

NOT DESIGNATED FOR PUBLICATION

No. 111,925

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BARBARA-JEAN L. OTTLEY,  
*Appellee,*

v.

MARK A. OTTLEY,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Ellis District Court; EDWARD E. BOUKER, judge. Opinion filed August 21, 2015.

Affirmed.

*John T. Bird*, of Glassman, Bird, Schwartz & Park, L.L.P., of Hays, for appellant.

*Robert S. Jones*, of Norton, Wasserman, Jones & Kelly, L.L.C., of Salina, for appellee.

Before GREEN, P.J., STANDRIDGE and POWELL, JJ.

*Per Curiam:* Mark A. Ottley appeals the district court's award of child support to his ex-wife, Barbara-Jean L. Ottley. Mark argues the court abused its discretion in using the extended income formula found in the Kansas Child Support Guidelines (Guidelines) to calculate child support because the parties had entered into a shared custody arrangement and had agreed to split all of their child's expenses equally.

## FACTS

Barbara-Jean and Mark were married in 1999, and their daughter, Ashton, was born in 2001. The parties divorced in 2007. The district court divided their property and debt according to a postnuptial agreement, and all issues relating to child custody and support remained open pending a trial.

In March 2008, the parties jointly entered into an Agreed Permanent Parenting Plan providing for the joint legal custody of Ashton, with Barbara-Jean having primary residential custody subject to 45% parenting time with Mark. For settlement purposes, the parties stipulated that they each had monthly incomes of \$13,037. As a result of the 55%-45% split in parenting time, Mark received an adjustment that reduced his child support by 15%. Child support was established using the extended income formula found in the Guidelines and, by agreement of the parties, Mark was ordered to pay Barbara-Jean \$1,066 per month.

After certain issues arose with respect to child custody and parenting time, the parties were referred to mediation. In December 2013, the parties entered into an Agreed Amended Parenting Plan which set forth (1) a weekly alternating schedule of shared residential custody of Ashton and (2) a Direct Expense Sharing Plan in which the parties agreed to share all of Ashton's school and extracurricular expenses equally. Because Mark's parenting time had increased from 45% to 50%, the parties agreed that child support would be calculated pursuant to the Guidelines using the shared custody, equal shares approach.

Notwithstanding agreement on the issues above, Barbara-Jean and Mark were unable to agree on a child support amount. Accordingly, the parties appeared before the district court for a hearing on the matter. Prior to the hearing, the parties stipulated to several issues, including their respective monthly incomes. Barbara-Jean's stipulated

monthly income was \$13,342, and Mark's stipulated monthly income was \$54,785. Because the parties' combined incomes greatly exceeded the largest amount found in the Guidelines, the only issue before the court was whether the extended income formula should apply to calculate child support. The district court heard the following testimony from the parties.

*Barbara-Jean's testimony*

Barbara-Jean testified that she was a practicing physician. She stated her income had remained fairly consistent since 2008, while her monthly expenses had risen due to inflation, her home mortgage, and the increase in monthly expenditures for Ashton as she grew older. Barbara-Jean claimed these expenses were not significantly different than the expenses she had prior to the divorce, and she had not made any significant changes her lifestyle since 2008. She testified that after paying taxes her average monthly income was less than her monthly expenses. In order to supplement her income and continue to live the way she had before the divorce, Barbara-Jean had relied on her savings, cashed out bonds, and borrowed from her life insurance policy.

Barbara-Jean's monthly living expenses, totaling \$11,635, included \$652 in monthly travel costs. Barbara-Jean testified that she had regularly traveled with Ashton since she was 6 weeks old. Barbara-Jean explained that the two of them often traveled to see Barbara-Jean's family on the East Coast, in addition to other locations in the United States and other countries. She estimated that she traveled about 4 weeks a year, in addition to several extended holiday weekends. Barbara-Jean stated that traveling was very important to her and that she had tried to keep her travel schedule with Ashton the same since the divorce because it allowed them to have uninterrupted family time. Barbara-Jean claimed she had cut back on some of her travel expenses by taking shorter trips and by driving to some locations rather than flying.

Barbara-Jean testified that the parties' current equal custody and shared expenses arrangement had not resulted in any decrease to her expenses. According to Barbara-Jean, the custodial parent always had paid for Ashton's expenses and the parties historically had shared some or all of her school fees, even prior to the current arrangement. Barbara-Jean asked the court to use the extended income formula to provide support for Ashton so that she and her daughter could continue to live the same lifestyle.

*Mark's testimony*

Mark testified that he owned a wholesale auto auction business, in addition to owning farm land that had significantly increased in value over the last 3 years. Mark did not file a domestic relations affidavit to establish his monthly expenses but agreed that he could afford to pay any amount necessary for Ashton's support. However, Mark did not think that his increased income warranted an additional amount of child support because he and Barbara-Jean each had adequate incomes, split their time with Ashton equally, and shared her expenses evenly. Mark did not feel that Ashton would suffer in any way if the extended income formula were not applied.

Mark did not dispute that Ashton had the same type of basic monthly expenses that she had in 2008 and that these expenses had increased as she got older. Mark admitted he always had paid for Ashton's direct expenses when she was with him, even before the new shared custody arrangement was implemented. When asked, Mark could not explain how things had changed since going to the current shared custody. Mark also agreed that there was no evidence that his expenses had increased or that Barbara-Jean's expenses had decreased as a result of the shared custody/shared direct expense arrangement.

After taking the matter under advisement, the district court decided that use of the extended income formula was warranted and that Mark's monthly child obligation should

be increased from \$1,066 to \$1,355. In support of this decision, the district court reasoned:

"[E]mployment of the extended income formula to calculate child support is necessary to maintain Ashton's lifestyle while in her mother's custody. Employment of the formula will not result in a windfall to either Ashton or her mother. Finally, it is in Ashton's best interest to use the formula, as it assures Ashton's continued enjoyment of her historical activities with her mother, while not affecting the financial stability of her father, or his ability to provide Ashton with those extra things he might find appropriate to provide."

#### ANALYSIS

The sole issue on appeal is whether the district court erred in applying the extended income formula to calculate child support. Mark argues the court did so by failing to consider the parties' shared custody agreement with equal sharing of direct expenses. In response, Barbara-Jean contends that the court's application of the extended income formula was proper in order to maintain her ability to parent Ashton in a historically consistent manner.

We review a district court's order determining child support for an abuse of discretion. *In re Marriage of Thomas*, 49 Kan. App. 2d 952, 954, 318 P.3d 672 (2014). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013). As the party asserting the district court abused its discretion, Mark bears the burden of showing such abuse. See *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009).

Also, we review challenges to the sufficiency of the evidence to support a child support award only to assure the district court's findings of fact are supported by

substantial competent evidence and that they support the court's legal conclusions. "Substantial evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support such a conclusion." *In re Marriage of Atchison*, 38 Kan. App. 2d 1081, Syl. ¶ 3, 176 P.3d 965 (2008). On review, we do not weigh conflicting evidence, pass on witness credibility, or redetermine questions of fact. 38 Kan. App. 2d at 1085.

K.S.A. 2014 Supp. 23-3001(a) requires a district court to "make provisions for the support and education of the minor children." The Kansas Supreme Court has established child support guidelines that govern how a district court must generally calculate the amount of child support due. See K.S.A. 2014 Supp. 23-3002(a). The Guidelines include schedules that take into account various data regarding income and expenditures to aid in properly assessing the nature of the income and expenditures involved in calculating child support. See, e.g., Kansas Child Support Guidelines § § II.B and II.C (2014 Kan. Ct. R. Annot. 127); Guidelines § IV (2014 Kan. Ct. R. Annot. 138). Proper use of the Guidelines creates a presumed amount of support to be paid that is rebuttable. A district court must follow the Guidelines in calculating child support unless a deviation is supported by written findings in the journal entry. *In re Marriage of Thurmond*, 265 Kan. 715, 716, 962 P.2d 1064 (1998).

Relevant to the issue before us, the Guidelines expressly provide that if the combined child support income exceeds the highest amount reflected in the schedules, "the court should exercise its discretion by considering what amount of child support should be set in addition to the highest amount on the Child Support Schedule." Guidelines § III.B.3 (2014 Kan. Ct. R. Annot. 131). To assist the court in this discretionary task, the Guidelines include a specific formula at the end of each child support schedule showing how to compute the income amount not reflected in the schedules. See, e.g., Guidelines, Appendix VIII, Example 2 (Section III) (2014 Kan. Ct. R. Annot. 203). This method of calculating child support where parental monthly income

exceeds the amounts provided for in the Guidelines is commonly referred to as the extended income extrapolation formula. In these cases, the district court must consider the extended income formula and balance several factors in order to determine "the standard of living the child would have enjoyed absent parental separation and dissolution and also to ensure adequate support for upbringing the child without allowing windfalls." *In re Marriage of Leoni*, 39 Kan. App. 2d 312, 323, 180 P.3d 1060 (2007), *rev. denied* 286 Kan. 1178 (2008); See *In re Marriage of Patterson*, 22 Kan. App. 2d 522, 528-29, 920 P.2d 450 (1996) ("On the one hand, . . . a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury. . . . On the other hand, child support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of the children.").

Here, the district court relied on the following factors in determining that the extended income formula should be applied to calculate the child support award:

- Mark's annual income had more than quadrupled since the previous child support order, increasing from \$156,444 to \$657,418.
- Barbara-Jean's annual income had only increased slightly to \$160,100 and her monthly expenses had generally increased.
- In order to maintain her lifestyle with Ashton, Barbara-Jean had been spending her savings and retirement funds.
- Under the Agreed Amended Parenting Plan, the change in time Ashton spent with Mark increased by only 5%.
- Application of the extended income formula would increase Mark's monthly child support obligation from \$1,066 to \$1,355, or by \$289 per month. Without the formula, Mark's monthly obligation would fall to \$490.

A review of these factors led the court to conclude that use of the extended income formula was proper and necessary to maintain Ashton's standard of living while she was

with Barbara-Jean. The court noted that if the parties had not divorced, Ashton's standard of living would have been equivalent to that enjoyed under the existing order and would have potentially increased due to Mark's greater income. The court also found that use of the formula would not result in a windfall to Barbara-Jean or to Ashton, given Barbara-Jean's increased monthly expenses and the fact that she had been relying on her savings and life insurance plan to maintain her lifestyle with Ashton.

Mark claims the district court failed in its ruling to consider the parties' recent shared custody agreement that also provided for the equal sharing of Ashton's direct expenses. To that end, Mark argues the court erroneously determined the award would not result in a windfall to Barbara-Jean by comparing the \$1,355 award with the \$1,066 award that was in place when the parties had a "traditional custody situation" where Barbara-Jean was responsible for Ashton's direct expenses. Instead, Mark contends that because the monthly child support award would have been \$490 if the extended income formula was not applied, the district court should have used this number to evaluate whether an \$865 difference, rather than \$289, constituted a windfall to Barbara-Jean.

But Mark's argument that the shared custody/shared expense arrangement constituted an economic shift in the way the parties raised Ashton is contrary to the record. Indeed, the evidence presented at the hearing indicated that other than the 5% change in Ashton's time spent with each party, not much had actually changed. There was no evidence that this new arrangement provided any economic cost to Mark or economic gain to Barbara-Jean. And the undisputed evidence in the record reflects that the parties already had been splitting Ashton's direct expenses equally prior to the most recent agreement. Each party paid for Ashton's direct expenses when she lived with them, and they each paid a part of her school expenses. Thus, a comparison of the \$1,355 award (using the extended income formula) with a \$490 award (without the extended income formula) would not have provided an accurate picture of whether use of the extended income formula would provide a windfall to Barbara-Jean. Based on the circumstances

present here, the district court properly compared the \$1,355 award with the previous \$1,066 award in order to determine that an increase of \$289 in Mark's child support did not constitute a windfall to Barbara-Jean.

Given the parties' shared custody/shared expense agreement, Mark also alleges the district court's ruling failed to address his concerns that his increased income did not warrant an additional amount of child support and that he and Barbara-Jean were each financially capable of providing for Ashton on their own. Additionally, Mark claims there was no evidence to show that Ashton needed any extra support or that any increase in Barbara-Jean's expenses was related to Ashton, suggesting that the court's award was essentially a disguised maintenance award to support Barbara-Jean's voluntary travel expenses.

Contrary to Mark's argument, Kansas law does not focus solely on a child's demonstrable needs to guide a district court's discretionary application of the extended income formula. The court must balance several factors in order to accomplish fairness and prevent a windfall. See *In re Marriage of Leoni*, 39 Kan. App. 2d at 323; *In re Marriage of Patterson*, 22 Kan. App. 2d at 528-29. Here, the district court considered the financial resources and needs of both parents in deciding to apply the extended income formula to its calculation of child support. Although both parties each have considerable incomes, the court drew reasonable inferences from the evidence to conclude that failure to use the extended income formula in this case would lower Ashton's standard of living in Barbara-Jean's home. Substantial competent evidence supports this ruling. An appellate court should not second guess any credibility determinations or the weight afforded the evidence by the district court. See *In re Marriage of Atchison*, 38 Kan. App. 2d at 1085.

Based on the record before us, the district court was well within its discretion in concluding that the use of the extended income formula was proper and necessary in order to maintain Ashton's historical standard of living in Barbara-Jean's home.

Affirmed.