NOT DESIGNATED FOR PUBLICATION

No. 107,694

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

TRYSTA H. WILLIAMS,
Appellant,

and

BRIAN D. WILLIAMS,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; MERYL D. WILSON, judge. Opinion filed January 18, 2013. Affirmed in part, reversed in part, and remanded with directions.

Brenda J. Bell, of Brenda J. Bell, P.A., of Manhattan, for appellant.

No appearance by appellee.

Before STANDRIDGE, P.J., GREEN, J., and LARSON, S.J.

Per Curiam: In this appeal by Trysta H. Williams, it is contended a post-divorce child support order was entered based on evidence not in the record and without a hearing. Trysta further argues that the district court erred in failing to consider her evidence as to her child care costs in a later hearing on her motion to reconsider and establish child support.

The extensive record presented to us shows multiple proceedings and numerous filings over the amount and payment of child support involving Trysta and her former

husband, Brian D. Williams, which we will attempt to set forth sufficiently to focus on the appellate issues.

FACTUAL BACKGROUND AND LEGAL PROCEEDINGS

The parties were divorced on July 9, 2007, after approximately 7 years of marriage. During the marriage, two children were born.

Under the divorce decree, the Williams agreed to share joint legal custody of their children with Trysta serving as the primary residential parent. Initial child support by Brian was set at $845 per month with the child support worksheet attached to the permanent parenting plan crediting Trysta $791 for work-related child care costs.

The support was voluntarily increased in November 2007 to $969 per month. In February 2009, Trysta moved to increase Brian's support obligation to $1,340 per month based on a more than 10% increase in Brian's income. On April 6, 2009, the district court increased Brian's support obligation to $1,342 per month. The amount was derived as shown by the child support worksheet accompanying the order by crediting Trysta with $914 for work-related child care costs and Brian $194 for cost of health and dental insurance payments.

Approximately 2 years later on March 31, 2011, Brian moved to modify child support, contending his decreased income warranted a reduction from $1,342 per month to $1,175 per month. His motion included the following allegation concerning child care expenses:

> "3. Since both children are in school, the cost of child care is reduced. The children attend school at Bergman Elementary School and have child care costs for before and after school programs of $35.00 per week. The youngest child has child care

> at a cost of $31.50 per week for approximately thirty-two weeks per year. The children attend day care during the summer months at a cost of $125 per week per child for sixteen weeks. Annual child care costs are $6,128.00 or $510.67 per month paid for by Petitioner."

Brian attached a child support worksheet in which he credited himself $186 per month for the cost of the children's health and dental insurance payment and Trysta $373 per month ($511 less $138 child care tax credit) for work-related child care costs.

Trysta responded on May 3, 2011, with her child support worksheet requesting an increase in support to $1,578 which included a dispute as to who would carry the children's health and dental insurance and its costs. Trysta's worksheet asked for a $458 credit for health and dental monthly costs and submitted $522 as monthly child care costs with a child care tax credit of $69 resulting in a net of $453 for child care costs.

Motions for contempt and modification of parenting times were filed in the summer of 2011 and in September 2011, an order was entered requiring Brian to appear on Trysta's motion on October 3, 2011.

At the hearing on October 3, 2011, Trysta claimed support had been in arrears since 2009. Brian claimed he had overpaid and there was paperwork from SRS which supported his claim. The court ordered Brian to provide his documents to support his claims within 10 days to the court and Trysta's counsel. The court would then determine if any arrearages existed.

There is nothing in the record to show what Brian, now acting without counsel, submitted to the court. Trysta's counsel, in her brief to our court, makes the following comment concerning what Brian submitted:

> "7. Thereafter, when the Respondent submitted his information he did not submit the information requested but instead ask[ed] for a reduction in child support based on the fact that child support could be cheaper if the children went to Boys and Girls Club. The Respondent did not file his information with the Clerk of the District Court but, instead sent a Chamber's Copy to the Judge. Therefore, Respondent's response is not a part of the Record."

According to the record on appeal, Trysta, on November 30, 2011, filed a reply to Brian's response to the request for information and verification. Trysta objected to Brian's computation as not supporting a 10% reduction and specifically to changing after school care and summer care to what is the "cheapest." Trysta explained that she objected to bussing the children to the Boys and Girls Club when they could continue to attend the Bergman Childcare Program "as they always have." Finally, Trysta argued Brian was computing the cost of health care incorrectly.

The next filing in the record was the district judge's letter to the parties dated and filed December 1, 2011, in which he attached a child support worksheet which had been prepared and adopted. The child support amount was set at $1,087 effective October 1, 2011. Work-related child care costs were set at $258 with a child care tax credit of $71 for a net of $187 monthly. Health and dental insurance premiums were set at $102 and Brian was credited with this amount. There were no findings made by the court except for the worksheet which was a part of the court's order. We were not presented with any record of a hearing where evidence was presented.

On December 21, 2011, Trysta filed a "motion to reconsider and establish child support" which sought relief on the issue of actual child care costs and also because Brian had failed to inform the court he was "either in the process or had acquired a new job in Kansas City" with a "big pay increase." Trysta specifically objected to the district court only allowing her a credit of $187 per month for work-related child care costs. She objected to an order which, in effect, required child care to move to a lesser level of

service where they would have to be bussed. She further alleged she prepays for Bergman's services through a pretax dependent care program and she would "lose this pool of funds" if she attempted to opt out before July 1, 2012. She alleged her costs at the time Brian filed his motion to modify were $511 per month and she anticipated that in 2012, her monthly child care costs would total $402.50. She asserted she should be entitled to a $333 credit for work-related child care costs after deduction of the child care tax credit.

Trysta's motion was heard on January 25, 2012. Before the hearing, Trysta submitted two new child support worksheets to the court. The first worksheet reflected a child support obligation of $1,449 computed by crediting Trysta $42 for dental insurance premiums and $446 for work-related child care costs and crediting Brian $172 for medical insurance premiums. At the hearing, Trysta requested an order authorizing her to provide the children's medical and dental insurance, so Trysta's second child support worksheet reflected a child support obligation of $1,734, which Trysta derived by crediting herself $383 for medical and dental insurance premiums and $449 for work-related child care costs. Trysta explained that on her worksheets, she included the cost of the children's summer extracurricular activities or $103, within her calculation of her work-related child care costs because Brian had refused to pay a portion of these activities even though he had orally agreed to do so on a previous occasion.

At the January 25, 2012, hearing, the court agreed to hear evidence and testimony regarding Brian's income and the children's medical insurance, but refused to hear any evidence or reconsider his previous decision regarding the amount of work-related child care costs to be included in the support calculation. There was a disagreement in the hearing between the court and Trysta's counsel with the court stating that testimony had been heard on the day care question and Trysta's counsel contending there had been no testimony and no hearing on the issue. The judge said, "I'm not gonna revisit that issue. So it's a Motion to Reconsider, and I'm not gonna reconsider."

The hearing ran longer than expected and was continued until February 2, 2012. Trysta's counsel requested an opportunity to proffer her evidence on the issue of Trysta's work-related child care costs. The court authorized the evidence proffer and told Trysta's counsel it could be introduced at the February 27, 2012, hearing.

The record reflects that on January 27, 2012, Trysta submitted her evidentiary proffer on the actual, reasonable, and necessary cost of work-related child care costs. Trysta explained the proffer was necessary because the court refused to hear evidence on this issue on the grounds that it had been determined, heard, and was irrelevant.

Trysta also filed a motion on January 27, 2012, to disqualify Judge Wilson, contending the judge had exhibited bias by ruling on the child care issue without holding a hearing and refusing to reconsider the ruling, allowing Brian to avoid paying child support arrearage, asserting himself as an advocate for Brian, and interfering with her attempts to proffer excluded evidence.

Brian responded pro se to Trysta's proffer and motion to disqualify, contending the court had properly considered evidence necessary to establish reasonable child care costs. With respect to the motion to disqualify, Brian denied he had ever made a statement to Trysta that he had any kind of a relationship with the judge and that disqualifying the judge would result in a hardship on him because additional hearings would be involved and he has to travel and take time off from work to attend court hearings.

At the hearing on February 2, 2012, the court heard the continued motion to reconsider. The court accepted Trysta's proffer and denied her motion to disqualify as not complying with K.S.A. 20-311d because other than alleging Brian had a relationship with the judge, the rest of the basis for disqualification all related to previous legal rulings. The court denied any relationship with "Mr. Williams." Despite requests by Trysta's

counsel, the court again refused to reconsider the issue of work-related child care costs. The hearing proceeded with the court hearing testimony and entertained the parties' arguments on the unresolved issues relating to the children's medical and dental insurance and unpaid or unreimbursed medical expenses.

On February 7, 2012, the court issued a new child support worksheet setting Brian's support obligation effective February 1, 2012, at $1,360 per month. Brian's income was increased to $77,844 annually, the work-related child care costs remained at $258 monthly (as had been set by the December 1, 2011, order), but the tax credit was decreased to $65 from the $71 allowed in the December 1, 2011, order. The previous order had allowed a $5 income tax adjustment while the February 7, 2012, order set the adjustment at $50. From this order, Trysta has appealed.

APPELLATE ISSUES AND ANALYSIS

Trysta initially contends that the district court erred when it modified the amount of Brian's support obligation without hearing any evidence on the amount.

Our court reviews an order modifying child support and the district court's determination of the proper amount of support under an abuse of discretion standard. *In re Marriage of Schoby*, 269 Kan. 114, 120-21, 4 P.3d 604 (2000). A judicial action constitutes an abuse of discretion

> "if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

The party asserting the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009). The interpretation and application of the Kansas Child Support Guidelines (KCSG), however, is reviewed de novo. *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466 (2008), *rev. denied* 288 Kan. 831 (2009). Nevertheless, "[w]here a case falls factually outside the child support guidelines, the guidelines do not limit the authority of the court and review is strictly one of abuse of discretion. [Citation omitted.]" *In re Marriage of Branch*, 37 Kan. App. 2d 334, 336, 152 P.3d 1265, *rev. denied* 284 Kan. 945 (2007).

In Kansas, the KCSG are the basis for establishing and reviewing child support orders. Administrative Order No. 216, Kansas Child Support Guidelines, § I (2011 Kan. Ct. R. Annot. 117). The use of the KCSG is mandatory and a district court's failure to follow the KCSG constitutes reversible error. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998). According to the KCSG, when computing the amount of child support, the "[a]ctual, reasonable, and necessary child care costs paid to permit employment or job search of a parent should be added to the support obligation," but the district court has "discretion to determine whether proposed or actual child care costs are reasonable." Administrative Order No. 216, Kansas Child Support Guidelines, § IV D.5 (2011 Kan. Ct. R. Annot. 129). Accordingly, "[t]he [KCSG] only require child care costs to be included in the child support calculations if the costs are (1) actual, reasonable, and *necessary*, and (2) are incurred to permit employment or job search." (Emphasis added.) *In re Marriage of Scott*, 263 Kan. 638, 642, 952 P.2d 1318 (1998).

Essentially, Trysta argues on appeal that the district court abused its discretion for two separate and distinct reasons under the teachings of *State v. Ward*, 292 Kan. 541, Syl. ¶ 3. First, the district court violated the KCSG and her fundamental constitutional rights by failing to provide her with any opportunity to be heard on whether her actual work-related child care costs are reasonable and necessary. Second, she alleges that it was an

abuse of discretion for the district court to premise its decision upon an error of fact, *i.e.*, substantial competent evidence does not support its decision to deviate from the actual work-related child care costs she incurs.

In fact, Trysta asserts that no evidence supports the district court's decision, as according to Trysta, the district court "apparently" utilized information Brian provided the court in "a letter" as the sole basis for its decision to only include a portion of her costs in the child support calculation.

This "letter" is not found by us in the record and we are totally unclear whether such a "letter" exists and how, if it does exist, it was utilized in the ultimate determination of the ultimate child support amount.

We find no record of any hearing which occurred between the September 3, 2011, hearing and the hearing on Trysta's motion to reconsider which was held on January 25, 2012. The court's order of December 1, 2011, based on the record presented to us was not based on any substantial competent evidence which is in the record nor is it shown to be the result of any hearing where the parties appeared and had the issue of child care expenses and the resulting amount of child support determined.

This conclusion is troubling to us because the court below obviously believed that a hearing had been held and the December 1, 2011, order had been properly considered and issued.

The court below viewed Trysta's request to revisit the issue of work-related child care costs as an attempt to reconsider an issue that had already been properly decided rather than an aspect of a motion to establish child support. The transcript of the January 25, 2012, hearing contains the following exchange between the court and Trysta's attorney.

"THE COURT: Well, I've already addressed [the childcare costs] in my prior order and I'm not revisiting that. I'm not changing my mind on that.

. . . .

"[TRYSTA'S ATTORNEY]: That leaves my client to stand the costs of around 300 a month—

"THE COURT: Counsel, I heard the testimony originally on that, and about the Boys and Girls deal and the Bergman daycare and everything, and I made my order on that.

"[TRYSTA'S ATTORNEY]: No, there was no testimony on that, Your Honor. You had us submit that, and he submitted that after the fact when we had already agreed to that in prior—

"THE COURT: Well, I'm not gonna argue about it. I made my decision on that. I'm not gonna revisit that issue. So it's a Motion to Reconsider, and I'm not gonna reconsider.

"[TRYSTA'S ATTORNEY]" It's also a Motion to Establish Child Support.

"THE COURT: And I will establish that. I'm just not revisiting that. . . . But I'm not going back in and doing the—redoing the Bergman, and I made my decision on that and I'm not changing my mind."

It is clear to us that the issue of work-related child care costs cannot be severed from the motion of either party to establish child support. It has also been held that "[g]enerally a proper motion, notice to the adverse party and *an opportunity to be heard* are prerequisites to a modification of a child support order." (Emphasis added.) *Brady v. Brady*, 225 Kan. 485, 489, 592 P.2d 865 (1979); *Strecker v. Wilkinson*, 220 Kan. 292, Syl. ¶ 3, 552 P.2d 979 (1976). Moreover, district courts are obligated to consider *all* relevant evidence when determining an amount of child support, including evidence related to child care costs. In fact, according to K.S.A. 2011 Supp. 23-3002, whenever a district court undertakes the task of computing the appropriate amount of child support, the court "shall consider all relevant factors, . . . including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child." Similarly, the KCSG require district courts to "consider

all relevant evidence presented in setting an amount of child support." Administrative Order No. 216, Kansas Child Support Guidelines § 1 (2011 Kan. Ct. R. Annot. 117).

The granting of wide discretion in the determination of child care expenses does not eliminate a court's obligation to consider relevant evidence proffered by the parties. We read the Supreme Court's holding in *In re Marriage of Scott* to support the proposition that whenever the district court exercises its discretion with respect to child care expenses, substantial competent evidence must support such a decision. *Scott*, 263 Kan. at 641-43. As the court explained in *Scott*, under the KCSG, the test for determining the appropriate amount of child care costs to include in the child support computation "is not a 'best interests of the child' test. . . . [T]he test is whether the child care costs are (1) actual, reasonable, and *necessary*, and (2) incurred to permit employment or job search." 263 Kan. at 643.

When briefs and arguments are not received from both parties to an appeal, as is the case here, we are hampered to not have arguments on behalf of Brian. However, we have searched the record repeatedly and cannot find that substantial competent evidence was lawfully presented to the trial court on the issue of work-related child care expenses which were an integral and essential part of the child support order of February 2, 2012.

We conclude that the record as presented to us shows an abuse of discretion when it modified Brian's child support obligation without considering any substantial competent evidence upon the issue of work-related child care costs. Accordingly, we must reverse and remand this case to the district court for an evidentiary hearing to determine if Trysta's child care costs are (1) actual, reasonable, and necessary, and (2) incurred to permit employment or job search.

With the conclusion we have reached, we find it unnecessary to consider Trysta's arguments that the failure of the letter orders of December 1, 2011, and February 7, 2012, to include specific findings of fact to support the orders made to be reversible error.

We will, however, briefly address Trysta's argument in her brief that we should, on remand, order this case to be assigned to a district judge. We decline to address this issue because Trysta has not made any arguments or cited supporting authority to support such a conclusion. Generally, a point raised incidentally in a brief and not argued therein is deemed waived and abandoned. See *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011). Moreover, failure to support an argument with pertinent authority or show why it is sound despite a lack of supporting authority or, in the face of contrary authority, is akin to failing to brief the issue. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

The district court is affirmed in part, reversed in part, and remanded for further action consistent with this opinion.