NOT DESIGNATED FOR PUBLICATION

No. 103,375

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MARY ANN FLIPSE,
Appellant,

and

TYLER WADE FLIPSE,
Appellee.

MEMORANDUM OPINION

Appeal from Thomas District Court; GLENN D. SCHIFFNER, judge. Opinion filed June 25, 2010. Affirmed.

Todd R. Stramel, of Stramel Law Firm, P.A., of Colby, for appellant.

Melissa M. Schoen, of Worden Law Office, of Norton, for appellee.

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

Per Curiam: In this appeal, Mary Ann Flipse, now known as Mary Ann Engel, argues the district court abused its discretion in modifying a previous order regarding primary residential custody of D.F., the minor child of Mary Ann and Tyler Flipse, and in denying Mary Ann's motion for a new trial. For the reasons stated below, we affirm.

FACTS

In January 2007, Mary Ann and Tyler divorced. As part of the divorce decree, Mary Ann and Tyler were awarded joint custody of their minor daughter, D.F., with Mary Ann having primary residential custody. Tyler was granted parenting time every other weekend and alternating holidays. After the divorce, both parties continued to reside in Oakley, Kansas.

In July 2008, Tyler filed a motion to change custody, based on Mary Ann's intention to relocate to Lawrence, Kansas, to live with her boyfriend. In the motion, Tyler requested the district court award him primary residential custody of D.F. Tyler argued it would not be in D.F.'s best interest to continue to primarily reside with Mary Ann. The district court ordered the parties to participate in mediation and also ordered the parties to complete psychological evaluations with parenting emphasis.

On June 12, 2009, Mary Ann filed a petition for protection from abuse (PFA), alleging Tyler sexually abused D.F. In an order dated July 21, 2009, the district court issued an order denying relief, finding that any statements made by D.F. regarding alleged abuse were suspect based on Mary Ann's interrogations of D.F., two of which were recorded by Mary Ann. Although the tape recordings were not included in the record on appeal, apparently D.F. did not state she had been abused until after Mary Ann repeatedly communicated that she thought D.F.'s statements to the contrary were lies.

After two failed attempts at mediation, the district court conducted an evidentiary hearing on September 16, 2009. At the hearing, both parties called numerous character witnesses to testify regarding their parenting ability and relationship with D.F. The parties also testified.

In addition to the parties and character witnesses, Lori Hertel, the counselor who performed the psychological evaluations ordered by the court, also testified. Hertel testified she observed nothing in the evaluations that would justify a change in D.F.'s custody placement. She further testified she never recommends a change in custody unless there is a significant reason for doing so.

Notwithstanding Hertel's testimony, the district court ultimately awarded Tyler primary residential custody of D.F. The district court awarded Mary Ann parenting time every other weekend during the school year, alternating holidays and summer from 1 week after the end of school to 1 week before the start of school. In support of its decision, the district court found that designating Tyler as primary residential custodian was in D.F.'s best interests. In making this finding, the district court considered the factors set forth in K.S.A. 2009 Supp. 60-1610(a)(3)(B). More specifically, the district court primarily relied on K.S.A. 2009 Supp. 60-1610(a)(3)(B)(vi) in granting Tyler's motion. This factor focuses on "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. 2009 Supp. 60-1610(a)(3)(B)(vi). The court found the evidence demonstrated that Mary Ann did not show respect or appreciate the bond between D.F. and Tyler. The district court also reiterated its finding from an earlier petition for protection from abuse hearing that Mary Ann verbally abused D.F. in her interrogation of the child.

Mary Ann filed a motion for new trial based on newly discovered evidence. Mary Ann argued that Hertel, the psychological evaluator, should be allowed to update and supplement her evaluations. She also alleged in her motion that after the trial was over, Tyler advised Mary Ann that he would not be granting her any additional parenting time beyond the weekend, holiday, and summer visits set forth in the court's order. Finally, Mary Ann argued that the district court's decision was contrary to the evidence. The district court denied the motion for new trial.

ANALYSIS

Abuse of Discretion

In her first point of error, Mary Ann argues the district court abused its discretion in awarding Tyler primary residential custody of D.F. In support of this argument, Mary Ann asserts the record does not contain substantial competent evidence to support the district court's finding that it was in D.F.'s best interest to award Tyler primary residential custody.

We utilize an abuse of discretion standard of review when reviewing a district court's child custody determination. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). 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). 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).

When the custody issue is between only the parents, the primary consideration of the court is the welfare and best interests of the child. *Rayman*, 273 Kan. 996, Syl. ¶ 1. In determining what outcome best serves the interests and welfare of the child, a court decides "which parent will do a better job of rearing the child and provide a better home environment. [Citation omitted.]" *Dickison v. Dickison*, 19 Kan. App. 2d 633, 640, 874 P.2d 695 (1994). We review the record for evidence to support the district court's findings with regard to the best interests of the child as follows:

> "'The interest of an appellate court is directed only to such evidence as supports the findings of the trial court, and not to that which might tend to establish contrary findings or a different result. An appellate court must accept the evidence which is most

favorable to the prevailing party and where there is substantial competent evidence in the record to sustain a judgment—this court must sustain it rather than speculate as to what other dispositions the record might support.' *Schreiner v. Schreiner*, 217 Kan. 337, 340-41, 537 P.2d 165 (1975)." *Dickison*, 19 Kan. App. 2d at 640-41.

In her appellate brief, Mary Ann contends the weight of the testimony does not support a change in custody. She argues the district court should have given more weight to Hertel's finding that the psychological evaluations revealed nothing that would justify a change in custody. Mary Ann suggests Hertel's recommendations were "clear and direct" that it was not in D.F.'s best interests for the district court to award Tyler primary residential custody. Mary Ann also argues the district court ignored the allegations of abuse against Tyler and the testimony of D.F.'s primary care physician regarding the alleged abuse. She argues the district court should have considered the testimony of the social worker with the Kansas Department of Social and Rehabilitation Services that Mary Ann's questioning of D.F. was done in good faith. Finally, Mary Ann urges this court to reconsider Tyler's testimony that Mary Ann only violated the parenting plan on one occasion and that Mary Ann was flexible with the parenting schedule.

Mary Ann's arguments require this court to reweigh and examine all the evidence before the district court. This we cannot do. An appellate court must look only to evidence that supports the district court's decision in order to determine if discretion has been abused. See *In re Marriage of Whipp*, 265 Kan. 500, 502, 962 P.2d 1058 (1998). In other words, it is irrelevant whether this court would have reached a different decision based upon the reading of the evidence; the only consideration is whether the district court abused its discretion in reaching its decision. Our function as a reviewing court is not to, as Mary Ann suggests, "delve into the record and engage in the emotional and analytical tug of war between two good parents." See *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995).

Upon review of the record, we find ample evidence to support the district court's conclusion that Mary Ann failed to respect or appreciate the bond between D.F. and Tyler. Tyler complained that on Father's Day of 2008 Mary Ann refused to let D.F. spend the day with him. Mary Ann told Tyler that D.F. should spend time with Mary Ann's boyfriend on Father's Day rather than Tyler. Tyler further testified that when Mary Ann needs a babysitter for D.F., Mary Ann contacts other family members instead of Tyler. Tyler further explained that when he calls Mary Ann to talk to D.F. on the phone, Mary Ann will not answer the calls.

Tyler also testified that Mary Ann did not notify him of D.F.'s doctor appointments or school activities. She also failed to provide him with a school calendar. Tyler only learned of D.F.'s school activities from other parents. When Tyler was at D.F.'s after school events, Mary Ann would leave with D.F. without giving Tyler a chance to see D.F. after the event. Tyler also was not provided with copies of the weekly reports from the day care provider.

Based on the evidence in the record, the district court did not abuse its discretion in concluding that Mary Ann was unwilling to respect the bond between D.F. and Tyler. Accordingly, there is no error in the district court's decision to modify primary residential custody.

Motion for New Trial

As her second point of error, Mary Ann argues the district court abused its discretion in denying her motion for new trial based on newly discovered evidence, which consisted of supplemental testimony from Hertel regarding the psychological evaluations and evidence that Tyler informed Mary Ann that he would not permit her any parenting time over and above that which was ordered.

It is within the discretion of the trial court to grant or deny a new trial under K.S.A. 60-259(a), and such decision will not be disturbed on appeal except upon a showing of abuse of that discretion. *City of Mission Hills v. Sexton*, 284 Kan. 414, 421, 160 P.3d 812 (2007). A new trial may be granted where there is "newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." K.S.A. 60-259(a).

On a motion for new trial based on newly discovered evidence, the moving party "'bears the burden of proving that (1) the evidence is new and could not have been produced at trial with reasonable diligence, and (2) the evidence is of such materiality that there is a reasonable probability it would produce a different result upon retrial.' [Citation omitted.]" *Frans v. Gausman*, 27 Kan. App. 2d 518, 525, 6 P.3d 432, *rev. denied* 270 Kan. 897 (2000).

In Mary Ann's appellate brief, she refers to a portion of Hertel's testimony where Tyler's counsel asked Hertel if her conclusions would change if she knew that Mary Ann's relationship with her current boyfriend was unstable. Hertel responded that was "a really hard question to answer" and that she would "prefer to reassess the situation before [making a] recommendation." Based on this statement, Mary Ann argues that a new trial should be granted so Hertel can supplement her evaluation.

We are not persuaded by Mary Ann's argument. First, we do not believe Hertel's testimony qualifies as newly discovered evidence. Mary Ann does not provide the specific testimony that Hertel would testify to in the event of a new trial; she just asserts that Hertel should be allowed to supplement her opinion.

Second, Mary Ann does not explain why she was prevented from presenting a new assessment at trial. The evaluations were performed in March 2009 and trial did not occur until September 16, 2009. Hertel was called to testify by Mary Ann. Mary Ann had a

substantial amount of time in between the evaluations and trial to provide Hertel with additional information to supplement her findings.

Finally, any information that Hertel would provide is likely not of "such materiality that there is a reasonable probability it would produce a different result upon retrial." See *Frans*, 27 Kan. App. 2d at 525. In concluding that it would be in D.F.'s best interests to reside primarily with Tyler, the district court found that Mary Ann was unwilling to respect and appreciate the bond between D.F. and Tyler and that Mary Ann had verbally abused D.F. Any testimony Hertel would provide at a new trial likely would not have been material to either of those findings. When Hertel responded that she would need to "reassess the situation," she was referring to Mary Ann's relationship with her current boyfriend and not the verbal abuse or Mary Ann's inability to respect the bond between D.F. and Tyler.

Mary Ann's argument that the district court should have granted a new trial based on Tyler's statements that he was not going to allow Mary Ann any additional parenting time is also without merit. Mary Ann had a full opportunity to present this evidence to the district court at the hearing on the motion for new trial. At the hearing, the district court allowed Mary Ann to testify regarding Tyler's statements and also heard a tape recording of Tyler's statements. The district court concluded that none of the evidence presented at the hearing warranted a new trial.

For these reasons, we hold the district court did not abuse its discretion in denying Mary Ann's motion for new trial on the ground of newly discovered evidence.

Affirmed.