NOT DESIGNATED FOR PUBLICATION

No. 91653.

Rebecca June SMITH, and Alexandria June Brungardt, By and Through Her Mother and Next Friend, Rebecca June Smith, Appellees,

v.

Travis John BRUNGARDT, Appellant.

Court of Appeals of Kansas

December 10, 2004

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Appeal from Finney District Court; Michael L. Quint, judge. Opinion filed December 10, 2004. Affirmed in part, reversed in part, and remanded with directions.

William I. Heydman, of Heydman Kliewer, LLP, of Garden City, for appellant.

Ricklin R. Pierce, of Ricklin R. Pierce, Chartered, of Garden City, for appellees.

Before RULON, C.J., KNUDSON, S.J., and WAHL, S.J.

PER CURIAM.

Defendant Travis John Brungardt (father), appeals the custody determination for A.J.B., alleging a portion of the custody determination exceeded the district court's authority to impose a prospective modification of the custody arrangement. We affirm in part, reverse in part, and remand with directions.

A.J.B. was born on March 12, 2001. Although the parties were never married, both the mother and father agree they are the natural parents of the child. Both parties currently reside in Garden City, Kansas.

On April 4, 2003, the mother filed a paternity action for the purpose of establishing legal and residential custody and child support for A.J.B. The only issues contested by the parties concerned residential custody, parenting time, and child support.

A hearing on these issues was held. Subsequently, the district court filed a journal entry, awarding joint legal custody to the parties and shared residential custody until August 15, 2006. The district court ordered the shared residential custody to be implemented in the following manner:

"3. The Defendant, Travis John Brungardt, shall exercise his parenting time with the minor child of the parties from Wednesday at 7:00 p.m. until Saturday at 7:00 p.m. starting on October 29, 2003.

"4. The Plaintiff Rebecca June Smith shall exercise her parenting time with the minor child of the parties from Saturday at 7:00 p.m. until Wednesday at 7:00 p.m."

The order provided for a change in the residential custody arrangement as of August 15, 2006. Instead of continuing shared residential custody, the mother would be given primary residential custody of the child. The father would be allowed alternating weekends and holidays, and summers with the child, except that, during the summer, the mother would be allowed weekend visitation of the child.

The sole issue raised in this appeal concerns the district court's decision to change residential custody on August 15, 2006. The defendant contends the district court lacked the authority to impose a prospective modification in the child custody arrangement.

Even though the parties were not married, each possess the same status as a formerly married parent seeking custody in a divorce proceeding. Consequently, in any child custody determination, a Kansas court exercising proper jurisdiction must govern its decision by the statutory criteria provided by K.S.A.2003 Supp. 60-1610(a). The guiding principle by which a custody determination must be measured is what placement is in the best interests of the child. See *LaGrone v. LaGrone,* 238 Kan. 630, 632-33, 713 P.2d 474 (1986); K.S.A.2003 Supp. 60-1610(a)(3).

The father argues that, according to K.S.A.2003 Supp. 60-1610(a)(2), a modification or change in child custody is possible only upon a finding that materially changed circumstances have affected the best interests of the child. Because the district court

ordered a prospective change in residential custody, the father contends the district court essentially implemented a modification based solely upon the parties' respective situations at the time of the hearing. Consequently, father argues the August 15, 2006, shift in residential custody cannot possibly be supported by a material change in circumstances.

At first glance, it appears as though the father's argument is not yet ripe for adjudication because he is challenging an occurrence in the future from which, arguably, he has not yet sustained injury. However, the district court's order establishes, conclusively, the residential custody arrangement between the parties, unless a material change in circumstances occurs which affects the best interests of the child. See *Hill v. Hill,* 228 Kan. 680, 685, 620 P.2d 1114 (1980) (a litigated custody determination of a district court possessing proper jurisdiction is res judicata to subsequent challenges unless a material change in circumstances which affects the determination is demonstrated).

"A case is ripe for adjudication when the disagreement has taken a final shape and the court can see the legal issues it is deciding, including the impact of the decision upon the adversaries." *In re Tax Exemption Application of Allen, Gibbs & Houlik, L.C.,* 29 Kan.App.2d 537, 543, 29 P.3d 431 (2001). Because the district court's order regarding the August 15, 2006, residential custody change is conclusive to the extent that no subsequent order based upon materially changed circumstances supercedes such order, the legal issue presented in this appeal is sufficiently ripe to permit adjudication.

Whether a prospective change in a child's custody arrangement between parents exceeds the district court's authority involves an interpretation of K.S.A.2003 Supp. 60-1610(a)(2). Interpretation of a statute is a question of law, over which this court possesses unlimited review. See *Cooper v. Werholtz,* 277 Kan. 250, 252, 83 P.3d 1212 (2004). In pertinent part, K.S.A.2003 Supp. 60-1610(a)(2)(A) provides, "Subject to the provisions of the uniform child custody jurisdiction and enforcement act ... the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown."

Under the plain language of the statute, demonstration of a change of circumstances is required only where an order regarding custody, residency, visitation, or parenting time has previously been established and a party wished to modify the terms of the prior order. There is nothing within the statute limiting a district court's authority to anticipate a significant change in the life of a child and plan for that change accordingly. This court's reasoning in *In re Marriage of Perry,* 25 Kan.App.2d 447, 962 P.2d 1140 (1998), supports this interpretation of the statute. In the *Perry* case, an original California custody order, based upon the stipulation of the child's parents, created a 6-month rotation between the parents until the child reached school age; thereafter, primary residential custody would reside with the child's father during the school year and with the child's mother during the summers.

In *Perry,* following several subsequent foreign custody orders, the district court considered the custody issue and conducted a best interests analysis and found the

original custody order, placing primary residential custody with the father when the child began school, was in the child's best interests. One of the mother's issues on appeal concerned the district court's best interests analysis. She argued that the district court could not enforce the modification in the custody stipulation which had been adopted in a previous order without finding that a material change in circumstances warranted the modification. Citing *Hill,* 228 Kan. 680, Syl. ¶ 2, this court noted that, when a custody arrangement is based upon the agreement of the parents and is not litigated, a district court, upon subsequent challenge, may consider the totality of the circumstances to determine what custody would be in the child's best interests. 25 Kan.App.2d at 451.

"The rule requiring a material change in circumstances is judicially imposed. Its purpose is to prevent the relitigation of issues already presented to and determined by a trial court. The purpose of the rule is meritorious; nevertheless, it should not prevent a trial court from hearing evidence which it has not previously heard and considered, and which bears upon the principal issue: the best interests of the child. When the judicial rule prevents a trial court from considering relevant evidence which it has not heard, and from basing its decision at least in part upon that evidence, the rule conflicts with the best interest guideline established by legislative and decisional law." *Hill,* 228 Kan. at 685.

We conclude the district court here was clearly within its discretion to anticipate a predictable change in the child's life and fashion an appropriate residential custody order, accordingly. However, any custody order must be made in accordance with the child's best interests. See K.S.A.2003 Supp. 60-1610(a)(3). A determination of what is in a

child's best interests involves an essentially factual inquiry, and such determinations are wisely left to the sound discretion of the district court and will generally not be disturbed on appeal absent a demonstration of an abuse of that discretion. See *Johnson v. Stephenson,* 28 Kan.App.2d 275, 288, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001).

Judicial discretion is abused only where it is deemed arbitrary, fanciful, or unreasonable. If reasonable persons viewing the judicial action could differ about the propriety of the action, a court may not declare the action to be an abuse of discretion. See *Shay v. Kansas Dept. of Transportation,* 265 Kan. 191, 194, 959 P .2d 849 (1998).

Our difficulty in reviewing the reasonableness of the district court's residential custody determination effective August 15, 2006, is that the court provided no basis for making its determination that primary residential custody should be given to the mother rather than the father. In the absence of a contemporaneous objection, this court will presume that the district court found the facts necessary to support its judgment so long as a review of the record demonstrates a basis for such a presumption. See *In re Marriage of Whipp,* 265 Kan. 500, 508-09, 962 P.2d 1058 (1998). However, there is no record from which this court can exercise such a general review in this case.

The only basis for the district court's finding can be found in the journal entry. No basis for either of the residential custody arrangements is provided. Yet, based upon the initial arrangement, a shared custody arrangement wherein each parent would have

custody of the child for approximately half the week, this court may presume the parties are basically able to provide for the child's needs, equally.

Furthermore, from the date of the change in the residential custody arrangement, this court may assume that the change was meant to provide stability in the child's life during the school week. While the establishment of a primary residence thus has a basis in reason, the district court's selection of the mother as the primary residential custodian has no support in the record.

"Neither parent shall be considered to have a vested interest in custody or residency of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or young child to give custody or residency to the mother." K.S.A.2003 Supp. 60-1610(a)(3).

Without articulating any basis for giving the mother residential custody preference instead of the father, this court must conclude the district court's decision to grant the mother primary residential custody when the child starts school is in error. As such, the challenged custody determination must be reversed.

We affirm in part, reverse in part, and remand with direction to the district court to reverse the change of residential custody determination effective August 15, 2006.