NOT DESIGNATED FOR PUBLICATION

No. 97,516

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

REGINA KAYE CONNERS,
Appellee,

and

MARCO CORIOLANA CONNERS,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GUNNAR A. SUNDBY, judge. Opinion filed July 27, 2007. Affirmed in part, reversed in part, and remanded with directions.

Robert D. Beall, of Robert D. Beall, LLC, of Leavenworth, for appellant.

Louis M. Clothier, of Crow, Clothier and Associates, of Leavenworth, for appellee.

Before MALONE, P.J., GREEN and MARQUARDT, JJ.

Per Curiam: Marco Coriolana Conners (the father) appeals from a judgment of the trial court involving a child custody matter. On appeal, the father argues that the trial court abused its discretion in awarding attorney fees to Regina Kaye Conners (the mother), in allocating the fees for a child custody investigation, and in modifying child support. We affirm in part, reverse in part, and remand this matter to the trial court to recalculate the amount of child support.

The parties, who were married in 1988, have three minor children, Noah, Philip, and Ethan. After the mother filed a petition for divorce, the parties agreed to separate and entered into a separation agreement which was incorporated by decree of separate maintenance filed with the court on February 17, 2005. The decree of separate maintenance provided for maintenance, child support, child custody, visitation, provisions for property, debt division, and payment of attorney fees. The decree of separate maintenance incorporated the parties' agreement that each be responsible for their own attorney fees. Further, the decree of separate maintenance provided that if a divorce action was brought by either party, then the terms of the decree were not binding on the trial court.

After the decree was entered, the mother refiled a petition for divorce on May 24, 2005. The father filed a cross-petition for divorce on June 22, 2005. In a hearing held on June 8, 2005, the parties agreed to the appointment of a special child custody investigator, Cheryl Marquardt, who had been appointed investigator in the earlier action. The parties agreed to share the cost for the investigator equally.

On October 6, 2005, the trial court entered a journal entry and decree of divorce. The journal entry reserved various parenting and property issues for further action by the court. At the time the divorce was granted, the results of the child support worksheet indicated that the mother's income was $50,370 and the father's income was $102,167. The mother received child support in the amount of $301 per month and maintenance in the amount of $863 per month. The mother received her legal share of father's military retirement pay.

In November of 2005, the parties resolved outstanding property issues and entered into an agreement for the division of property; however, they could not reach a final agreement on a parenting plan. On January 5, 2006, the trial court ordered Cheryl Marquardt to continue as the child custody investigator. The parties continued to share the cost for the investigator equally.

On March 16 and 17, 2006, the trial court heard testimony and argument regarding the remaining issues of the division of expenses, whether the children could attend primitive camp outs with the paternal grandfather, and the time and day the children should be exchanged. At that hearing, the father testified that the parties' youngest child, Ethan, has osteogenesis imperfecta. The father testified that one of the reasons he retired from military service and the family moved to Kansas City was to provide specialized care for Ethan at Children's Mercy Hospital in Kansas City. The father testified that his child care costs were $1,093 per month.

At the hearing, the court received Marquardt's recommendation that the father should have residential custody of the children with the mother receiving appropriate visitation. The father relied on Marquardt's recommendation in arguing that he should be awarded residential custody and raised several concerns in support of his request. These concerns included the excessive injuries that Ethan had suffered (including 16 bone breaks in 3 1/2 years all while in the care and custody of the mother), the mother's unwillingness to follow the investigator's recommendation to use gates on the stairways to prevent Ethan from falling down the stairs, the mother taking the children and spending the night at her boyfriend's home in Missouri, the mother not providing medical and child care information to the father, the mother not providing the father with Ethan's prescription medicine, the mother allowing people to smoke around the children, the

mother not using seat restraints for the children while traveling in vehicles, the mother exchanging the children early in the morning on school days resulting in the children being tired and not prepared for school, and the mother's excessive and unnecessary travel on school days.

During the March 2006 hearing, the mother requested that another investigator, Dr. John Spiridigliozzi, be appointed by the court to provide another child custody report. The mother also suggested that Dr. Spiridigliozzi be paid according to the child support worksheet guidelines. After hearing all the evidence, the court agreed to appoint Dr. Spiridigliozzi and have him submit his recommendations to the court. The court rejected the mother's request to have the payment for such services divided according to the child support worksheet and ordered the mother to pay two-thirds of the cost of the investigation and the father to pay one-third of such costs. In assessing the costs, the court stated that it did not assess costs as a "penalty" but imposed them because the actions of the mother put it in the position of needing additional information.

Dr. Spiridigliozzi prepared a report which included a list of 18 recommendations, including a provision that the parties continue with shared residential custody. In August of 2006, the court held a hearing to make a final determination regarding residential custody. At the hearing, the father told the court that the parties had agreed to work on a

parenting plan and since Dr. Spirdigliozzi's report had been reviewed, there remained only three unresolved issues: (1) the division of nonmedical expenses; (2) the "right of first refusal" which would allow the noncustodial parent to have the children when the custodial parent required an alternate custodian for the children; and (3) the home schooling. The mother requested that the father pay additional attorney fees and investigation fees.

The mother also requested a modification of child support based upon her voluntary reduction of work hours from 80 hours every 2 weeks to 64 hours. The mother stated that she voluntarily reduced the hours she worked because she wanted to be home with the children. She is a nurse and does not work any shifts while the children are in her care, which eliminates her need for work-related child care expenses. The mother requested her reduced income be used for support purposes. The mother did not include child care costs for either herself or for the father when calculating her proposed child support figures. The father objected to the removal of both his child care costs and the mother's child care costs from the support worksheet. The father acknowledged that his support proposal did not include his child care expenses, but this was in error and he in fact incurred such expenses. The father requested a rehearing to review the support issue and the child care costs. The mother did not incur child care costs because she elected to work during the weeks she did not have custody of the children and she had voluntarily

reduced her work hours. The father incurred child care expenses whether he used the childcare services or not.

In an order filed September 14, 2006, the court resolved the outstanding issues. In that order, the court ordered the mother to reimburse the father for attorney fees in the amount of $900 and ordered the father to reimburse the mother's attorney fees in the amount of $4,600. The court also ordered that the father pay two-thirds of Dr. Spiridigliozzi's fees and that the mother pay one-third of those fees, which is proportionate to their incomes. The court also ordered the father to pay child support in the amount of $496 per month, which constitutes a $195 per month increase in child support from the time the parties' divorce was granted. In calculating child support, the court did not give the father a credit for his child care costs.

Did the trial court abuse its discretion in awarding attorney fees to the mother?

The father argues that the trial court abused its discretion in awarding attorney fees to the mother. A trial court has discretion to assign attorney fees in divorce and child custody cases. K.S.A. 2006 Supp. 60-1610(b)(4); see *Dunn v. Dunn*, 3 Kan. App. 2d 347, 350, 595 P.2d 349 (1979). A court may assign attorney fees "as justice and equity require." K.S.A. 2006 Supp. 60-1610(b)(4). An award of attorney fees is reviewed under the abuse of discretion standard. *Tyler v. Employers Mut. Cas. Co.*, 274 Kan. 227, 242,

49 P.3d 511 (2002). "The district court is vested with wide discretion to determine the amount and the recipient of an allowance of attorney fees. . . . An attorney fee award will not be set aside on appeal when supported by substantial competent evidence. [Citation omitted.]" *In re Marriage of Burton*, 29 Kan. App. 2d 449, 454, 28 P.3d 427, *rev. denied* 272 Kan. 1418 (2001). "Substantial evidence is that which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.]" *Griffin v. Suzuki Motor Corp.*, 280 Kan. 447, 459, 124 P.3d 57 (2005). "Discretion is abused only when no reasonable person would take the view adopted by the district court." *State v. Moses*, 280 Kan. 939, 945, 127 P.3d 330 (2006). The party asserting that the trial court abused its discretion bears the burden of showing such abuse of discretion. *State v. Matris*, 277 Kan. 267, 280, 83 P.3d 1216 (2004).

The father argues that the award of attorney fees to the mother was an abuse of the district court's discretion. Specifically, the father argues that the award of attorney fees was unreasonable because the mother had been awarded maintenance, child support and retirement benefits, which he maintains equalized the parties' incomes. In assessing the award of attorney fees in this matter, the trial court used the "income approach" by examining the incomes of the parties and then assessing the attorney fees proportionately. In this case, the father's income of over $100,000 per year constituted approximately 63%

of the parties' income and the mother's income of less than $50,000 per year constituted approximately 37% of the parties' income. The trial court used these percentages in apportioning attorney fees between the parties. The facts presented in this case are similar to those presented in *Dunn* where the court found that the trial court's decision to apportion the payment of attorney fees based upon each party's relative wealth and ability to pay was not an abuse of discretion. See 3 Kan. App. 2d at 350.

The father additionally contends that the court abused its discretion in awarding attorney fees to the mother because she caused the attorney fees to escalate during the pretrial period by requesting that the matter be continued and by failing to effectively negotiate a settlement of the issues on the parenting plan. It was not unreasonable for the mother to request a continuance of the matter for further investigation or for her to consult with her attorney during negotiations. Despite the fact that the parties were attempting to negotiate a settlement of the pending issues, each of the parties should have been allowed to consult with their attorneys during the period of negotiations. The fact that the mother consulted with her attorney, and thereby incurred attorney fees, during the negotiation process is not unreasonable.

Finally, the father asserts that the award of attorney fees to the mother should be reversed because the parties had entered into a separation agreement which was

incorporated by the decree of separate maintenance, whereby the parties had agreed to pay for their own attorney fees. The trial court, however, was not bound by the provisions of the separation agreement because the terms of that agreement specifically stated that should one or both of the parties seek a divorce action, the terms of the agreement were not binding on the court. As a result, the trial court was not bound by the provision in the separation agreement which provided that each party would bear their own attorney fees.

We find that the trial court did not abuse its discretion in its apportionment of attorney fees. The apportionment was calculated according to the percentage of income earned by each party. Although the parties attempted to negotiate a settlement of pending issues without heavily relying on their attorneys, it was not unreasonable for the mother to consult with her attorney during that negotiation process. Furthermore, the award of attorney fees is not prohibited by the parties' separation agreement, as that agreement was not binding on the court upon the filing of a decree of divorce. As a result, we cannot say that the trial court abused its discretion in awarding attorney fees in this case.

Did the trial court abuse its discretion in allocating the fees for a third child custody investigation?

The father also argues that the trial court erred in assessing the costs of the custody investigation. A trial court has discretion to assess the costs of a custody evaluation. *Jones v. Walker*, 29 Kan. App. 2d 932, 934, 33 P.3d 872 (2001).

Our analysis previously mentioned regarding the assessment of the attorney fees is also applicable to the father's challenge of the assessment of the investigator's fees. The parties were not in similar financial positions. The father earned approximately two-thirds of the family's income, while the mother earned approximately one-third of the family's income. Although the mother requested the third child custody investigation by Dr. Spiridigliozzi, such request was not unreasonable given the complexities of the parenting arrangement, the allegations made by the father, and the reports previously submitted by Marquardt. We cannot say that no reasonable person would assess the costs of the third child custody investigation in the manner done by the trial court in this case. The trial court did not abuse its discretion in assessing the cost of the custody investigation report according to the parties' ability to pay.

Did the trial court abuse its discretion in modifying child support?

Next, the father maintains that the trial court abused its discretion in modifying the child support. We review the trial court's determination of whether a material change of circumstances existed so as to warrant a modification of child support payments by an

abuse of discretion standard. *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000). "Use of the [child support] guidelines is mandatory and failure to follow the guidelines is reversible error. [Citations omitted.] Any deviation from the amount of child support determined by the use of the guidelines must be justified by written findings in the journal entry. [Citations omitted.] Failure to justify deviations by written findings is reversible error. [Citation omitted.]" *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

The father argues that the trial court did not follow the child support guidelines in modifying the amount of child support awarded to the mother because the court did not credit him for his child care expenses. Although the trial court considered the father's child care expenses in the original award of child support to the mother, such expenses were not considered when the child support was modified. The father admits in his appellate brief that although his original child support worksheet included child care expenses, he neglected to include such expenses on his worksheet that was used to calculate the modified amount of child support.

The mother, however, argues that because the trial court imputed income to her, it could have also imputed her child care expenses. The mother argues that her imputed child care expenses would be equal or nearly equal to those of the father. The mother

also notes that had the court included the father's child care expenses and imputed an equal amount for her, this would have resulted in an additional $200 per month in child support paid to her.

It is appropriate to impute income and child care expenses in some cases: "[t]o impute fictitious income without an estimation of the expenses necessary to its generation would defy common sense and work an injustice. . . . [Nevertheless], where child care is not necessary to the income imputed, such costs may not be considered whether incurred or estimated." *In re Marriage of Paul*, 32 Kan. App. 2d 1023, 1025-26, 93 P.3d 734 (2004).

The mother's argument in this case is based on the assumption that she would have to find new full-time child care if she were to work 40 hours each week. Nevertheless, the record seems to indicate that the father was already paying for full-time child care. The record shows that the father's child care expenses are $1,093 per month and that he incurs these expenses whether he uses the child care services or not. Although the mother works 64 hours every 2 weeks, she does not incur any child care expenses because she works only when the children are with the father. Moreover, the mother's brief indicates that the parties are still residing "in the same community." If the father is paying for full-time child care, the mother could use this full-time child care to earn the additional

income that was imputed to her. Under this situation, additional child care would be unnecessary for the mother to make the imputed income. Accordingly, the mother's income would not be reduced for child care expenses, and the father would likely be entitled to a credit.

Moreover, assuming *arguendo* that the mother did have to incur additional child care expenses in order to earn the imputed income, the record fails to establish that she would need to incur the same amount of child care expenses as the father. The mother was already working 64 hours each 2-week period and did not incur any child care expenses. The trial court imputed the mother income based on a 40-hour work week, that is, an additional 16 hours each 2-week period. It is illogical to conclude that an imputed income based on an additional 16 hours would require additional child care of 80+ hours each two-week period. The record fails to support such a conclusion.

Because the record does not support the mother's assumption that she would have to find new full-time child care to work 40 hours a week, we reverse and remand to the trial court to recalculate the amount of child support. It is undisputed that the father paid $1,093 per month in child care expenses. Under Section IV.D.5 of the Kansas Child Support Guidelines, the trial court should consider child care expenses in calculating child support. (2006 Kan. Ct. R. Annot. 115). Here, the trial court did not include the

father's child care expenses in modifying child support and did not justify such deviation from the guidelines by written findings. Therefore, we reverse on this issue and remand for the trial court to comply with the Kansas Child Support Guidelines.

Affirmed in part, reversed in part, and remanded with directions.