

NOT DESIGNATED FOR PUBLICATION

No. 108,437

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CARISA R. SIMS,
Appellee,

and

THERON L. SIMS, JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; REBECCA W. CROTTY, judge. Opinion filed September 27, 2013. Affirmed in part, reversed in part, and remanded with directions.

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellant.

Carisa R. Sims, appellee pro se.

Before MALONE, C.J., POWELL and SCHROEDER, JJ.

POWELL, J.: Having previously requested a reduction of his child support obligation, and only 7 months after agreeing with the mother, Carisa Sims, to pay \$2,000 per month in child support, the father, Theron Sims, Jr., filed another motion to modify child support seeking to again reduce his support obligation. The case manager refused to recommend a change, prompting the father to object to the case manager's recommendations. The district court held an evidentiary hearing on the father's objections, found him to be underemployed, imputed \$164,046 of annual income to him,

chose not to subtract the federal tax deduction for depreciation of assets from the father's income, and set his monthly child support payment at \$2,886.

The father appeals the district court's calculation of his child support obligation, arguing the district court erred in: (1) finding he conceded and agreed to his previous income figures; (2) imputing his income without any factual basis; (3) failing to consider depreciation; (4) failing to include his dental insurance payment in its calculations; (5) improperly relying on a prior ruling of the administrative hearing officer; and (6) failing to consider the totality of the circumstances.

For the reasons set forth herein, we do not find that the district court abused its discretion, but we do remand for recomputation of the child support figure as the district court failed to include the father's monthly dental insurance payment in the child support worksheet.

FACTUAL AND PROCEDURAL HISTORY

Carisa and Theron Sims were married on February 14, 2000. Two children were born of the marriage—one in 2000 and the other in 2004. On November 18, 2004, the mother filed for divorce. The divorce was final on January 12, 2006. Initially, the father was order to pay \$1,000 in child support each month. The child support worksheet listed the mother's gross annual income as \$10,716 and the father's gross annual income as \$75,000.

In 2007, the mother moved to modify child support. Due to the sale of some of the parties' real estate, the administrative hearing officer calculated that the father's 2004 to 2006 3-year average income equaled \$400,959 per year. After a reduction for the father's payment of self-employment tax, the administrative hearing officer set the father's income at \$389,544 and the mother's income at \$30,000. The father's child support

payment rose to \$4,039 per month. The father appealed to the district court to reconsider the administrative hearing officer's decision; however, before the district court ruled, the parties came to an agreement. The parties agreed that the father would pay \$3,020 per month from October 2007 through August 2009, then \$3,184 per month from September 2009 until further order of the court.

In August 2008, the father sold his collections law firm in Topeka and relocated to Arizona. The mother and the two children remained in Kansas. The buyers of the collections law firm agreed to pay the father a percentage of the profits from the clients they retained until October 2012. In Arizona, the father bought a house for \$535,000, requiring monthly payments of \$2,600. The father did not pursue an Arizona license to practice law or to sell real estate license. The father eventually obtained his Arizona real estate license in March 2012.

In October 2010, the father moved to modify child support. In March 2011, the parties agreed that the father's child support would be reduced to \$2,000 per month. The agreement specifically stated: "The parties do not agree to the amount which should be used for the parties' income for child support calculation purposes and therefore each party provides the Court with a separate Child Support Worksheet." However, only one child support worksheet was filed, listing the mother's income as \$27,869, and the father's income as \$150,000.

Seven months after the agreement, in October 2011, the father filed another motion requesting a modification of child support. The child support worksheet attached to the motion listed the mother's income as \$25,000 and the father's income as \$43,992. In January 2012, the parties' case manager reviewed both parties' tax returns from 2008, 2009, and 2010. The case manager found it would not be in the best interests of the children to modify the child support order, citing the parties' tax returns and a previous child support worksheet in 2008 that listed the father's income over \$300,000. The father

objected to the case manager's recommendations and asked the district court to reduce his child support payment to \$1,000 per month.

The district court held an evidentiary hearing on April 23, 2012. At the hearing, Doug Bassett, a commercial real estate agent in Topeka, Kansas, testified to the difficult real estate market for investors and discussed two of the father's properties currently listed for sale in Topeka. Bassett testified that the two properties for sale had both been on the market for about a year and a half, one priced below the appraised value, yet neither had sold. Bassett explained that the father had invested quite a bit of money into the properties and had done extensive repair and remodeling work himself. The father also called his accountant, Victor Petty, to testify. Petty did the father's personal taxes and the books and taxes for the many entities in which the father owned an interest.

Petty walked the district court through the father's 2010 tax return in order to explain how the father's gross taxable income was calculated. The father's 2010 tax return revealed that he had interests in multiple entities, some of which were dormant, while others were active and owned property and collected rents. Petty explained that the father's income in 2010, before business expenses and deductions, included \$25,216 in taxable interest, \$5,766 in ordinary dividends, \$603 in state or local income tax refunds, \$42,598 in capital gains, \$93,944 gross income from certain business interests, and \$5,950 from Partnership and S-corporation K-1's. Petty explained those numbers did not mean the father had \$174,000 in gross income in 2010; rather, that number must be reduced by the business expenses reported in Schedules C and E. The federal income tax summary report created by Petty listed \$35,784 in business income but a \$54,181 loss in income from "Rent, royalty, partnership, S-Corp, trust" sources. The father's 2009 federal income tax summary report similarly reported a \$42,605 loss, and his 2008 tax summary reported a loss of \$56,976. Petty also discussed depreciation of the father's assets.

The father testified that, between 2008 and 2012, he worked as a real estate developer in both Arizona and Kansas. Since moving to Arizona, he had been active in the real estate market and worked on multiple large-scale real estate investment deals that fell through for various reasons. He also estimated that he had spent 600-700 hours working on fixing and updating one of his properties for sale in Topeka. He explained the inconsistent nature of the real estate industry. Among his real estate investments, he testified that he had successfully flipped a house in Arizona from which he expected a \$20,000 profit after the sale closed. He also expected a \$100,000 profit if one of his listed properties in Topeka sold. Conversely, if he had sold a property in Topeka for the asking price, he would have sustained a \$100,000 loss. At the conclusion of his testimony, the district court asked the father what he would say was a reasonable estimate of his net worth. The father responded "Zero." However, he testified that the financial statements he would give to his bank for lending purposes indicated his net worth was \$800,000.

The mother testified that she understood that the real estate market was bad since she was also a realtor and property manager. She explained that she could not make ends meet in that business and took a job as a receptionist at a law firm.

The district court ruled on June 12, 2012, finding that the father was deliberately underemployed considering his experience in law and real estate. The district court noted that the father had a large amount of taxable interest income reported on his 2008, 2009, and 2010 tax returns, indicating significant assets. The difference between the father's reported income and the amount of income he accepted for purposes of child support calculation over the previous 4 years also indicated to the district court that he possessed greater assets than apparent.

Finding that the father's conflicting testimony regarding his net worth reflected poorly on his credibility to represent his financial situation, the district court reasoned that if his net worth was \$800,000 for lending purposes, then the same ability to pay

could be applied to child support. The district court found that the depreciation tax deductions taken by the father were not necessary to the production of income and included those amounts in the father's gross income. The district court made 16 specific findings of fact and set out the findings which supported its decision to impute \$100,000 annual income to the father.

The district court's child support worksheet set the mother's income as \$25,071 and the father's income as \$162,455. The father was ordered to pay \$2,886 per month in child support. The father timely appeals from this order.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN SETTING
MONTHLY CHILD SUPPORT AT \$2,886 PER MONTH?

Standard of Review

"The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation and application of the Kansas Child Support Guidelines are subject to unlimited review." *In re Marriage of Leoni*, 39 Kan. App. 2d 312, 317, 180 P.3d 1060 (2007), *rev. denied* 286 Kan. 1178 (2008). 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, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

"An appellate court generally reviews a district court's findings of fact to determine if the findings are supported by substantial competent evidence Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion." *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009).

1. *Is there substantial competent evidence to support the district court's finding that the father conceded to an annual income of \$389,544 in 2008 and agreed to an annual income of \$150,000 in 2011?*

The father disputes the district court's findings that he agreed that his income was \$389,544 in 2008 and \$150,000 in 2011 for the purposes of child support.

In 2008, the father requested the district court review the administrative hearing officer's ruling increasing his child support obligation. The administrative hearing officer had set the father's income at \$389,544 and ordered him to pay \$4,039 per month in child support. Before the district court reviewed the order, the parties reached an agreement that the father would pay \$3,020 per month in child support through August 2009, then \$3,184 per month from September 2009 until further order of the court. Each party provided a child support worksheet. Both worksheets set the mother's income at \$30,000, but each differed in setting the father's annual income. The mother's worksheet set the father's income at \$389,462, while the father's worksheet set his income at \$264,599. Each worksheet utilized different adjustments to show the father's child support obligation of \$3,020 per month.

The father correctly argues that the parties' differing worksheets show that the parties agreed to the amount of child support, not to the fact that he had an annual income of \$389,544. The evidence is contrary to the district court's finding that the father agreed that his income was \$389,544 in 2008, the number selected by the administrative hearing

officer. The father appealed the administrative hearing officer's ruling, and both child support worksheets submitted by the parties listed an income amount for the father that was different from that adopted by the administrative hearing officer's ruling. There is no direct evidence that the father agreed to set his income at \$389,544. The district court erred in this finding of fact; however, this error is harmless.

The district court did not use the exact amount listed as the father's income to calculate the current child support. The district court made this finding to support its conclusion that the tax returns did not accurately represent the father's income for the purposes of child support calculations. There is substantial competent evidence to support the district court's conclusion on this point.

Despite the father's tax return listing his taxable income as \$49,617, the evidence before the district court presented the argument that the father's income for purposes of child support calculations was much higher. The administrative hearing officer set the father's income at \$389,544, and, in their respective child support worksheets, both parties set the father's income more than \$200,000 higher than the income reported on his tax return. Though the father's proposed child support worksheet shows that he did not agree with the administrative hearing officer's listing of his income at \$389,544, the evidence shows that he at least agreed to show his income at least \$200,000 more than the amount given on his tax return. The district court's error in finding that the father agreed to the amount set by the administrative hearing officer is not cause for remand.

The father also argues that the district court erred when it found that he had agreed to use an income of \$150,000 in 2011, despite his 2010 tax return showing an adjusted gross income of \$43,992. The father is correct. There is no evidence that the father agreed his income was \$150,000 for 2011. Instead, the agreed order specifically states: "The parties do not agree as to the amount which should be used for the parties' incomes for child support calculation purposes." However, for the same reason as set out above, the

finding that the father specifically agreed to the number used for his income is harmless. The evidence does support that fact that the father agreed to pay \$2,000 per month in child support regardless of the income figure reflected on child support worksheet. This was one of the factors relied upon by the district court to conclude that the father had a financial situation beyond the figure listed on his tax return. The district court's errors are harmless.

2. *Is there substantial competent evidence to support the district court's calculation of the father's income?*

a. *Did the district court err in imputing \$100,000 in regular income to the father?*

The Kansas Child Support Guidelines allow the district court to impute income to a parent not having primary residency of the child if the parent is deliberately unemployed or "deliberately underemployed for the purposes of avoiding child support." Kansas Child Support Guidelines § II, F.1.b, e (2012 Kan. Ct. R. Annot. 124). When a parent is deliberately underemployed, "the court may evaluate the circumstances to determine whether actual or potential earnings should be used." Kansas Child Support Guidelines § II, F.1.e (2012 Kan. Ct. R. Annot. 124).

The father contends there was insufficient evidence to support the district court's decision to impute \$100,000 in regular income to him. He argues that there was no testimony about how much he was capable of earning as an attorney or as a real estate salesman. He did not have a license to practice law in the state of Arizona, and, other than filing his motions pro se in this case, there was no evidence that he practiced law after 2007. He also argues there was no evidence introduced regarding the job opportunities in Topeka or Arizona or expected earnings levels in the fields of law or real estate.

Writing pro se, the mother's brief relies on the case *In re Paternity of A.L. v. Florez*, No. 104,684, 2011 WL 2801080 (unpublished opinion), *rev. denied* 293 Kan. ____ (November 4, 2011). This case was also cited in the district court's decision.

In *In re Paternity of A.L.*, the father (Florez) was an attorney with 29 years of legal practice experience. A panel of this court upheld the district court's decision to impute income to Florez for the purposes of calculating child support. 2011 WL 2801080, at *5. Despite having several opportunities, Florez had failed to provide his tax returns or other information regarding his income to the district court. Florez testified that he made around \$31,000 per year; however, at the evidentiary hearing before the district court, a lawyer and former employee of Florez' law firm testified that he should have been capable of earning around \$115,000 per year for 2006 through 2008. The former employee, now a solo practitioner himself, testified that his own gross income in 2008 was \$280,000. Based on that testimony and on Florez' failure to provide information regarding his actual income, the district court imputed an income of \$80,000 to Florez. This court concluded this was not an abuse of discretion. 2011 WL 2801080, at *5.

In *In re Marriage of Kunzle*, No. 96,332, 2007 WL 3146683 (Kan. App. 2007) (unpublished opinion), the wife asserted that the husband made \$120,000 per year working for a Swiss pharmaceutical company. She presented evidence that the husband was making \$120,000 per year from 1994 to 1996. She testified that the company would pay \$120,000 into a Swiss bank account, but the couple would only transfer \$60,000 into the United States. The husband testified that from about 2000 on, he had made between \$60,000 and \$64,000 per year. The couple's federal income tax returns showed the husband's gross income to be \$59,658 in 2003, and \$63,287 in 2004. The couple bought their house for just over \$1 million and, at the time of the divorce (2006), had it listed to sell at \$1,275,000. The wife's testimony and the evidence regarding the husband's employment in 1994 to 1996 was the only evidence that the husband's income was \$120,000 per year. This court found that "the trial court's conjecture on their lifestyle,

combined with [the wife's] testimony, is not substantial competent evidence to support the trial court's finding that [the husband's] income was \$120,000 per year." 2007 WL 3146683, at *3.

The father argues that, as in *Florez*, there should have been expert testimony regarding how much he could have been making as an attorney or as a real estate developer in either Topeka or Arizona. District courts should have flexibility when imputing income to deliberately underemployed parents and should take both past earnings and potential employment opportunities into account when making such determinations. See 2 Elrod and Buchele, *Kansas Family Law Handbook* § 14.25(1), p. 356 (rev. 1999). The district court's order specifically referenced the father's past earnings by reviewing his tax returns, hearing testimony regarding his real estate businesses, noting the sale of the father's law firm, and citing the father's given level of income on past child support worksheets. Though testimony regarding the potential income of a professional with qualifications similar to the father might have been helpful, it certainly was not required.

Considering the father's experience in law and real estate in this case, the district court found the father was deliberately underemployed. Therefore, the district court chose to impute income to the father. The father challenges the district court's assessment of his yearly income, which is a finding of fact. The district court made very specific findings of fact to support its ruling and its decision to impute income to the father. The court's order reads in pertinent part:

"2. [The father] sold his law practice, did not practice law, and did not secure stable employment until this year when he obtained his real estate license.

"3. [The mother] has alleged that [the father's] income was 'several hundred thousand dollars' in 2006 and exceeding \$1,000,000 in 2007, and [the father] has objected to providing financial reports on those years so far,

"4. [The father's] business is a fluctuating one in which he has shown large profits and some recent problems disposing of certain hard-to-sell properties. The court acknowledges that such income can change from year to year; however, this is not sufficient reason to modify child support so frequently when [the father] has post-graduate professional degrees and an experienced work history in both law and real estate.

"5. Respondent submitted his personal tax statements for the past three years for review. However, his tax returns summarize several LLCs and other business entities, and no income or expense detail on these was provided.

....

"7. [The father] has relied on the annual income he is still receiving from the sale of his law practice five years ago rather than even trying to obtain employment until this year.

....

"9. It is reasonable to assume that [the father] is capable of earning \$100,000 a year as an attorney or a real estate salesman. This is based upon:

- a. [The father's] level of education in having a law degree;
- b. the fact that [the father] has experience in the practice of law in both general private practice and a specialized collections practice;
- c. the fact that [the father] has more than introductory experience in the real estate markets in both Topeka and Phoenix in that he has bought and sold properties in both locations;
- d. the fact that [the father's] standard of living has established evidence of an expectation of a high level of income to service debt on the purchase of a half-million-dollar residence;
- e. the fact that [the father] has voluntarily set his income for child support purposes at greater levels; and
- f. the fact that [the father] indicates that he keeps in touch with his children in Topeka by making numerous trips to see them and flying them to see him."

The district court noted that for the purposes of calculating child support in 2008, the father conceded to using an income of \$289,544 and in 2011 an income of \$150,000.

This was despite the fact that his 2008 and 2010 tax returns calculated his adjusted gross income to be under \$50,000. Additionally, the father's 2008, 2009, and 2010 tax returns all showed significant taxable interest income. His 2008 return showed taxable interest income of \$38,141; his 2009 return showed \$60,229; and his 2010 return showed \$25,216.

The district court's order specifically commented on the father's lack of credibility as to his financial situation. The district court noted the father's inconsistent statements regarding his estimated net worth. The father testified that for purposes of child support, his net worth was zero. However, he also testified that when he represents himself to banks to show his ability to pay a loan, he reported his net worth to be \$800,000. He further testified that he paid 100% of the travel expenses associated with the children or himself traveling between Arizona and Kansas. It is reasonable that the district court was inclined to believe the father had undisclosed assets which needed to be considered in the calculation of child support.

Taking into account the fluctuating nature of the father's real estate business, the district court did the best it could to evaluate the father's yearly income. It is reasonable to conclude that substantial competent evidence supported the district court's decision; therefore, the district court did not abuse its discretion in assessing \$100,000 in regular income to the father.

b. Did the district court err by using the father's actual income figures when calculating the father's potential income?

The father also argues that the district court erred by adding the imputed amount of income plus his actual 2010 income from real estate sales and investments. He points out that the Kansas Child Support Guidelines § II, F.1.e (2012 Kan. Ct. R. Annot. 124), states that when "a parent is deliberately underemployed for the purpose of avoiding child

support, the court may evaluate the circumstances to determine whether actual *or* potential earnings should be used." (Emphasis added.) The cases cited in the father's brief are not particularly relevant to this argument; however, his main argument is that the district court violated the clear language of the Guidelines.

The above Kansas Child Support Guidelines' language when taken in its ordinary meaning supports the father's interpretation that a district court must determine either the parent's actual income or a number that the district court deems is that parent's potential income. The father argues that the district court calculated his potential income to be only \$100,000 then erred by adding income from real estate sales and depreciation onto that potential income number. However, the district court's order reads:

"10. These factors contribute to the court's determination to impute an ability to earn \$100,000 regular income as well as \$43,992 income from real estate sales and investments, shown on [the father's] 2010 dividend tax return, and depreciation of \$20,054 added back in. This amounts to *a total imputed income* of \$164,046—which is comparable to his agreed income in previous modifications of child support." (Emphasis added.)

The Kansas Child Support Guidelines do not prohibit the district court from utilizing the numbers given in the father's 2010 tax return from assisting the district court in its calculation of the father's potential income. The district court estimated the father could earn \$100,000 in regular income; it then chose to utilize the numbers in the father's 2010 tax return as an estimate of how much income the father could receive from his real estate and investment businesses. All of these numbers together resulted in the district court's decision to impute the father's potential yearly income of \$164,046. The district court did not add the father's potential income and his actual income together.

3. *Did the district court err by including depreciation deductions in the father's income for purposes of child support?*

The father also argues that the district court erred by choosing not to deduct the depreciation of his real estate. According to the Kansas Child Support Guidelines § IV (2012 Kan. Ct. R. Annot. 132), a parent's domestic gross income is used when computing the amount of child support. The Kansas Child Support Guidelines § II, D (2012 Kan. Ct. R. Annot. 122), defines "Domestic Gross Income" as "income from all sources, including that which is regularly or periodically received" When a person is self employed, domestic gross income for the purposes of child support is defined as "self-employment gross income less Reasonable Business Expenses." Kansas Child Support Guidelines § II, E.3 (2012 Kan. Ct. R. Annot. 123). "In cases of self-employed persons, Reasonable Business Expenses are those actual expenditures reasonably necessary for the production of income. *Depreciation shall be included only if it is shown that it is reasonably necessary for the production of income.*" (Emphasis added.) Kansas Child Support Guidelines § II, E.2 (2012 Kan. Ct. R. Annot. 123).

For purposes of setting child support, courts view depreciation as an accounting technique used to determine an annual amount of money to deduct from the gross income that can be used to build up replacement costs of an asset before it must be replaced. *In re Marriage of Wiese*, 41 Kan. App. 2d 553, 558, 203 P.3d 59 (2009). In Kansas, depreciation is not categorically deducted as an expense or treated as income; rather, its inclusion or exclusion depends on the particular circumstances of each case. *Wiese*, 41 Kan. App. 2d at 558.

In *In re Marriage of Lewallen*, 21 Kan. App. 2d 73, 895 P.2d 1265 (1995), Jerrie Marie Lewallen (now Hazlett) filed a motion to increase Richard Ray Lewallen's child support obligation. Lewallen argued that the trial court erred by excluding depreciation as a necessary business expense in his farm operation, which caused an increase in his child

support obligation. "[I]n arriving at his domestic gross income, the trial court disallowed all of the depreciation he claimed on his tax return and added it back to his farming income." 21 Kan. App. 2d at 74. Our court held that a total disregard of depreciation in farming operations was an abuse of discretion and constituted reversible error. The *Lewallen* court remanded the case with instructions for the district court to determine which of the depreciation expenses were necessary for the production of income and therefore excludable in the calculation of the husband's income. 21 Kan. App. 2d at 75.

Conversely, in *In re Marriage of Cox*, 36 Kan. App. 2d 550, 554, 143 P.3d 677 (2006), our court held that the district court did not abuse its discretion in determining Cox's child support obligation because the district court did consider Cox's tax returns, property, and the fluctuating rental market before deciding that the depreciation of his rental properties was not reasonably necessary for the production of income from those properties.

During the hearing in this case, the father's CPA testified about the depreciation of the father's real estate and how that depreciation turned into tax deductions which affected the father's income. The district court's order specifically addresses its findings related to depreciation. The district court found that the depreciation of the father's properties was not necessary to the production of income and declined to subtract the depreciation amount from the father's income. Consistent with that finding, when the district court estimated how much income the father could make from real estate sales and investments, the district court added the amount taken as a depreciation deduction on his 2010 tax returns to the amount listed as his net income. The district court gave careful consideration to the father's arguments regarding depreciation but ultimately did not agree. The district court did not abuse its discretion.

4. *Did the district court err by not including the father's dental insurance payments for purposes of child support?*

The father argues that the district court erred as a matter of law by failing to include the father's \$50 per month payment for the children's dental insurance on the district court's final child support worksheet. The father's proposed child support worksheets attached to his initial objections to the case manager's recommendations list that the father paid \$50 per month for insurance premiums. The father also testified that he paid \$50 per month to maintain dental insurance for the children. The district court's order and child support worksheet listed the mother's monthly health insurance payment but did not list the father's \$50 monthly dental insurance payment.

The Kansas Child Support Guidelines § IV, D.4.a (2012 Kan. Ct. R. Annot. 134), addresses dental insurance expenses.

"The cost to the parent . . . to provide for health, dental, orthodontic, or optometric insurance coverage for the child is to be added to the Gross Child Support Obligation. . . . If there is a cost, the amount to be used on Line D.4 is the actual cost for the child or children.

"The court has the discretion to determine whether the proposed insurance cost is reasonable, taking into consideration the income and circumstances of each of the parties and the quality of the insurance proposed, and to make an adjustment as appropriate."

The father relies on *In re Marriage of Johnson*, 24 Kan. App. 2d 631, 637, 950 P.2d 267 (1997), *rev. denied* 264 Kan. 821 (1998), to support his contention that this \$50 dental insurance premium should have been included in the child support worksheet. In *Johnson*, the parties disagreed on how much the district court should have designated as an insurance expense because the father paid for family coverage which included the child of the parties, the father's current wife, and the father's other two children. The

court's opinion focused on how much of the father's insurance payments should have been listed on the child support worksheet. 24 Kan. App. 2d at 637.

In this case, the issue is whether the district court should have included the father's dental insurance expenses in the child support worksheet, not how much of the expense should be included. Under the language of the Kansas Child Support Guidelines, a parent's expenses for providing dental insurance coverage for the children is to be used in calculating the parent's support obligation. The district court does have some discretion in deciding how much should be included in the calculation, but, in this case, it appears that the district court completely ignored the father's uncontroverted testimony that he provided dental insurance for the children. "Use of the guidelines is mandatory, and failure to follow the guidelines is reversible error." *In re Marriage of Leoni*, 39 Kan. App. 2d 312, 317, 180 P.3d 1060 (2007), *rev. denied* 286 Kan. 1178 (2008). Because the district court failed to include the father's dental insurance expenses on the child support worksheet, the case must be remanded with instructions for the district court to adjust the father's child support by taking into consideration his dental insurance payments.

5. *Did the district court improperly rely on the administrative hearing officer's 2008 ruling in determining the father's child support obligation in 2012?*

The father argues that the district court erred by "focusing on" the 2008 administrative order. The father's brief gives arguments as to why the 2008 administrative order was incorrect. It is not necessary to assess the father's arguments regarding the 2008 order because the parties adopted an agreed order which superseded the administrative order.

The father also incorrectly alleges that the district court in its 2012 order relied heavily on the 2008 administrative order. The district court's order does not mention the

administrative order. It does mention the parties' agreed order but makes its findings of fact and conclusions of law based on the testimony and evidence presented at the April 23, 2012, hearing. The district court did not rely on the administrative order.

6. *Looking at the "totality of the circumstances," did the district court abuse its discretion?*

Finally, the father contends that a variety of the district court's actions taken together, and when viewed in context of the entire record, constitute an abuse of discretion and are enough to show that the district court erred in setting his child support amount. The father appears to advance a "cumulative error" analysis typically used in the criminal context. See *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011) (in cumulative error analysis, individual actions which are harmless may deny a party a fair trial when considered together). However, the father fails to cite any authority to support such a theory in this context. Typically, a party's arguments are waived if the issue is not adequately briefed. *Miller v. Johnson*, 295 Kan. 636, 688, 289 P.3d 1098 (2012). Therefore, it is unnecessary to address each of his arguments in great detail.

The father references three areas which he claims cumulatively show that the district court abused its discretion. First, he challenges the district court's decision not to utilize the interstate pay differential. Second, he argues that the district court should not have relied on the father's testimony that he lists his net worth at \$800,000 when applying for a loan. Third, he alleges that the judge was hostile towards him and biased in favor of the case manager.

First, the father, relying on *Depew v. Depew*, No 102,593, 2010 WL 3488810, * 1 (Kan. App. 2010) (unpublished opinion) (use of Guidelines mandatory and deviations must be justified by written findings), argues that the district court erred in failing to explain the reasoning behind its choice not to utilize the interstate pay differential.

However, the Kansas Child Support Guidelines § III, B.9 (2012 Kan. Ct. R. Annot. 131), explicitly states that the application of the interstate pay differential is within the discretion of the court. While we acknowledge that the use of the differential may have been appropriate here, we cannot find that the district court abused its discretion in declining to do so.

Second, the father challenges the district court's assessment of his net worth and his own credibility. Appellate courts do not reevaluate the credibility of witnesses or reweigh conflicting evidence. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010). In its order, the district court gave very specific findings of fact that support its decision to assess the father's financial situation beyond the confines of his tax returns and its conclusion regarding his lack of credibility as to his financial situation.

Finally, the father complains that the district court exhibited "hostility" towards him during the trial. As evidence of this, the father points to the district court's decision in a prior hearing to require him to appear and present evidence regarding his financial situation rather than only appear via phone, the district court's refusal to take judicial notice of Shawnee County's mass appraisal values, and the district court's handling of the case manager during the trial. However, a review of the record does not reveal a lack of impartiality or hostility towards the father.

First, with regard to requiring the father to personally appear at trial, this is the normal practice, not the exception. We view the district court's initial decision to allow the father to appear by telephone as a courtesy. The district court's decision to change course and require the father to appear personally seems particularly appropriate in light of the issues raised by counsel's questioning of the case manager concerning the father's tax returns and the importance of credibility determinations regarding the father's testimony about his income.

Second, as to the district court's refusal to take judicial notice of Shawnee County's mass appraisal values, we are unaware of any provision in the rules of evidence that would require the district court to take judicial notice of such information. In the absence of a stipulation agreeing to the admission of the appraisal values, a proper foundation would have been needed to admit such evidence.

Third, while we admit to being troubled by the role the case manager was allowed to play at the hearing, specifically, the case manager being given the opportunity to confer with the mother at counsel table and given the opportunity to ask questions of the witnesses, we cannot find that such actions constitute "hostility" towards the father or an abuse of discretion. As for the father's complaint about the judge's willingness to sit as a factfinder in a trial at which the judge's own divorce counsel, acting as the case manager, appeared as a witness, we express no view about the propriety of such an act as the father is barred from raising the issue when his counsel specifically waived any such conflict.

Accordingly, there is no basis for the father's argument that the district court abused its discretion based on the totality of the circumstances.

The district court is affirmed in part, reversed in part, and the case is remanded for recalculation of the child support amount based upon the father's \$50 per month dental insurance payments.