NOT DESIGNATED FOR PUBLICATION

No. 110,263

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of
MARSHALL T. MCFEETERS,
*Appellee,*

and

KRISTINA C. MCFEETERS,
*Appellant.*

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed June 19, 2015. Vacated in part and remanded with directions.

*Aaron C. McKee*, of McKee Law, L.L.C., of Olathe, for appellant.

*Bruce W. Beye*, of Overland Park, for appellee.

Before STANDRIDGE, P.J., BRUNS, J., and HEBERT, S.J.

*Per Curiam*: Kristina C. McFeeters and Marshall T. McFeeters were divorced in 2013. Following the entry of the divorce decree, Kristina filed a notice of appeal. But before a decision on the merits was rendered, a panel of this court stayed the appeal, remanded the case to the district court for a hearing, and directed the district court to make findings regarding what it had relied upon in arriving at its decision on the issue of child support. After the district court held a hearing and made additional findings, the stay was lifted. Although Kristina filed an amended brief, Marshall did not do so and continues to rely upon the brief he filed prior to the stay.

On appeal, Kristina raises two issues. First, she contends that the district court erred in applying the equal parenting time formula in calculating child support for one of the parties' three children. Although the district court has discretion to apply the equal parenting time formula, a review of the record reveals that the district court has not made the findings required by the Kansas Child Support Guidelines (Guidelines) (2014 Kan. Ct. R. Annot. 127) to use the equal parenting time formula. We, therefore, vacate in part and remand the portion of the district court's order applying the equal parenting time formula in calculating the amount of child support for the parties' son with directions for further proceedings.

Second, Kristina contends that we should assess sanctions and attorney fees against Marshall. But we do not find the imposition of sanctions or attorney fees to be appropriate because we find that neither party is blameless for making this divorce action difficult for the district court, that Marshall's arguments on appeal are not frivolous, and that neither justice nor equity require that Kristina be awarded attorney fees and costs. Accordingly, we deny Kristina's request for sanctions and attorney fees.

## FACTS

On September 7, 2010, Marshall filed a petition for divorce against Kristina, to whom he had been married since 1989. Three children—two girls and one boy—were born to Kristina and Marshall during the marriage. At the time the divorce action was filed, their two daughters were 15 years old and 13 years old and their son was 8 years old.

Ultimately, the parties agreed to a parenting plan, which was approved by the district court on November 28, 2012. In the parenting plan, the parties agreed to joint legal custody of their children. In addition, the parenting plan set forth a parenting time arrangement. As to their daughters, Kristina was generally to have supervised parenting

time for up to 3 hours with each daughter every 2 weeks. As to their son, Kristina was to have all parenting time not awarded to Marshall and her home was designated as the son's residence for the purposes of school and extracurricular activities.

Specifically, Marshall was to have parenting time of the parties' son on the following schedule:

> "Alternating Weekends.
>
> "The Father shall have alternating weekends from Wednesday from 5:30 p.m. until the start of school on . . . Monday morning (or 3:30 p.m. if the child is not in school).
>
> "During the school week when Father has parenting with [the parties' son], Mother will provide the after school care from the time when school lets out until Father picks [the parties' son] up; provided, however if father has the time off and so desires he may pick [the parties' son] up from school as long as he gives mother 2 hours notice."

In addition, the parenting plan provided that Marshall would "have parenting time with [the parties' son] each Wednesday at 5:30 until the start of school on Thursday or 3:30 p.m. if there is no school on Thursday." Moreover, the parties' son was to "alternate weeks with each parent during the summer months."

The divorce action proceeded to trial on February 11, 2013. Another hearing was held on March 1, 2013, at which time the district judge announced his decision from the bench, including how the parties were to divide their assets and debts. Regarding child support, the district judge stated that he would need to calculate the amount, but he anticipated that Kristina would ultimately owe Marshall child support. Further, the district judge directed Marshall's attorney to prepare a proposed journal entry and decree of divorce pursuant to Kansas Supreme Court Rule 170 (2014 Kan. Ct. R. Annot. 278).

Following the hearing, the district court provided the parties with child support worksheets that it had prepared.

Kristina subsequently objected to the proposed journal entry and decree of divorce prepared by Marshall's attorney. Because the parties were unable to resolve their dispute over the terms of the journal entry and decree of divorce, it was presented—together with Kristina's objections—to the district judge for his consideration. On June 13, 2013, the district judge entered the journal entry and decree of divorce proposed by Marshall's attorney over Kristina's objections. Because the district court had already approved the parties' parenting plan, the journal entry and decree of divorce noted that there were no disputed parenting time or custody issues for the district judge to decide.

Regarding child support the journal entry and decree of divorce stated:

> "Each party owes the other child support. The Court has computed Child Support Worksheets in accordance with the Kansas Child Support Guidelines. The completed Child Support Worksheets are attached to this Decree and incorporated herein by this reference. The Court has imputed income to Respondent [Kristina] of $36,000:00 per year and finds that Petitioner's [Marshall's] income is $53,004 per year. There is no work related child care expense and Petitioner provides health insurance for the children at a total cost of $319.00 for all three children (divided $106.00 on one worksheet and $213.00 on the other worksheet). No enforcement fees are charged. The net result is that Respondent owes $594.00 to Petitioner ($796.00 less $202.00). Child support under this order shall begin March 1, 2013."

The child support worksheets attached to the journal entry and decree of divorce indicated that Marshall owed Kristina $202 per month in child support for the parties' son but that Kristina owed Marshall $796 per month in child support for the parties' daughters. On the son's child support worksheet, the box for "Parenting Time

Adjustment" in Section E was checked as not applicable. Under Section F of the worksheet, however, the district court applied the equal parenting time formula.

On July 10, 2013, Kristina filed a timely notice of appeal. Both parties subsequently filed their briefs, and the record was ordered on April 15, 2014. Also, on April 24, 2014, Kristina filed a motion for attorney fees and costs. Although this court scheduled the appeal to be heard on a summary calendar docket to be held on June 18, 2014, the case was not heard at that time. Instead, the panel of this court to which the case was previously assigned stayed this appeal—on its own motion—and removed the case from the docket. Furthermore, the panel remanded this case to the district court "for the limited purpose of holding a hearing to settle the record with direction that the district court make finding[s] on what was and was not considered by the district court in arriving at its decision on child support."

On July 2, 2014, the district court held a hearing on remand. At the end of the hearing, the district judge told the parties that he would file a journal entry at a later date addressing the issues he was ordered to consider by the Kansas Court of Appeals. Finally, on August 27, 2014, the district judge filed a journal entry that, among other things, confirmed that the district judge had purposefully applied the equal parenting time formula to the child support calculation for the parties' son

> "based upon Father's extended time with the son every other 'weekend' (Wednesday from 5:30 p.m. until the start of school on Monday morning (or 3:30 p.m. if the son is not in school)), as well as every other Wednesday at 5:30 p.m. through the start of school on Thursday (or 3:30 p.m. if no school on Thursday). Additionally, Father shares equal time with his son during the summer vacation from school and equal time during the various holidays as listed in the parents' agreed plan. *The Court found that the Father's parenting time with his son, taken as a whole, is 'equal or nearly equal time' as defined by the Kansas Child Support Guidelines (2012 KCSG § IV.F.4).*" (Emphasis added.)

Thereafter, the stay of this appeal was lifted, and Kristina's motion to file an amended brief was granted over Marshall's objection.

## ANALYSIS

*Equal Parenting Time Formula*

Kristina contends that the district court erred when it determined that Marshall was entitled to application of the equal parenting time formula in calculating the amount of child support owed for the parties' son. Specifically, Kristina argues:

> "The Equal Parenting Time Formula does not apply in this case because none of the requested elements are present. The trial court made no determination that a shared residential custody arrangement was in the best interest of the [parties' son]. And . . . the parents do not share the minor son equally or nearly equally. Moreover, there was no discussion, testimony, evidence or request concerning the Shared Expense Formula to show that any of the requisite conditions applied."

We review a district court's order determining the amount of child support for an abuse of discretion. But the interpretation or application of the Guidelines is a question of law subject to unlimited review. *In re Marriage of Wiese*, 41 Kan. App. 2d 553, 559, 203 P.3d 59 (2009). Judicial discretion is abused if the judicial action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 106, *cert. denied* 134 S. Ct. 162 (2013).

The use of the Guidelines by Kansas courts is mandatory. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998). Although a district court can deviate from the amount of child support listed in the Guidelines, it must justify any such deviation by making specific written findings stating how the deviation is in a child's best

interests. Failure to make such written findings constitutes reversible error. 265 Kan. at 716; *In re Marriage of VanderVoort*, 39 Kan. App. 2d 724, 732, 185 P.3d 289 (2008).

The 2012 version of the Guidelines govern the child support award at issue in this appeal. The Guidelines provide a district court the discretion in situations where parenting time is equal or nearly equal to use either the shared expense formula or equal parenting time formula in setting child support. Guidelines § III.B.7 (2014 Kan. Ct. R. Annot. 133). Here, the district court did not use the shared expense formula and it does not appear from a review of the record that the parties are sharing the expenses of their son. Rather, the district court applied the equal parenting time formula when calculating the child support obligation for the parties' son based on its finding that Marshall's "parenting time with his son, taken as a whole, is 'equal or nearly equal time' as defined by the Kansas Child Support Guidelines (2012 KCSG § IV.F.4)."

To use the equal parenting time formula, a district court must find that a shared residential custody arrangement is in the best interests of the minor child, that the parents share the children's time equally or nearly equal, and one or more of the following conditions apply:

- the parties do not agree to use the shared expense plan;
- applying the shared expense formula would place the parent designated to pay the direct expenses without the sufficient funds to be responsible for the direct expenses; or
- applying the shared expense formula is not in the best interests of the minor child. Guidelines § III.B.7.b (2014 Kan. Ct. R. Annot. 135).

Here, we find nothing in the record to indicate that the district court made a finding that shared residency is in the best interests of the minor son. In fact, it appears from a review of the parenting plan approved by the district court that the parties do not

share residency. Instead, it appears that the mother was granted primary residency of the parties' son and that the father has substantial parenting time. Likewise, we find nothing in the record to indicate that the district court made a finding that one of the other three conditions set forth in the Guideline apply. Accordingly, even if it was reasonable for the district court to find that the parties have nearly equal parenting time with their son, it has failed to make two of the three findings required by the Guidelines to apply the equal parenting time formula.

We note that nowhere in his brief does Marshall respond to Kristina's arguments that the district court erroneously applied the equal parenting time formula when calculating child support for the parties' son. In fact, Marshall admits that the district court did not make specific findings in its ruling. Instead, Marshall argues that Kristina's failure to seek posttrial relief in the district court negates her claim for relief on appeal. In support of this argument, Marshall cites K.S.A. 2014 Supp. 60-259 and K.S.A. 2014 Supp. 60-260. But he does not cite any authority for his position that Kristina's failure to move for relief under K.S.A. 2014 Supp. 60-259 or K.S.A. 2014 Supp. 60-260 prevents her from raising the issue on appeal. Failing to support a point with pertinent authority or to 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. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013). As such, we find that Kristina's failure to seek posttrial relief does not preclude her claim for relief on appeal.

We do not, however, find Kristina's argument that the district court did not have the authority to apply the equal parenting time formula simply because Marshall did not request its application to be persuasive. The equal parenting time formula is not one of the adjustments set forth in Guidelines § IV.E (2014 Kan. Ct. R. Annot. 142). Rather, the equal parenting time formula is found in Guidelines § III.B.7.b and its use is "discretionary with the court" so long as the requisite findings are made. Furthermore, Guidelines § III.B.7.b does not contain the type of language found in Guidelines § IV.E

requiring that a request be made before the court can consider an adjustment. Thus, we conclude that it was within the discretion of the district court to consider whether the application of the equal parenting time formula was in the best interests of the parties' son without a request from one of the parties.

*Request for Sanctions and Attorney Fees*

Kristina contends that Marshall should be sanctioned for his behavior in this case. In particular, she claims that throughout the case Marshall obstructed the truth, made this case more difficult than necessary, and ran up expenses. Although Kristina argues that this court "should review the question of sanctions under an abuse of discretion standard of review," it is not clear whose discretion she wants us to review because we find nothing in the record to suggest that she moved for sanctions in the district court. Regardless, Kristina has not provided support for her position that we should impose sanctions for conduct in the district court when she did not request sanctions below. See *Tague*, 296 Kan. at 1001 (stating that failure to support a point with pertinent authority or to show why it is sound despite a lack of supporting authority is the same as failing to brief the issue). Moreover, a review of the record suggests that neither party is blameless for making this divorce action difficult for the district court.

Lastly, Kristina claims that she is entitled to attorney fees under Supreme Court Rule 7.07(b) (2014 Kan. Ct. R. Annot. 71), which allows an award of "attorney fees for services on appeal in a case in which the district court had authority to award attorney fees." She contends that the district court had the authority to award attorney fees under K.S.A. 2010 Supp. 60-1610(b)(4), which was repealed and recodified effective July 1, 2011. See K.S.A. 2014 Supp. 23-2715. She also contends that attorney fees should be awarded as a sanction under K.S.A. 2014 Supp. 60-211(c). However, we do not find the arguments set forth by Marshall to be frivolous, nor do we find that justice or equity require that Kristina be awarded attorney fees and costs.

## CONCLUSION

For the reasons set forth above, we vacate that portion of the district court's order applying the equal parenting time formula in calculating the amount of child support for the parties' son. Accordingly, we remand the issue of child support for the parties' son to the district court for a hearing to determine whether each of the elements set forth in Guidelines § III.B.7.b for application of the equal parenting time formula have been established. All other orders issued by the district court in this case remain in effect. Furthermore, we deny Kristina's request for sanctions and/or attorney fees.

Vacated in part and remanded with directions.