NOT DESIGNATED FOR PUBLICATION

No. 103,715

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF JAMES ERIK THOMPSON
AND ALISA S. COTTER.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; J. PATRICK WALTERS, judge. Opinion filed October 8, 2010. Affirmed.

James A. Thompson, of Malone, Dwire & Thompson, LLC, of Wichita, and *Gerald D. Eidelman*, of Law Offices of Gerald D. Eidelman, of Wichita, for appellant.

Stephen M. Turley, of Floodman, Wagle & West, of Wichita, for appellee.

Before MALONE, P.J., HILL and ATCHESON, JJ.

Per Curiam: This dispute illustrates the shortcomings of the judicial process in resolving issues arising from child custody disputes. Everyone has acted appropriately. Both parents appear to genuinely care about their daughter and have worked cooperatively to raise her. The trial court weighed a wealth of testimony and other evidence about the child's best interests in determining whether to continue or change residential custody. The trial court ultimately transferred that custody from mother to father. Especially given our standards for reviewing those sorts of decisions, we find no legal deficiency in the trial court's conclusion and, therefore, affirm.

The record would have supported the opposite conclusion, as well. There lies the shortcoming. The parents could not agree on a custodial arrangement for their daughter. In the absence of a mutual agreement, a judge is required to impose a solution. That's

what happened here. The process worked and worked correctly. The result, however, cannot be as satisfactory as an arrangement the parties might have fashioned for themselves.

Appellant Alisa S. Cotter and Appellee James Erik Thompson are, respectively, the mother and father of T.M.T., who at the time of these proceedings was 10 years old. Cotter and Thompson never married. Shortly after T.M.T. was born, Thompson initiated a paternity proceeding in Sedgwick County District Court. The judge hearing that matter granted residential custody to Cotter. T.M.T. lived with her mother and two half-siblings in Wichita; she saw her father, who also lives in Wichita, on a regular basis. And by all accounts, each parent took an active and constructive role in raising T.M.T. T.M.T. did well in school, participated in many extracurricular activities, and enjoyed the company of extended family on both her mother's and father's sides. All seemed to be running smoothly until Cotter decided to pursue a doctorate degree and determined the nearest school that could accommodate her academic desires was in the Dallas, Texas, area.

In 2009, Cotter sought to move with her husband, T.M.T., and her other children. Thompson objected, since the relocation would significantly reduce his time with T.M.T. The two could not work out a satisfactory resolution—the distance prevented any realistic approach preserving the existing arrangements for sharing time with T.M.T. In June 2009, Thompson filed a motion with the Sedgwick County District Court seeking residential custody of T.M.T. and asking that he be granted temporary custody until the court entered a final decision. The district court granted Thompson temporary custody without a hearing and set the motion for a bench trial in November. The pretrial order placed the burden of proof on Thompson as the party moving for a change of custody. At the trial, which lasted the better part of a day, the trial court heard testimony from Cotter, Thompson, and other family members. The testimony described T.M.T.'s relationship with family, including her half-siblings, her school activities, and living arrangements as they would be with Cotter in Dallas and as they had been with Thompson both before and

after he received temporary custody. Thompson and Cotter each agreed the other was a fit and suitable parent. There was hearsay testimony about T.M.T.'s views of the potential move to Dallas and the living arrangements with Thompson and with Cotter. The testimony suggested T.M.T. sometimes preferred moving to Dallas and sometimes preferred staying in Wichita. The trial judge declined to hear from T.M.T. directly either in the courtroom or in chambers.

The trial court ruled that based on all the evidence, T.M.T.'s best interests would be served by making permanent the temporary custody order he had previously entered. In short, T.M.T. would remain with her father in Wichita. The trial court entered a journal entry to that effect in December 2009. Cotter has timely appealed that decision.

Because Cotter and Thompson never married, the statutes regarding paternity, K.S.A. 38-1110, *et seq.*, control the original custody order and the recent proceedings to modify that order. In particular, K.S.A. 38-1132 addresses changes in court-ordered custody and closely resembles K.S.A. 60-1620. The parties, however, argued their appeal as if the divorce statutes furnish the governing law. Despite the similarity of K.S.A. 38-1132 and K.S.A. 60-1620, the legislature has not borrowed other divorce statutes for inclusion among the paternity statutes. And those distinctions blunt some of Cotter's legal arguments on appeal.

In considering a motion for change of residential custody of a minor child, the trial court is to weigh "all factors" it "deems appropriate." K.S.A. 38-1132(c). The statute enumerates "the best interest of the child," the effect of the move on any party granted parenting time with the child, and "the increased cost" the move may have for a party with parenting rights. The trial court may take into account other circumstances.

A trial court's decision regarding initial custody or any change of custody may be successfully challenged on appeal only for an abuse of discretion. *Carty v. Martin*, 233

Kan. 7, 11, 660 P.2d 540 (1983) (abuse of discretion standard applied to custody determination in paternity proceeding); *Skillett v. Sierra*, 30 Kan. App. 2d 1041, 1049, 53 P.3d 1234 (2002). A trial court may be said to have abused its discretion only if the result is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if the court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). The standard for appellate review here is a formidable one.

In deciding this appeal, we need not recreate the trial court's scorecard of pluses and minuses for placing T.M.T. with either parent. Nor do we need to fill out our own scorecard. Indeed, the standard of review precludes us from doing so. Nonetheless, Cotter invites us to reweigh the evidence. The question here is not whether we would have or even might have reached the same conclusion as the trial judge. The question is simply whether that decision strays so far from what might be considered reasonable that we would conclude no judge should have reached that result. In framing the issue, we do not mean to suggest that we necessarily would have decided the custody issue differently from the trial court. The trial court correctly characterized this as a close and difficult case. Either result – allowing Cotter to retain residential custody of T.M.T. or transferring custody to Thompson – would have been within the trial court's sound discretion as we review the record. We cannot and shall not reverse on that basis.

Certainly, Thompson is a capable, loving parent. So is Cotter. T.M.T. has extended family in Wichita. She continued to excel in school and otherwise appeared to be well-adjusted socially between the time Thompson assumed temporary custody and the bench trial. Those circumstances support the trial court's decision. The evidence showed that Thompson works full-time and probably would not have been able to spend as many hours a day with T.M.T. as Cotter, at least until she began her doctoral program.

But T.M.T. was not a latch-key kid with Thompson; other adult family members were present to supervise and assist her. While the testimony indicated that in Dallas T.M.T. would have her own bedroom rather than having to share a room in Thompson's house and would have continued to live with her half-siblings, those considerations cannot render the trial court's determination an abuse of discretion. We have no legal reason or basis to disturb the trial court's ultimate conclusion to switch residential custody to Thompson.

Cotter raised several other specific objections on appeal, and we address those briefly. First, Cotter contends the trial court improperly placed the burden of proof on her to demonstrate that the move to Dallas was in T.M.T.'s best interests (and, therefore, that custody should remain with her). The record does not support the argument.

As noted, the pretrial order placed the burden on Thompson as the moving party to prove his case for changed custody. Although the trial judge never explicitly stated how he allocated the burden of proof, nothing in his comments from the bench or in the journal entry suggests he did anything other than follow the pretrial order. Just as we are reluctant to say jurors have ignored instructions, *City of Mission Hills v. Sexton*, 284 Kan. 414, Syl. ¶ 20, 160 P.3d 812 (2007), we are disinclined to suppose a trial judge hearing a case has disregarded the pretrial order without some clear evidence to that effect.

Cotter points to a finding in the journal entry that states: "The Court . . . must determine what is in the best interests of the minor child as to whether she should be allowed to leave the State of Kansas and move to the State of Texas." The trial court made a similar statement from the bench. But Cotter reads too much into the journal entry and the statement. They identify the issue (and correctly so), but do not reflect the party bearing the burden of proof. Here, the way the issue is phrased, Thompson bore the burden of showing the move was *not* in T.M.T.'s best interests. Cotter, however, says the issue should have been stated as whether T.M.T. ought to stay in Wichita with custody

changed to Thompson. In that event, Thompson would have had the burden to show that staying in Wichita (with him) was in T.M.T.'s best interests. In short, however the issue might have been stated the burden of proof did not shift from Thompson.

For example, in an intersection collision in which the key issue is whether the plaintiff or defendant had the green light, the issue might be stated a couple of different ways. The issue could be stated: "Was the light green for Defendant John Doe?" In that case, Plaintiff Richard Roe would have the burden of proving the light was NOT green for Doe. But the issue could be stated: "Was the light red for Defendant John Doe?" Roe would then have the burden to show the light was red for Doe. The phrasing of the issue does not change the party bearing the burden of proof.

Cotter points to *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 186 P.3d 852 (2008), as requiring reversal here. But in that case, the trial judge explicitly declared the burden of proof fell on the custodial parent to prove why she should retain custody in light of her contemplated move out of the state. 39 Kan. App. 2d at 1032. That error required reversal for reconsideration in light of the proper allocation of the burden. 39 Kan. App. 2d at 1033. As noted, there are no comparable facts here.

Cotter contends the trial judge should have spoken directly to T.M.T. as part of the bench trial. Maybe, maybe not. That is a call left to the discretion of the trial judge, especially given his vantage point in assessing the testimony of other witnesses. We do not second guess or fault the trial judge for declining to interview a 10-year-old child in a custody dispute.

Cotter similarly suggests the trial judge elevated Thompson's interests in being with his daughter over those of her half-siblings in being with their sister. That certainly is the net effect of the trial court's decision. But, again, there is no abuse of discretion in suggesting a parent's interests are paramount to those of half-siblings. The trial court did

not ignore the benefit of preserving the family unit of Cotter, T.M.T., and the two other children and transferring that unit to Dallas. In doing so, he considered the sibling relationship. He ultimately concluded, however, that relationship, considered with the rest of the evidence, did not offset the benefits of T.M.T.'s remaining in Wichita with Thompson, the rest of her extended family, and her established and familiar social circles.

Similarly, Cotter argues that the trial judge's decision to separate T.M.T. and her half-siblings somehow runs afoul of K.S.A. 60-1610(a)(5)(B) and amounts to an impermissible divided residency in which siblings are separated absent "exceptional" circumstances. Even supposing that K.S.A. 60-1610(a)(5)(B) covers half-siblings, the statute has no application here. The statute addresses child custody in a divorce proceeding. Here, we are concerned with custody arrangements in a paternity case. There is no comparable admonition to courts considering residential custody arrangements in paternity actions. Had the legislature intended one, it would have enacted a comparable statute in Chapter 38, Article 11.

In sum, we agree with the trial judge that this was a difficult case in no small part because both Cotter and Thompson have been concerned and attentive parents to T.M.T. In that sense also, it was, as the trial judge said, a close case. The trial judge was asked to make a decision regarding residential custody for T.M.T. He did so. We find nothing legally amiss in that decision. We, therefore, affirm.