NOT DESIGNATED FOR PUBLICATION

No. 109,117

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

KAREN MCHENRY,
Appellee,

and

MERRILL MCHENRY,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; KATHLEEN M. LYNCH, judge. Opinion filed March 14, 2014. Affirmed.

Merrill W. McHenry, appellant pro se.

Sheryl A. Bussell, district court trustee, of Kansas City, for appellee.

Before HILL, P.J., ATCHESON and BRUNS, JJ.

Per Curiam: Merrill McHenry appeals a ruling of the Wyandotte County District Court granting the motion of Karen McHenry, his former wife, to increase the child support he pays. In setting or modifying child support in divorces, district courts are to rely on the guidelines established by rule. But a district court may vary from the guidelines in a given case when the variance has been sufficiently explained and finds support in the evidence. Merrill has failed to demonstrate the district court stepped outside those bounds, so we affirm.

Merrill and Karen were married in 1994, and they have one child—a son born in 1998. They were divorced in 2006. Since then, the district court has on several occasions modified the amount of child support Merrill pays to Karen, as the parent having physical custody of their son, sometimes increasing the payment and sometimes reducing it. In 2007, Merrill moved to Toronto, Canada, where he believed his training and expertise as a market analyst of the gold mining industry would make him particularly employable. With the economic downturn, Merrill had difficulty finding and retaining fulltime employment in the Kansas City area. His move to Toronto plays a part in the grounds on which he challenges the district court's decision on child support.

In 2012, on Karen's motion, the district court increased Merrill's monthly child support obligation from $276 to $580. He has timely appealed that decision. We provide additional facts as necessary to outline the points Merrill has raised.

At the outset, we note that Merrill has represented himself on appeal, although he appeared through a lawyer in the district court to oppose Karen's motion. He has identified three issues that directly bear on the district court's most recent child support ruling. But in presenting his argument, Merrill has failed to cite relevant portions of the appellate record and has diluted the legal presentation with extended commentary about what he perceives to be the general unfairness of the district court, prejudice of the case manager, and insufficient notice to him of some aspects of the divorce action. Those complaints seem to lack any immediate connection to the contested child support ruling. We have, however, carefully reviewed the submissions from the parties and the record evidence.

We recognize that district courts are obligated to apply the child support guidelines as the template for calculating those payments. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998). The failure of a district court to start there amounts to reversible error. 265 Kan. at 716. By the same token, however, a district court

may make a studied departure from the guidelines in a given case, so long as the supporting findings are spelled out in a written order or journal entry. 265 Kan. at 716; *In re Marriage of VanderVoort*, 39 Kan. App. 2d 724, 732, 185 P.3d 289 (2008). Here, we consider the guidelines in effect when the district court heard Karen's motion. See Kansas Child Support Guidelines (2013 Kan. Ct. R. Annot. 123).

For his first issue, Merrill contends Karen's motion was improper because there had been no material change in circumstance that would justify modifying the amount of child support. Under K.S.A. 2013 Supp. 23-3005(a), a party must wait 3 years before seeking modification of an initial order setting child support absent a material change in circumstances warranting an adjustment. If more than 3 years has passed, a party need not show changed circumstances. In this case, the district court entered the initial support order in 2007, some 5 years before Karen filed her motion. Accordingly, Karen did not have to show a change in circumstance. That alone disposes of Merrill's first issue.

Even if we were to assume Karen had to demonstrate changed circumstances to seek an increase in Merrill's child support payments, the record reflects legally adequate changes. The guidelines identify circumstances sufficient to justify a motion to modify support. One of those is a 10% change in the adjusted child support obligations reflected on line F.3 of the guidelines worksheet. See Kansas Child Support Guidelines § V.B.1 (2013 Kan. Ct. R. Annot. 144). The evidence in this case shows a sufficient change based on the pertinent worksheets. A second circumstance supporting a motion to modify support is a child becoming 12 years old. Kansas Child Support Guidelines § V.B.3. In this case, the McHenrys' son turned 12 years old in 2010—a year after the last adjustment of Merrill's support obligation. That independently would have supported Karen's 2012 motion to modify.

In short, Merrill's challenge to the district court's order fails on that basis.

For his second point, Merrill contends the district court improperly refused to grant him a long-distance travel adjustment because he now lives in Canada. The adjustment would have the effect of reducing his child support obligation. The guidelines require a district court to take into account "substantial and reasonable" transportation costs "directly associated with parenting time" in setting the amount of child support. Guidelines § IV.E.1 (2013 Kan. Ct. R. Annot. 133). A district court, however, need not make an adjustment for those costs if the facts of a particular case don't warrant one. This court has recognized several general factors to be considered: (1) which party moved away, causing the expense; (2) the reasonableness and the amount of expense; and (3) other circumstances bearing on how any appropriate expense may be allocated between the parties. *In re Parentage of Brown*, 39 Kan. App. 2d 26, 29, 176 P.3d 242 (2008); *In re Marriage of McPheter*, 15 Kan. App. 2d 47, 50, 803 P.2d 207 (1990).

The information presented to the district court at the hearing on the motion showed that Merrill had an annual salary of $30,000 (Canadian) and purported annual living expenses exceeding that amount. As we indicated, Merrill moved to Toronto because he believed he would be more likely to find work there matching his professional expertise. In that respect, the district court viewed his move as voluntary—in contrast to an employee of a large company facing an involuntary transfer. The district court also found that in 2012, some 5 years later, Merrill either was deliberately underemployed in Toronto or was making an economically irrational decision to remain there if he could not secure work paying more than $30,000 a year. On that basis, the district court declined to make an adjustment in Merrill's child support obligation for travel costs between Toronto and Kansas City.

The district court's findings on this point have support in the record. In particular, Merrill voluntarily chose to move to and remain in Toronto. Even assuming his assumptions for going there in 2007 were sound, the result 5 years later seemed to undercut that reasoning. At the very least, Merrill failed to offer any compelling

economic justification for remaining in Toronto in 2012 and, in that respect, failed to demonstrate the job prospects for capable, experienced market analysts in the Kansas City metropolitan area were no better than in Toronto.

Accordingly, we find no error in the district court's decision to refrain from modifying Merrill's child support obligations based on travel costs.

For his final point on appeal, Merrill argues the district court should have taken account of the substantially higher cost of living in Toronto compared to Kansas City and then made an appropriate adjustment in his child support obligation. The guidelines permit a district court to adjust support payments based on cost of living variances among states. Guidelines § III.B.9 (2013 Kan. Ct. R. Annot. 139). The guidelines specifically provide that any such change is "discretionary." Based on that language in the guidelines, the district court should exercise its sound discretion in weighing a cost of living adjustment. See *State v. White*, 289 Kan. 279, 284, 211 P.3d 805 (2009) (construing use of word "discretion" in K.S.A. 22-3210(d) as conferring discretionary authority on district court); *In re Estate of Mildrexter*, 25 Kan. App. 2d 834, 838, 971 P.2d 758, *rev. denied* 267 Kan. 885 (1999) (construing K.S.A. 59-1504). On review, this court may reverse only if that discretion has been abused.

A district court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if the district court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). Finally, a district court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support in the record. *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d

801 (2011), *cert. denied* 132 S. Ct. 1594 (2012) (outlining all three bases for an abuse of discretion).

Here, the district court's reasoning on the denial of travel costs is equally applicable to the denial of any cost of living adjustment. Both issues depend upon Merrill's decision to move to and then remain in Toronto. Although the guidelines refer only to cost of living comparisons among states, we presume a district court could consider that factor when one of the parents lives in a foreign country. In this case, the relevant facts appear to be largely undisputed, including Merrill's income and the higher cost of living in Toronto. The guidelines express no particular legal standards a district court must apply in considering whether to allow an adjustment in contrast to calculating the amount of any adjustment. So our review is limited to asking if some other judge would have made a like ruling based on the hearing and the case file. We cannot say the district court would have stood alone.

The district court, therefore, did not abuse its discretion. Again, Merrill's decision to remain in Toronto for 5 years notwithstanding his comparatively limited success in finding employment compensating him commensurately with his education and experience supports the district court's determination to deny him a cost of living adjustment reducing his child support obligation.

Affirmed.