

NOT DESIGNATED FOR PUBLICATION

No. 99,179

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF  
ERIC MOORE,  
*Appellee,*

and

STEPHANIE A. HUNT, F/N/A STEPHANIE MOORE,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Douglas District Court; JEAN F. SHEPHERD, judge. Opinion filed  
December 19, 2008. Affirmed.

*Charles A. Briscoe*, of Douglas County Legal Aid Society, Inc., of Lawrence, for  
appellant.

*Paul T. Davis*, of Skepnek, Fagan, Meyer & Davis, P.A., of Lawrence, for  
appellee.

Before CAPLINGER, P.J., LEBEN, J. and BUKATY, S.J.

*Per Curiam:* Stephanie A. Hunt, f/k/a Stephanie Moore, respondent-appellant, appeals from the district court's order modifying child custody and parenting time, alleging the district court abused its discretion in failing to grant her motion for residential custody and in establishing a parenting plan which requires her to travel from Topeka to Wichita for supervised visitation. Finding no abuse of discretion, we affirm.

*Factual and procedural background*

Stephanie married Eric Moore in 1995 and the couple had one child, H.L.M., in 1996. Eric filed for divorce in December 1996. Initially, the district court granted Eric temporary sole custody of H.L.M. and ordered reasonable supervised visitation with Stephanie. The couple was granted a divorce in March 1997, and a hearing was set on the remaining issues, including child custody.

Following a hearing in April 1997, the district court granted joint legal custody of H.L.M. to both parties, named Eric as the primary residential custodian, and granted Stephanie specific periods of residential custody.

Eric and Stephanie maintained a fairly consistent visitation schedule for several months until Stephanie went to Philadelphia for a period of time. When Stephanie returned, Eric took H.L.M. to see her at a local restaurant. Sometime after that visit, Eric received a call from Stephanie's father notifying him that Stephanie was in jail in Indiana. In January 1999, Eric moved to modify the custody order, seeking sole custody for himself and supervised visitation for Stephanie. Eric alleged that Stephanie had cancelled several visits and was no longer exercising her visitation rights, that he did not know where Stephanie was living, and that he and Stephanie had no contact for over 2 months. He further alleged Stephanie had failed to pay child support, and he had concerns regarding Stephanie's mental stability.

In March 1999, the district court modified the custody order, granting Eric temporary sole custody of H.L.M. and supervised visitation for Stephanie. The court noted that Stephanie was incarcerated in Indiana at the time, and temporary sole custody with Eric was in H.L.M.'s best interest based on Stephanie's failure to maintain contact with Eric or H.L.M., her failure to pay child support, and her history of mental instability.

Stephanie resumed supervised visitation with H.L.M. after she was released from jail. The visits went well and eventually Eric and Stephanie agreed to unsupervised visits and overnight stays. The overnight visits terminated, however, after Eric received a call

from Stephanie's acquaintance asking Eric to pick up H.L.M. from the acquaintance's house. Eric drove to Topeka, observed Stephanie "laid out on the couch" and "spaced into a zone," and learned that Stephanie, H.L.M., and H.L.M.'s half-sister A.H., had arrived at the house sometime during the night. Immediately after this incident, which occurred in 2003, Stephanie was admitted to Osawatomie State Hospital and remained hospitalized for about 3 months.

After Stephanie was discharged, she resumed supervised visits with H.L.M. According to Stephanie, the visits went well, but Eric eventually cut off visitation. In June 2004, Stephanie moved to enforce visitation alleging Eric had denied her right to visitation. Following a hearing, the district court modified the custody order to allow Stephanie unsupervised visitation with H.L.M. on Sundays from 11 a.m. to 6 p.m.

According to Eric, Stephanie cancelled several visits, failed to maintain contact with Eric, and failed to show up for scheduled or rescheduled visits. According to H.L.M., his mother slept during some of the visits, and the visits terminated because Stephanie failed to show up. Eric stopped trying to contact Stephanie after she cancelled a Mother's Day visit in 2005, and Eric and H.L.M. subsequently moved to Oklahoma without notifying Stephanie.

In October 2005, Stephanie moved to modify child custody, alleging a material change in circumstances and seeking joint legal custody with shared residential custody. Stephanie alleged Eric had denied her authorized parenting time; refused to allow her to see H.L.M. since January 2005, or to have phone contact since April 2005; that Eric had moved H.L.M. out of state without providing notice as required by K.S.A. 60-1620; and that Eric had failed to provide a safe or stable home environment for H.L.M.

After Eric failed to appear at the hearing on Stephanie's motion, the district court granted sole legal custody of H.L.M. to Stephanie, ordered supervised parenting time for Eric, and ordered Eric to pay child support. The district court found that Eric had refused to allow Stephanie to exercise her visitation rights, and that Eric's act of moving H.L.M. out of state constituted a material change in circumstances.

Eric subsequently moved to set aside the judgment, alleging he did not receive notice of the hearing because it was sent to an attorney who had no contact information for Eric, and that the judgment was not in the best interest of H.L.M. The district court granted Eric's motion to set aside the judgment.

Stephanie then filed an amended motion for change of legal custody and modification of the parenting plan seeking sole custody of H.L.M. with specified

parenting time for Eric. At the commencement of the hearing on the motion, the parties reached an agreement on joint legal custody. The district court heard testimony from several witnesses and conducted an in-chambers conference with H.L.M.

Eric testified that he had not heard from Stephanie for about 6 months prior to his decision to move to Oklahoma. Eric made a half-hearted attempt to contact Stephanie about the move, but admitted that he did not reach her and did not notify her of his intent to move. Eric testified that he moved to Oklahoma because he could not find stable day care for H.L.M. At the time of the hearing, Eric and H.L.M. were living in Guthrie, Oklahoma with Eric's mother, Sharon Beckner. Beckner provided care for H.L.M. while Eric worked rotating shifts as a maintenance technician.

Eric testified that H.L.M. was doing well in school. Eric testified that he had not spoken to Stephanie since they moved to Oklahoma, that he knew that Stephanie had called and talked to H.L.M., and that during one call Stephanie gave H.L.M. her address and told him to take the address to anyone and have that person take him to see Stephanie. Eric testified that H.L.M. had not asked to see Stephanie. Eric did not take affirmative steps to arrange visitation because he was "tired of [Stephanie] walking out on [H.L.M.]."

Eric testified that Stephanie's failure to maintain consistent visitation affected H.L.M. academically, socially, and emotionally.

Stephanie testified that the last time she saw H.L.M. was in January of 2005, and that she spoke with H.L.M. on the phone once for about 15 minutes. Stephanie tried to obtain information about H.L.M. from his schools, but she testified that Eric had "padlocked that." According to Stephanie, Eric had alienated H.L.M. from her, and she wanted a role in H.L.M.'s life. At the time of the hearing, Stephanie was remarried and living in Topeka with her husband, two children, and a step-child. She was attending school to become a CNA; and working part-time as a paraprofessional. Stephanie testified she was not taking any medications, and was in good mental and emotional health.

Stephanie testified that she did not have the financial resources to make regular trips to Oklahoma or to a midpoint between Topeka and Guthrie, and that her "older style car" would not be able to handle the miles. She suggested that Eric should be responsible for transportation costs, although she indicated a willingness to assist with costs. Stephanie admitted that she had never served as H.L.M.'s residential parent since the parties' divorce. She also conceded that H.L.M. had been in and out of her life, but she testified that for the most part it was not her fault.

The district court spoke with H.L.M. in chambers. H.L.M. advised the court that he spoke to Stephanie by phone a couple of times after he moved to Oklahoma. H.L.M.

told the court that during one of these phone calls, Stephanie asked H.L.M. if he ever wanted to leave, asked which school he attended, gave him her address, and told him to ask a stranger for a ride to Topeka.

H.L.M. also recounted for the court the details of his last overnight stay with Stephanie which led to her hospitalization in Osawatomie. According to H.L.M., Stephanie got in a fight with someone she was staying with, and Stephanie, H.L.M., and A.H. ended up walking at night near the highway. H.L.M. remembered that he was barefoot and A.H. was naked. H.L.M. did, however, express to the court an interest in having visitation with Stephanie.

Following the hearing, the district court granted joint legal custody of H.L.M. to Eric and Stephanie, with primary residential custody to Eric based upon its finding that Eric had been the consistent parenting figure in H.L.M.'s life. However, because it was in H.L.M.'s best interest to have a relationship with Stephanie, the court adopted a permanent parenting plan giving Stephanie supervised visits with H.L.M. in Wichita. Under the plan, the visits would increase in length, and eventually be unsupervised if Stephanie maintained consistent visitation.



*Discussion*

In this appeal, Stephanie argues the district court abused its discretion, (1) by failing to award Stephanie primary residential custody and (2) by ordering supervised visitation to take place in Wichita. Eric argues the district court's decisions were based on the best interests of H.L.M and were supported by substantial evidence of Stephanie's failure to maintain consistent visitation with H.L.M.

We review the district court's decision regarding child custody and visitation for an abuse of discretion. See *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006) , *cert. denied* 549 U.S. 954 (2006).

Judicial discretion is abused when the decision is based upon inapplicable legal standards or when no reasonable person could have reached a similar determination under the facts presented. *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1031, 186 P.3d 852 (2008).

"When the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the child. The trial court is in the best position to make the inquiry and determination, and in the absence of abuse of sound judicial discretion, its

judgment will not be disturbed on appeal. [Citations omitted.]" *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 (1998).

In reviewing the district court's decision for abuse of discretion, we look only to evidence supporting the decision. *In re Marriage of Whipp*, 265 Kan. at 502. The party asserting an abuse of discretion bears the burden of establishing such abuse. *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007).

*Denial of Stephanie's motion for primary residential custody*

In her amended motion, Stephanie alleged a material change in circumstances based on Eric and H.L.M.'s relocation to Oklahoma. Stephanie further alleged that Eric failed to provide the required notice of the move, failed to maintain communication with her, and failed to permit visitation. Although Stephanie sought sole legal custody in the motion, by the time of the hearing the parties agreed to joint legal custody. On appeal, Stephanie does not appear to challenge the district court's findings of fact, but rather argues the district court did not properly consider those facts in concluding that it was in H.L.M.'s best interests to remain in the residential custody of Eric.

Subject to the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, K.S.A. 38-1336, *et seq.*, a district court may change or modify any prior

order of custody, residency, visitation and parenting time, upon a showing of a material change of circumstances. K.S.A. 2007 Supp. 60-1610(a)(2)(A). Relocation of a child's residence may be considered a material change in circumstances which justifies modification of prior orders. K.S.A. 60-1620(c). Additionally, a parent entitled to legal custody, residency of, or parenting time with a child pursuant to K.S.A. 60-1610, is required to provide the child's other parent with written notice of a change of the child's residence or that child's removal from the state if such removal is to exceed 90 days. K.S.A. 60-1620(a).

In theory, the parent desiring to change the child's residence or to remove the child from the state for an extended period would provide written notification to the other parent prior to the relocation. Then, if the other parent objects, he or she would file a motion claiming a material change of circumstances and seeking modification of previous court orders. The district court would then consider, *inter alia*, the following factors:

"(1) The effect of the move on the best interests of the child; (2) the effect of the move on any party having rights granted pursuant to K.S.A. 60-1610, and amendments thereto; and (3) the increased cost the move will impose on any party seeking to exercise rights granted under K.S.A. 60-1610, and amendments thereto." K.S.A. 60-1620(c).

Here, it was undisputed that Eric failed to provide the statutorily required notice prior to moving with H.L.M. to Oklahoma. While the district court may consider relocation as a material change in circumstances, it is not required to modify residential placement based solely on the residential parent's failure to provide statutorily required notice prior to relocation. See K.S.A. 60-1620(b) (failure to provide the required notice is punishable as indirect civil contempt); K.S.A. 60-1620(c) (courts may consider a change of residence or removal of the child as a material change in circumstances); *In re Marriage of Grippin*, 39 Kan. App. 2d at 1033 ("the mere fact of the relocation . . . does not mandate a change in residential placement").

Nevertheless, in all child custody or residency situations, the overriding factor in a district court's decision is the best interests of the child. K.S.A. 2007 Supp. 60-1610(a)(3); *In re Marriage of Whipp*, 265 Kan. at 506. Moreover, neither parent is considered to have a vested interest in the custody or residency of the child. K.S.A. 2007 Supp. 60-1610(a)(3)(C). In determining the best interests of the child, the district court is to consider several relevant factors, including but not limited to:

"(i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

(ii) the desires of the child's parents as to custody or residency;

- (iii) the desires of the child as to the child's custody or residency;
  - (iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
  - (v) the child's adjustment to the child's home, school and community;
- [and]
- (vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent." K.S.A. 2007 Supp. 60-1610(a)(3)(B).

See also Leben & Moriarty, *A Kansas Approach to Custody Move-Away Cases*, 37 Washburn L. J. 497, 535-36 (1998) (suggesting additional factors for consideration by the district court, including the availability of a reasonable alternative visitation schedule; the extent of the non-custodial parent's exercise of visitation rights; the soundness of the motive behind the custodial parent's decision to relocate; and "[t]he attributes and characteristics of the parents and children and how the children have fared under the original custody and visitation agreement").

Here, in denying Stephanie's motion for residential custody, the district court considered Stephanie's history of inconsistent visitation and her inability to recognize the detrimental impact of that inconsistency on H.L.M. While the district court acknowledged that Stephanie's life had stabilized since 2004, it further found that Eric

had been the consistent parenting figure in H.L.M.'s life and that he had provided for H.L.M. both physically and emotionally. At the time of the hearing, H.L.M. had not seen Stephanie for over 2 years and had spoken to her by phone only twice. Stephanie admitted that since the divorce she had never served as the residential parent.

Although Eric failed to provide the statutorily required notice prior to the move to Oklahoma, he testified that he had not heard from Stephanie for 6 months prior to his decision to relocate and that he moved in order to live with his mother, who provided stable day care while Eric worked.

While Stephanie's failure to maintain contact with Eric did not excuse Eric's noncompliance with the statute, it undermines Stephanie's claim that Eric failed to maintain communication with her, failed to permit visitation, and that the move to Oklahoma "effectively destroyed any chance for Stephanie to be a parent for H.L.M."

We conclude the district court's findings of fact are supported by the record, and the court applied the proper legal standards in determining whether to grant Stephanie's motion for sole custody of H.L.M. The district court did not abuse its discretion in denying Stephanie's request for residential custody, and we affirm the district court's denial of that request.

*Permanent parenting plan*

Next, Stephanie challenges the district court's parenting plan, arguing its requirement that Stephanie to travel from Topeka to Wichita for supervised visitation with H.L.M. is arbitrary and unreasonable based on Stephanie's limited financial resources.

A parent is entitled to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the child's physical, mental, moral or emotional health. K.S.A. 60-1616(a). A district court has discretion to order exchange or visitation to take place at a child exchange and visitation center, as established in K.S.A. 75-720 and amendments thereto. K.S.A. 60-1616(f)(1).

Here, the district court determined it would be in H.L.M.'s best interests to develop a relationship with Stephanie through a graduated parenting plan. The plan began with limited supervised visits for 3 months, moved to extended unsupervised visits for 3 months, and culminated in extended unsupervised visits plus a monthly overnight stay in Topeka. The plan was conditioned on Stephanie's ability to maintain consistent visitation, and required supervised visitation and exchanges to occur at the Wichita visitation center.

Stephanie testified she did not have the financial resources to make regular trips to Oklahoma or to a midpoint between Topeka and Guthrie because her "older style car" would not be able to handle the miles, but that she would be willing to help with transportation costs.

While we recognize that the parenting plan established by the district court may be difficult for Stephanie financially, it appears to be a reasonable compromise under the circumstances. The district court was within its discretion to order exchanges and visitation to take place at any of the statutorily established visitation centers. See K.S.A. 60-1616(f)(1). Additionally, we note that Wichita is approximately halfway between Topeka and Guthrie. See K.S.A. 60-409(b); K.S.A. 60-412(c).

Because we find no abuse of discretion, we affirm the permanent parenting plan established by the district court.

Affirmed.