NOT DESIGNATED FOR PUBLICATION

No. 102,593

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DAKIREE DEPEW by and through her mother
and best friend, HAYLEY HELLER,
Appellee,

v.

MICHAEL DEPEW,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; RICHARD J. ROME, judge. Opinion filed August 27, 2010. Affirmed in part, reversed in part, and remanded with directions.

Remington S. Dalke, of Bush, Bush & Shanelec, of Lyons, for appellant father.

Randy M. Barker, of Kansas Department of SRS Child Support Enforcement, for appellee.

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

Per Curiam: Michael Depew, the natural father of Dakiree Depew, appeals from an order of the Reno County District Court modifying his child support obligation. We affirm in part, reverse in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Michael Depew was ordered to pay $207 per month in child support to Hayley Heller, Dakiree's natural mother. Both parties were ordered to share the child tax exemption. In 2002, a modification order was filed, which reduced Depew's child support

obligation to $130 per month and allowed Heller to retain the child tax exemption and credits based upon the reduction.

In the present case, the Kansas State Department of Social and Rehabilitation Services (SRS) filed a motion for modification of child support on January 28, 2009. At the hearing, SRS provided a domestic relations affidavit signed by Heller and a completed child support worksheet. The affidavit showed Heller had a monthly health insurance expenditure of $249.36, her medical and dental expenses from January 1, 2008, through July 31, 2008, were $2,300, and she paid $90 "plus pay family" for work-related child care costs. The record does not contain a domestic relations affidavit or child support worksheet prepared by Depew.

The district court filed a journal entry increasing Depew's child support obligation to $365 per month, effective February 1, 2009. Depew's child support obligation was later corrected by a nunc pro tunc order and reduced to $360 per month. The child support worksheet approved by the district court did not give Depew credit for health insurance or an adjustment for a child tax exemption or credits. In arriving at the new child support obligation amount, the district court granted Heller a $162 per month credit for health and dental insurance premiums and a $134 per month credit for work-related child care costs.

Depew filed a timely appeal.

RETROACTIVE MODIFICATION OF CHILD SUPPORT

A district court's order determining the amount of child support is reviewed for an abuse of discretion. *In re Marriage of Branch*, 37 Kan. App. 2d 334, 336, 152 P.3d 1265, *rev. denied* 284 Kan. 945 (2007). An abuse of judicial discretion occurs when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the

propriety of the district court's actions, then it did not abuse its discretion. *Schuck v. Rural Telephone Service Co.*, 286 Kan. 19, 24, 180 P.3d 571 (2008). An abuse of discretion also may be found if a district court's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). The party asserting an abuse of discretion bears the burden of showing it. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Interpretation and application of the Kansas Child Support Guidelines are subject to unlimited review. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466, *rev. denied* 288 Kan. 831 (2009). Use of the Guidelines is mandatory, and failure to follow them is reversible error. Any deviation from the amount of child support determined by use of the Guidelines must be justified by written findings in the journal entry, and failure to make such written findings is reversible error. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998); *In re Marriage of Atchison*, 38 Kan. App. 2d 1081, 1089, 176 P.3d 965 (2008).

Finally, the most fundamental rule of statutory construction is that the intent of the legislature governs if it can be ascertained. *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008). On appeal, the court should determine the legislature's intent through its statutory language, giving ordinary words their ordinary meaning. *State v. Gracey*, 288 Kan. 252, 257, 200 P.3d 1275 (2009). When a statute is plain and unambiguous, the appellate court does not speculate as to legislative intent, nor does it read the statute to add something not readily found in it, as statutory construction is not necessary. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009).

On appeal, Depew contends the district court erred because it increased his child support obligation retroactively, beginning February 1, 2009, when February 28, 2009, was the first date by which the court was allowed to retroactively impose the support

obligation pursuant to K.S.A. 2009 Supp. 60-1610(a)(1) (amended by L. 2010, ch. 75, sec. 21 regarding reconciliation of multiple support orders under K.S.A. 23-9,207). SRS disagrees with this interpretation and argues for a different construction of K.S.A. 2009 Supp. 60-1610(a)(1).

Generally, orders for modification of child support must operate prospectively. See *In re Marriage of Schoby*, 269 Kan. 114, 117, 4 P.3d 604 (2000). However, there is a statutory exception to this rule now found in K.S.A. 2009 Supp. 60-1610(a)(1), which provides, in relevant part: "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." (Emphasis added.)

Depew argues that pursuant to K.S.A. 2009 Supp. 60-1610(a)(1), the earliest date the district court could modify support was February 28, 2009. In short, Depew interprets the phrase "at least one month after" in the statute to mean the same day of the ensuing month. On the other hand, SRS interprets the same phrase to mean any day during the ensuing month and urges this court to adopt its interpretation as the most practical and efficient.

We are persuaded that the plain statutory language favors Depew's legal position. Moreover, in *In re Marriage of Matthews*, our court determined that K.S.A. 2009 Supp. 60-1610(a)(1) "restricts the district court from setting the effective date *earlier* than 1 month after the motion was filed." (Emphasis added.) 40 Kan. App. 2d at 432. As a result, we conclude the legislature's clear intent was to allow the district court to retroactively make child support modifications effective no earlier than 1 month after the date on which the motion to modify was filed, not merely any day during the ensuing month as SRS suggests. See 40 Kan. App. 2d at 431-32.

In this case, SRS filed its motion to modify child support on January 28, 2009, and the district court made its order of child support modification effective on February 1, 2009, only 4 days later. Pursuant to K.S.A. 2009 Supp. 60-1610(a)(1), the first date on which the district court retroactively could order a modification was February 28, 2009, 1 month after the motion was filed. Accordingly, because we find the district court abused its discretion by not complying with the statute, we reverse the order of modification and remand with directions to make the effective date of the order no earlier than February 28, 2009. See *Woodward*, 288 Kan. at 299.

TRIAL COURT'S CONSIDERATION OF CHILD TAX EXEMPTION AND CREDITS

Depew contends the district court erred "when it refused to grant [Depew] a reduction in child support upon the mistaken belief that [Heller] and [Depew] alternated child exemptions and credits for tax purposes." SRS responds that the tax exemption adjustment is not mandatory, but discretionary with the district court.

At the hearing on the motion to modify child support, Depew noted that Heller's computations did not take into account the fact that Heller had claimed Dakiree as a dependent for tax purposes. Depew stated:

> "I have never once claimed [Dakiree] on any taxes. And when I figure in [Heller] gets [to] claim head of household adjustment, uh, that's going to give me credit a credit of $28 per month on that one. She also gets an income tax deduction and offsets which comes out to $21 per month and the federal child tax credit gives me $31 per month credit for a grand total of $80 a month credit off of the amount that they're showing."

In response, SRS incorrectly informed the court that under the current order Depew and Heller presently alternated years claiming the tax exemption. Depew attempted to correct the attorney for SRS, but the district judge stated, "Well, I have made my order. You can appeal it." The district court's journal entry and approved final

child support worksheet confirm that Depew did not receive any adjustment for Heller's yearly child tax exemptions and credits.

On appeal, SRS admits that "the SRS attorney may have misstated the terms of the prior order regarding the tax exemption." In fact, the prior order filed on January 11, 2002, clearly provides that "all tax exemptions and credits shall be retained by [Heller]."

The 2008 Kansas Child Support Guidelines provide:

> "If the parties do not agree to share the actual economic benefits of the dependency exemption for a minor child or, if after agreeing the parent having primary residency refuses to execute IRS form 8332, the court shall consider the actual economic effect to both parties and may adjust the child support." (Emphasis added.) Administrative Order No. 216, Guidelines § IV.E.3. (2009 Kan. Ct. R. Annot. 128).

See also *In re Marriage of Roth*, 26 Kan. App. 2d 365, 370, 987 P.2d 1134 (1999).

In the present case, Depew and Heller did not agree to share the actual economic benefits of the dependency exemption, which means the district court was allowed to adjust child support accordingly. But Guidelines § IV.E.3. did not require the district court to make an adjustment. Because the decision to adjust Depew's child support obligation based on the child tax exemption fell within the district court's discretion, the burden is on Depew to show that the district court acted in an arbitrary, fanciful, or unreasonable manner. See *Harsch*, 288 Kan. at 293; *Schuck*, 286 Kan. at 24.

We are persuaded that Depew has satisfied his burden. The Guidelines mandate the district court "*shall consider* the actual economic effect to both parties" of the dependency exemption before allowing the court discretion regarding whether to adjust the child support obligation. (Emphasis added.) Guidelines § IV.E.3. On the record before us, the district court made no findings regarding the actual economic effect to the

parties. This failure was exacerbated by SRS's incorrect recitation of the prior support order provision regarding the exemption and credits and the district judge's statement that his order was final without consideration of Depew's attempt at correcting the factual record which was misstated by counsel for SRS.

Accordingly, we reverse the child support order and remand with directions to the district court to consider the actual economic effect to both parties of the tax exemption and credits and make appropriate findings of fact and conclusions of law before entering an appropriate child support order.

CREDIT FOR WORK-RELATED CHILD CARE COSTS

Next, Depew contends the district court erred in granting Heller a work-related child care cost credit of $134 per month because her domestic relations affidavit stated that she paid $90 per month, plus an undetermined sum to her family for child care, and there was no substantial competent evidence to justify the $134 per month figure. The SRS counters the $134 per month figure was not unreasonable.

In accordance with Guidelines § IV.D.5. (2009 Kan. Ct. R. Annot. 123), the district court has discretion to determine whether to use *proposed or actual* child care costs. In the present case, Heller's domestic relations affidavit stated that she incurred monthly work-related child care expenses in the amount of $90, plus additional money paid to her family. In order to prevail on appeal, Depew must show the sum awarded by the district court was arbitrary, fanciful, or unreasonable. See *Schuck*, 286 Kan. at 24.

We agree with SRS that $90 of the monthly child care expense is supported by the evidence of Heller's affidavit. We are also persuaded the additional $44 per month found by the district court to pay family members for child care was not unreasonable given the variable and prospective nature of paying family members for child care expenses.

On this record, Depew has failed to satisfy his burden to show an abuse of discretion, and the district court's decision to award Heller a $134 per month credit for work-related child care expenses is affirmed. See *Harsch*, 288 Kan. at 293; *Schuck*, 286 Kan. at 24.

CREDIT FOR HEALTH AND DENTAL INSURANCE

Depew contends the district court erred in granting Heller a credit for health and dental insurance because it previously ordered Depew to provide Dakiree with health and dental insurance and he complied with the order. SRS responds that the district court acted within its discretion when it ordered Heller to provide the health and dental insurance and made the corresponding adjustment on the child support worksheet.

Under Guidelines § IV.D.4. (2009 Kan. Ct. R. Annot. 122), the district court has discretion to determine whether the proposed health and dental insurance costs are reasonable, taking into account the income and circumstances of the parties and the quality of the insurance proposed.

The facts of this matter were controverted. On appeal, Depew argues that he has been paying for Dakiree's health and dental insurance since he was originally ordered to by the district court on November 19, 2001, but that Heller has refused to use the insurance. On the other hand, Heller contends that Depew never provided her with any useable indicia of insurance, her medical and dental expenses between January 1, 2008, and July 31, 2008, were $2,300, and she had a monthly health insurance expenditure of $249.36, all but $87.64 of which was attributable to Dakiree.

Heller's child support worksheet revealed that her monthly premium for Dakiree's health insurance was $161.72. On appeal, Depew has not articulated why the district court's decision was an abuse of discretion. Given that Heller is the custodial parent (and

one or both of the parents have been unsuccessful in providing Dakiree with health and dental insurance paid for by Depew) we are unable to find an abuse of discretion in the district court's determination that Dakiree's best interests were served by allowing Heller to provide the insurance and receive the corresponding credit on the child support worksheet.

For these reasons, and because Depew does not cite any controlling authority suggesting the district court acted outside its discretion, it cannot be said that the district court acted in an arbitrary, fanciful, or unreasonable manner. See *Harsch*, 288 Kan. at 293; *Schuck*, 286 Kan. at 24. Accordingly, the district court's decision to allow Heller to provide Dakiree with health and dental insurance and receive the corresponding credit on the child support worksheet is affirmed.

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