denial of Jonathan's request to find shared residential custody and granted a 15 percent visitation adjustment in child support. In doing so, the trial court stated: "The Court finds that [Jonathan] spends a substantial amount of time with the children, but there is no approved plan for sharing of expenses."

Jonathan filed a timely notice of appeal, appealing the "Journal Entry of Judgment entered by the District Court of Johnson County, Kansas, June 29, 2005." There is no journal entry in this case dated June 29, 2005. We assume that Jonathan is appealing the journal entry of June 22, 2005, since that is the most recent journal entry in the record on appeal.

Jonathan challenges the trial court's refusal to find shared residential custody for child support purposes. His argument is three-fold. First, Jonathan contends that the trial court erred in failing to make specific findings of fact regarding the parties' sharing of time and expenses. Second, he maintains sufficient evidence existed to support a finding of shared residential custody. Third, Jonathan argues an approved plan for shared expenses was not a prerequisite for shared residency and claims the trial court's finding to the contrary was erroneous.

Generally, the standard of review of a trial court's order determining the amount of child support is whether the trial court's decision constituted an abuse of discretion. *In re Marriage of Paul*, 32 Kan. App. 2d 1023, 1024, 93 P.3d 734 (2004), *aff'd* 278 Kan. 808, 103 P.3d 976 (2005). However, the interpretation and application of the KCSG is subject to unlimited review. Further, a finding that shared residential custody did not exist is a negative finding; accordingly, it will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *In re Marriage of Karst*, 29 Kan. App. 2d 1000, 1001, 34 P.3d 1131 (2001), *rev. denied* 273 Kan. 1035 (2002).

Although K.S.A. 60-1610(a)(4) deals with child custody, the KCSG governs child support. 29 Kan. App. 2d at 1002. Trial courts are required to comply with the KCSG;

failure to do so is reversible error, absent findings by the trial court justifying its deviation from the KCSG. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

The KCSG provides:

"Shared residency is the regular sharing of residential custody on an equal or nearly equal basis. To qualify for shared residency treatment, two components must exist. First, the blocks of time must be regular and equal or nearly equal rather than equal based on a nonprimary residency extended parenting time basis (i.e., summer visitation, holidays, etc.). Second, the parties must be sharing direct expenses of the child *on an equal or nearly equal basis*. Direct expenses include, but are not limited to, clothing and education expenses, but do not include food, transportation, housing or utilities.

"No shared residency treatment shall be ordered without the court having approved a plan for paying and sharing expenses. The court shall require that a detailed expense sharing payment plan be submitted by the party or parties requesting the shared residency treatment. Failure to adhere to the expense sharing plan may result in sanctions including, but not limited to, imposition of full child support and/or an order for payment of specific expenses." KCSG, § III.B.7 (2005 Kan. Ct. R. Annot. 109-10).

There are two prerequisites for the application of the shared residency provisions of

the KCSG: (1) The parents must regularly share residential custody on an equal or nearly equal basis; and (2) the parents must share the direct expenses of the child(ren) on an equal or nearly equal basis. *Sparks v. Sparks*, 34 Kan. App. 2d 499, 502, 120 P.3d 376 (2005).

At the hearing before the trial court, the court admitted into evidence exhibits pertaining to how the parties' parenting time was allocated during various blocks of time. Additionally, at trial, the court admitted into evidence exhibits detailing the parties' respective income and expenses. Jonathan testified that he did not pay any daycare costs, with the exception of the summer weeks during which the children were with him. Further, Jonathan testified that he and Diane did not split the cost of the children's clothing, and Diane did not ask him to pay a share of the uninsured portion of the children's medical expenses.

Although Jonathan had "the children a great deal of the time," he nevertheless was unable to satisfy the requirements for shared residential custody. The trial court adjusted his parenting time in excess of the KCSG and approved the hearing officer's decision to grant Jonathan a 15 percent visitation reduction, noting that KCSG, § IV.E.2 (2005 Kan. Ct. R. Annot. 117) provides that a parent who has the children 45-49 percent of the time is entitled to a 15 percent parenting time adjustment to child support. The trial court characterized the evidence as showing Jonathan had the children either 43 percent of the time (according to Diane) or 48 percent or more of the time (according to Jonathan). The trial court stated, "I

think the hearing officer hit it dead center when the hearing officer gave [Jonathan] a 15 percent reduction."

Adequacy of factual findings

Jonathan argues that the trial court committed reversible error by failing to make specific factual findings regarding the parties' sharing of time and expenses. Importantly, however, Jonathan failed to object to the adequacy of the trial court's findings below.

> "'[A] litigant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal. Where there has been no such objection, the trial court is presumed to have found all facts necessary to support the judgment.' [Citation omitted.]" *Gilkey v. State*, 31 Kan. App. 2d 77, 77-78, 60 P.3d 351, *rev. denied* 275 Kan. 963 (2003).

Moreover, although the trial court did not attribute a specific percentage of parenting time to Jonathan, the trial court did comment on the hearing officer's decision to grant Jonathan a 15 percent reduction, noting such a reduction is appropriate when a nonresidential parent has a child 45-49 percent of the time. By definition, a parenting adjustment is allowed if a child spends 35 percent or more of the time with the nonresidential parent *and* the court does not find that the shared residential custody provision applies. KCSG, § IV.E.2a (2005

Kan. Ct. R. Annot. 117). Hence, implicit in the trial court's approval of the hearing officer's decision is a finding that Jonathan spent 49 percent or less of the time with the children.

Sufficiency of the evidence

Jonathan claims he presented sufficient evidence to meet his burden of proof with respect to the parenting time and sharing of expenses for shared residential custody and that the trial court erred in finding to the contrary. Jonathan relies on exhibits he presented at the hearing before the trial court, claiming they demonstrate he spent regular blocks of time with the children–including Jewish holy days–and that he and Diane shared expenses related to the children.

Unfortunately for Jonathan, *none* of the exhibits from the hearing is included in the record on appeal. Jonathan submitted a lengthy appendix to his brief containing copies of several exhibits; however, under Kansas Supreme Court Rule, an appendix is not a substitute for the record on appeal. Supreme Court Rule 6.02(f) (2005 Kan. Ct. R. Annot. 36); see *In re Marriage of Brotherton*, 30 Kan. App. 2d 1298, 1300, 59 P.3d 1025 (2002). Jonathan had the duty to designate a record sufficient to establish his claimed error. Without an adequate record, Jonathan's claim fails. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Moreover, because of the negative finding, this court will not disturb that finding absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. See *Karst*, 29 Kan. App. 2d at 1001. From a review of the record before this court, there is no indication that the trial court disregarded undisputed evidence or that its decision resulted from bias, passion, or prejudice. Accordingly, Jonathan's challenge fails.

Plan for Sharing Expenses

Finally, Jonathan argues that the trial court erroneously found its approval of a plan for shared expenses was a prerequisite to qualifying for shared residency treatment. Jonathan claims that an approved plan comes into play only after a determination is made that the two elements articulated in the KCSG, § III.B.7 are satisfied.

As previously stated, the KCSG provide: "No shared residency treatment shall be ordered without the court *having approved* a plan for paying and sharing expenses. The court shall require that a detailed expense sharing payment plan be submitted by the party or parties requesting the shared residency treatment." (Emphasis added.) KCSG, § III.B.7 (2005 Kan. Ct. R. Annot. 109).

For support of his interpretation of KCSG, § III.B.7, Jonathan refers this court to *In re Marriage of Armstrong*, No. 90,891, unpublished opinion filed August 20, 2004. In *Armstrong*, a panel of this court reversed and remanded for an evidentiary hearing on the issue of whether the trial court should have applied the shared residential custody provision in calculating the father's child support obligation. A separation and property settlement agreement provided that the parties would share joint custody of their children, the father would pay child support, and the mother would pay all bills relating to the children. The father moved to modify child support, claiming the mother's failure to pay all the children's bills transformed their custody arrangement into one of shared custody. The trial court denied the father's request, stating it would not order the application of the shared custody adjustment absent a written agreement by the parties agreeing to the shared custody arrangement.

After identifying the two required elements for shared custody as stated in *Karst*, the *Armstrong* court held:

> "[W]e 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." Slip op. at 5-6.

In *Armstrong*, the trial court failed to consider whether the two required elements for shared residency were met and instead denied the father's request on the basis that the parties had not agreed in writing to such an arrangement. Here, the trial court addressed the prerequisites for shared residency and denied Jonathan's request on the basis that there was no court approval of a plan for sharing expenses.

In re Marriage of Monter, No. 93,660, unpublished opinion filed December 23, 2005, interpreted KCSG, § III.B.7. As in the instant case, in *Monter,* the trial court refused to apply a shared residency provision. Pursuant to the parenting plan adopted by the trial court, both parents had joint legal and physical custody of their children, with the father having a set number of days of parenting time during each 2-week period. The father was also required to pay child support. The trial court based its refusal to apply the shared residency provision, in part, on the father's failure to submit a detailed expense sharing payment plan to the court.

This court affirmed the trial court's decision, holding, *inter alia*, that in the absence of a detailed plan for the sharing of expenses, the father was not entitled to a shared residency order. Slip op. at 14-17. The *Monter* court explained:

"We agree with the district court that the December 2003 parenting

> plan's shared expenses provision was not sufficient to comply with the KCSG's requirement of a detailed expense sharing payment plan. [The father] relies solely on the terms of the parenting plan; there is no claim that any detailed expense plan was ever submitted by [the father]. In addition, there was conflicting testimony whether the parties were, in fact, sharing expenses equally." Slip op. at 14.

The *Monter* court also affirmed the trial court's alternative finding that the parties previously had agreed to forgo the shared residency provision, holding such finding was supported by substantial competent evidence. Slip op. at 15.

Here, Jonathan asserts that he did submit "a proposed prospective expense sharing plan" to the trial court which he claims it erroneously failed to consider. The record on appeal simply does not substantiate this contention. Not only is there no proposed plan included in the record on appeal, but the appearance docket does not show that Jonathan ever submitted a proposed plan to the trial court.

The language of KCSG, § III.B.7 is clear; a trial court must approve a plan for sharing expenses. See *Sparks*, 34 Kan. App. 2d at 503. Here, the record on appeal is devoid of any expense sharing plan submitted by either party and there is certainly no indication that the trial court approved such a plan. These deficiencies further support the trial court's refusal to apply the shared residency provisions of the KCSG.

Jonathan next urges this court to "establish a policy based upon the rights of both parents and children to a rebuttable presumption of shared residency when joint custody and parental residency has been ordered." Couching his claim in terms of fundamental rights and equal protection, Jonathan argues that "[o]nly if there is a rebuttable presumption of equal residency, will parents be on the equal footing contemplated in the preference for joint custody expressed by the legislature, the courts, and the public in general."

Jonathan concedes that he did not raise this issue before the trial court, but nonetheless requests this court to consider the issue based upon an exception to the rule precluding appellate review of issues raised for the first time on appeal.

Constitutional grounds for reversal which are asserted for the first time on appeal are not properly before an appellate court for review. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 325, 64 P.3d 372 (2003). There are three exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal. They are: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or that it assigned a wrong reason for its decision. *Smith v. Yell Bell Taxi, Inc.*, 276 Kan. 305,

311, 75 P.3d 1222 (2003). Here, Jonathan relies on the second exception, claiming consideration of this issue is necessary to serve the ends of justice or to prevent the denial of fundamental rights.

Jonathan's argument for the application of an exception to the general rule is not persuasive. Granted, Jonathan correctly states that parents have a fundamental right to decide the care, custody, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000). However, the only matter presently before this court pertains to the trial court's determination of child *support*, not custody. Simply put, when Jonathan's request for the establishment of a rebuttable presumption is viewed within the factual framework of this case, it is clear that consideration of this issue is not necessary to serve the ends of justice or to prevent the denial of fundamental rights.

Affirmed.