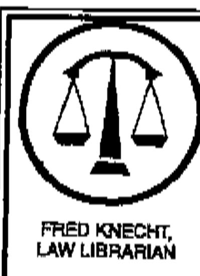

Kansas Supreme Court Law Library

KANSAS JUDICIAL CENTER
301 WEST 10TH ST.
TOPEKA, KANSAS 66612-1598

FRED KNECHT,
LAW LIBRARIAN

Telephone (785) 296-3257
Fax (785) 296-1863
e-mail lawlibrary@kscourts.org

FAX COVER SHEET
STATEMENT OF CHARGES

Date: 1-15-10

This fax is directed to: Ron Nelson Sct. Ct. # 11000

Address: Overland Park

Address:

Requested by: Betsy

Business Phone: 913-312-2500 Fax Phone: 913-312-2501

Number of pages including cover sheet: 16 $0.50 ea. $ 8.00

Special Instructions:

This fax has been sent by Claire

If you do not receive all pages, please call as soon as possible.

THIS FAX COVER SHEET IS YOUR STATEMENT OF CHARGES. ***PAYMENT IS DUE UPON RECEIPT.*** **PLEASE ENCLOSE A COPY OF THIS SHEET WITH YOUR PAYMENT.** Make checks payable to:

Kansas Supreme Court Law Library
301 S. W. 10th Street
Topeka, KS 66612-1598

NOT DESIGNATED FOR PUBLICATION

No. 102,076

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

JENNIFER L. GODFREY,

Appellant,

v.

MICHAEL R. GODFREY,

Appellee.

MEMORANDUM DECISION

Appeal from Meade District Court; VAN Z. HAMPTON, judge. Opinion filed January 15, 2010. Affirmed.

Linda Gilmore, of Gilmore, Shellenberger & Maxwell, P.A., of Liberal, for appellant.

Glenn I. Kerbs, of Kerbs Law Office, of Dodge City, for appellee.

Before HILL, P.J., CAPLINGER and LEBEN, JJ.

Per Curiam: After her divorce from Michael R. Godfrey in 2005, Jennifer L. Godfrey's two children, Caden and Carson, lived mainly with her in Meade, Kansas. But when she moved from Meade to McPherson, Kansas, in 2008, Michael wanted the children to stay with him in Meade. The parties turned the matter over to the district court to decide after unsuccessfully trying to settle their differences. In the end, the court decided both children should stay in Meade. Jennifer appeals, arguing this decision is an abuse of discretion. Because we find no abuse of discretion, we hold the district court properly granted Michael's motion and placed the children in his home. We affirm.

Jennifer wants to move about 3 years after the divorce.

Jennifer L. Godfrey and Michael R. Godfrey were divorced in May 2005. The court awarded Jennifer primary residential custody of the parties' children. In turn, the court ordered parenting time for Michael with the children based upon a mediated agreement that accommodated his work schedule. Then, in April 2007, through mediation, the parties revised their parenting agreement in response to Michael's job change. As a result, Michael and the children were together Monday through Friday from 5 p.m. to 7 p.m. The district court approved that agreement.

Sometime in June 2008, Michael learned that Jennifer planned to move from the parties' hometown of Meade to McPherson. He responded by asking the district court to modify his parenting time. The parties were unsuccessful in mediation so the court heard the matter at hearings set in September and October 2008. By the time of the hearings, Jennifer had moved with the children to McPherson. In the end, the court held it was in the best interests of the Godfrey children that they return to Meade to live with Michael.

In this appeal, Jennifer attacks the court's order by arguing the court abused its discretion in three ways. First, she contends the court failed to consider all of the statutory factors set out in K.S.A. 60-1610(a)(3) as it should have. Second, Jennifer argues that Michael did not timely file his motion and her move to McPherson was not a "material change of circumstances" that the law requires before a court will address such an issue. Finally, she avers Michael failed to meet his burden of proving it was in the children's best interests to move them from her home in McPherson to his in Meade. We will address her contentions in that order after establishing our standard of review and reviewing some fundamental points of law.

We must use an abuse of discretion standard of review.

When a party appeals a district court's grant of a motion to modify custody, this court reviews for an abuse of discretion. When the district court bases its decision on an inapplicable legal standard or when no reasonable person could have reached a similar determination under the facts presented we hold that court has abused its discretion and reverse. Further, a district court also abuses its discretion when it misapplies the burden of proof when reaching its decision. See *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1031, 186 P.3d 852 (2008).

We recognize that these important questions of child placement are not easy to resolve, but they are reviewable. And, we note that a court abuses its discretion when the judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then we will not say that the trial court abused its discretion. Finally, simply put, it is inappropriate for this court to reweigh the evidence. See *State v. Gant*, 288 Kan. 76, 81, 201 P.3d 673 (2009).

We review some fundamental points of law concerning child placement.

Our law establishes certain steps for a court to take when making a ruling on custody questions. First, when the evidence shows a material change of circumstances, K.S.A. 60-1610(a)(2) allows a court to modify any prior order of custody, residency, visitation, or parenting time. In dealing with such questions, the party filing a motion seeking a change in the existing court order bears the burden of showing a material change of circumstances. See *Simmons v. Simmons,* 223 Kan. 639, 642, 576 P.3d 589 (1978). Then, according to K.S.A. 60-1620(c) a court can consider a change in a child's residence a material change of circumstances. This court in *Grippin* held that the parent seeking a modification of the court's order met his burden of proving a material change in circumstances where it was undisputed that the other parent had moved with the child from Kansas to another state. 39 Kan. App. 2d at 1031-32.

Applying those rules here, we note the parties do not dispute the fact that Jennifer moved from Meade to McPherson with their children. Under the ruling in *Grippin,* it is clear Michael met his burden of showing a material change of circumstances and the district court decided properly that the move represented a material change of circumstances.

Next, we examine the statutory factors considered by the court in making its decision.

The law requires a district court to look at several factors that the court may deem appropriate when making a child placement decision. According to K.S.A. 60-1620(c), the court must consider:

(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,

(3) any increased cost the move will impose on any party seeking to exercise rights granted under K.S.A. 60-1610.

Moreover, following K.S.A. 60-1610(a)(3)(B), the court must determine custody or residency in accordance with the best interests of the child and must consider:

(1) the desires of the parents as to custody or residency;

(2) the desires of the child as to custody or residency;

(3) the interaction and interrelationship of the child with parents, siblings, and other persons who may significantly affect the child's best interests;

(4) the child's adjustment to his or her home, school, and community; and,

(5) the willingness and ability of each parent to respect the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent.

Our review of the record leads us to conclude the district court considered the factors set forth in K.S.A. 60-1620(c) when making its decision. The court found the move had an effect on the best interests of the Godfrey children because of the "extraction of their father from their life." The court noted it was "clear" that Michael had frequent contact with the children before the move and much less contact after the move. The court also found the move had a direct effect on Michael "as a result of having his parenting time changed, as well as increasing the costs and difficulty of him having contact with the children." All of these findings correspond to the statute.

The record supports the court's findings. At the custody hearing, Michael testified he saw the children every day after the divorce. Under the parenting agreement, Michael saw the children Monday through Friday from 5 p.m. to 7 p.m., every third weekend, and on certain holidays. After the move, Michael was unable to see the children on the weeknights. Jennifer admitted Michael could not see the children at these times because she was out of town. McPherson is 182 miles from Meade. Michael testified the move

changed his relationship with the children and noted a "distance" between himself and Caden that was not there before the move.

Jennifer cites *Grippin* in support of her contention that the district court failed to consider all the statutory factors. She argues that when the trial court in *Grippin* failed to address the factors set forth in K.S.A. 60-1610(a)(3)(B), this court reversed and remanded the case for the district court to detail its findings in the context of these statutory factors. Jennifer's argument is inaccurate. First, in *Grippin,* this court reversed and remanded because the district court placed the burden of proof on the wrong party. 39 Kan. App. 2d at 1032-33. Second, this court merely *encouraged* the district court to detail its findings regarding K.S.A. 60-1610(a)(3)(B) on remand. 39 Kan. App. 2d at 1034. Finally, this court did not suggest that the failure to consider or address all factors in K.S.A. 60-1610(a)(3)(B) is reversible error.

It appears the district court did consider several K.S.A. 60-1610(a)(3)(B) factors when reaching its decision. The court appears to have considered the relationship of the children with their parents, their siblings, and other persons who would significantly affect their best interests. The court looked at the children's adjustment to their home, school, and community in Meade, and the willingness and ability of Jennifer and Michael to respect the bond between the children and the other parent and to allow for a

continuing relationship. Although the district court did not mention K.S.A. 60-1610(a)(3)(B) or discuss the factors set forth in the statute, its failure to do so is not error especially since Jennifer did not object to the court's findings. See *Grippin*, 39 Kan. App. 2d at 1034.

When ruling, the district court noted it could consider any restrictions the custodial parent placed on the parenting contact of the noncustodial parent and found "that to be a factor." The court also noted it had considered other factors, including that their maternal grandfather was a helpful influence in the children's lives. The court reasoned that the children were doing as well in Meade as in McPherson, that Meade was the children's hometown, that the children have family in Meade, and that it was in the best interests of the children to be returned to Meade.

The record supports these findings. At the custody hearing, Michael testified Jennifer did not contact him or ask permission to move the children. Michael also explained that Caden was involved in a bowling league and that both children were involved in tractor pulls, baseball, and tee ball. Michael stated he took the children to baseball practice and games and would not be able to coach or go to practices in McPherson.

The record also reveals that Michael testified that his parents and the children's aunts, uncles, and cousins all live in Meade. Michael stated the children have school friends in Meade and know the teachers there. Michael testified the children have a very good relationship with his present wife and stepsister and that they all get along well. Michael maintained it was not in the best interests of the children to take away their relationships in Meade and that the children would not have as much freedom in a big town.

Jennifer agreed the children's needs and interests were met in Meade and that Meade was a good community in which to live. The children's grandfather, Jennifer's father, testified he often took the children hunting and fishing on weekends and that he would be moving to McPherson.

We look at the specific concerns raised by Jennifer.

Jennifer first claims the court failed to address the desires of the parents regarding custody or residency. She argues the testimony indicates Michael only desired reasonable parenting time, not a change of custody. The testimony indicates Michael initially wanted reasonable parenting time and did not object to the move but that Michael changed his mind when he and Jennifer could not agree on a parenting

agreement and Jennifer moved the children. At that time, Michael not only expressed his desire for a change in custody, as reflected by his motion to modify custody, but he repeatedly testified that he never indicated to Jennifer that it was okay to move the children to McPherson. Michael testified he made his objection to the move clear and that he did not feel it was in the children's best interests. This feeling is clearly reflected in letters Michael had sent to Jennifer's attorney first, on June 10, 2008:

> "We expect Jennifer to comply with the Parenting Plan dated April 11, 2007, until the plan is either modified by agreement of the parties or an order from the Court. I mention this because Jennifer mentioned during mediation she intends to move from Meade County. We want the children to remain in Meade County with either Jennifer or Michael until such time as the parenting plan is modified."

Then, in a letter dated July 16, 2008:

> "As stated in my letter to you dated June 10, 2008, we expect the Godfrey children will remain in Meade County with either Jennifer or my client until the parenting plan is reviewed by the court in September."

Jennifer next complains about the lack of findings regarding the desires of the children. Because the children were never given the opportunity to voice their desires regarding custody or residence on the record, this factor is inapplicable.

Jennifer next complains about the lack of discussion regarding the interaction and interrelationship of the children with parents, siblings, and other persons, specifically emphasizing on the lack of discussion regarding the relationship between Jennifer and the children. We view this argument as a request to reweigh the evidence, a task we cannot perform. The record includes ample testimony regarding both Jennifer and Michael's relationship and involvement with the children. Moreover, the district court heard testimony about the children's relationship with Michael's present wife, daughter, and the children's grandfather. The district court specifically addressed the latter when it noted that the grandfather was a helpful influence in the children's lives. Michael testified his parents, aunts, uncles, and cousins live in Meade, the children have school friends in Meade, and the children know the teachers in Meade.

Jennifer next complains the district court did not consider the children's adjustment to their home, school, and community. We note K.S.A. 60-1610(a)(3)(B)(vi) does not specify that the district court must consider how the children have adjusted to the *new* location. Here, the district court considered the children's home, school, and

community situation in Meade. As noted, the district court found that the children were doing as well in Meade as in McPherson, that Meade was the children's hometown, and that the children have family and friends in Meade, and these findings are supported by the record.

Jennifer finally argues the district court failed to consider testimony regarding the willingness and ability of each parent to respect the bond between the child and the other parent and to allow for a continuing relationship. This court will not reweigh the evidence. We do note that Michael's testimony revealed valid explanations for some of the instances Jennifer notes on appeal. Moreover, the record reveals that these incidents only reflect problems between Jennifer and Michael and do not represent situations in which Michael directly hindered Jennifer's bond or relationship with the children. The district court focused on the fact that Jennifer moved the children without Michael's consent or authority of the court. This is reflected by the district court's comments that it could consider any restrictions the custodial parent placed on the parenting contact of the noncustodial parent and that it found "that to be a factor."

Jennifer fails to convince us to reverse the district court on these points.

Michael's motion was timely filed.

Next, Jennifer argues Michael's motion to modify custody was not timely and was therefore not a material change in circumstances. Jennifer emphasizes that she gave a 30-day notice, and Michael only responded with a motion to modify parenting time and did not object to the move. She argues Michael should have filed a motion to modify custody once he learned of the move if he had an objection because the purpose of the 30-day notice is to give the nonresidential custodial parent a time in which he or she can file a motion to modify custody if he or she objects to the move. Because Michael failed to file such a motion during the 30-day period, his motion was untimely.

We must point out that the statute in question, K.S.A. 60-1620(c), gives no deadline for the filing of such a motion.

Jennifer goes on to argue that because Michael did not file a motion to modify custody until after the move, the move was no longer a material change in circumstances and their residence in McPherson was the "new status quo." In essence, she contends since she went ahead and moved, Michael cannot complain about it. That contention is disingenuous. Michael filed his motion to contest the anticipated move. Jennifer must have been aware that the court would hear his motion in September but moved anyway.

If we would allow such an argument, it would reward a parent for ignoring an upcoming court hearing and moving away from the jurisdiction of the court.

Michael met his burden.

For her final issue, Jennifer claims Michael failed to meet his burden of proving a change in residential custody was warranted. She essentially argues there was insufficient evidence to support each claim Michael set forth in his motion to modify custody. We will not go over all of the evidence again in order to rule on this point. The district court properly considered the factors listed in K.S.A. 60-1610(a)(3)(B) and K.S.A. 60-1620(c), and the record in this regard supports the court's findings.

The court did not abuse its discretion in granting residential custody to Michael.

Affirmed.