

NOT DESIGNATED FOR PUBLICATION

No. 101,917

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

DENISE GRAY STEVENS,
Appellant,

and

TIMOTHY STEVENS,
Appellee.

MEMORANDUM OPINION

Appeal from Lyon District Court, W. LEE FOWLER, judge. Opinion filed
January 22, 2010. Affirmed.

Pantaleon Florez, Jr., of Topeka, for appellant.

No appearance by appellee.

Before RULON, C.J., GREENE and McANANY, JJ.

Per Curiam: Denise Gray Stevens (Mother) appeals from the district court's orders related to a motion for change of residential placement of her minor son filed by her ex-husband, Timothy Stevens (Father). She claims the court erred in changing residential placement to Father. She also claims the court erred in ordering her to prepay Father's expenses as a condition of scheduling a rehearing, in denying her motion for a continuance, and in calculating her child support payments.

These proceedings occurred in 2008. They followed a protracted series of placement disputes that began after the parties divorced in February 2000. At the time of the divorce, the court granted primary residential placement to Mother. There were four change of placement motions filed before the instant motion.

We need not recount the details of the parties' lives since they divorced. It suffices to say that Father remarried shortly after the divorce, moved to Kentucky, and is now in a stable marriage relationship. The child, now a young teenager, apparently has a good relationship with his stepmother.

Mother also remarried at some point and divorced again in 2007. It appears that this later marriage was marred by domestic violence. Mother changed her residence a number of times, but apparently stayed in the same area of Topeka.

There was evidence, albeit disputed, regarding the child's frequent absences from school and a general decline in his school grades.

Father filed the instant motion on February 13, 2008, and served Mother with a copy. He later mailed a notice of hearing to Mother but at a wrong address. While Mother was aware of the motion for some time, she learned of the hearing only a few days before its scheduled date. On the date of the hearing, Mother orally requested a continuance, which the court denied. Both Father and Mother testified. The court then spoke privately with the child outside the presence of his parents. The court found a material change in circumstances, noting the child's falling grades and rising school absences, the disruptions in Mother's home, and the contrasting stability in Father's home. The court changed the child's primary residential placement to Father.

Mother moved for a rehearing, arguing that the improperly sent notice of hearing deprived her of adequate time to retain counsel and to fully prepare for the hearing. The court granted the rehearing but found that Mother had failed to request a continuance when she had ample opportunity to do so before the hearing. As a result, Father incurred expenses for him and his witnesses to travel from Kentucky to the hearing. Consequently, the court conditioned the rehearing on Mother reimbursing Father for his travel expenses for the initial hearing. Concerning child support, the court granted Mother a long

distance parenting cost adjustment of \$104, and a parenting time cost adjustment of 1/2 the child support for 2 months, to be apportioned over the year.

Mother paid the court-ordered travel expenses and a rehearing was held, after which the court again determined that a change in circumstances warranted a change in residential placement from Mother to Father. The court cited a number of factors, including: (1) the child's age (13 years old at the time of the first hearing); (2) the history of conflicts between the parties concerning visitation; (3) Mother's frequent moves; (4) marital discord in Mother's home; (5) the child's frequent school absences, which affected his school work; and (6) Father's stable, long-term relationship.

Mother appeals.

The Order to Repay Father's Expenses

Mother claims the court abused its discretion in conditioning the rehearing on her paying Father's travel expenses. Conditioning the rehearing in this manner was within the court's sound discretion. Judicial discretion is abused when the court acts in an arbitrary, fanciful, or unreasonable manner. If reasonable minds could differ as to the propriety of the court's action, the court did not abuse its discretion. *Schuck v. Rural Telephone*

Service Co., 286 Kan. 19, 24, 180 P.3d 571 (2008). Here, Mother has the burden of showing an abuse of discretion. See *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Mother had knowledge of the hearing several days before the scheduled date. Father's misdirecting the notice of hearing apparently was inadvertent and due to Mother's frequent changes of address. The court stated the local rules required that requests for continuance be filed at least 72 hours prior to the scheduled hearing. Rule No. 32, District Court Rules, Fifth Judicial District. The court noted that Mother could have sought a continuance consistent with the local rules, but failed to do so. Further, Mother had notice of the pending motion shortly after it was filed and had taken steps to prepare for the hearing before she learned of the hearing date. When she learned of the hearing, she failed to notify the court or Father's counsel of her need for a continuance. She waited until the day of the hearing, knowing that Father would be traveling from Kentucky in anticipation of a hearing on that date. We find no abuse of the district court's discretion in having Mother pay for travel expenses that could have been avoided had she requested a continuance sooner.

The Order Denying a Continuance

Mother complains that the district court abused its discretion when it failed to grant the continuance she requested at the commencement of the first hearing on Father's motion. The hearing proceeded. Following the hearing, Mother moved for a rehearing, which was granted. At the rehearing, Mother had the opportunity to cross-examine Father and his witnesses and to present her own evidence in opposition to the motion.

Generally, an appellate court does not decide moot questions or render advisory opinions. It is the function of a judicial tribunal to resolve real controversies between the parties. *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005). A case is moot when the controversy between the parties no longer exists and any judgment of the court would be ineffective. *Rodarte v. Kansas Dept. of Transportation*, 30 Kan. App. 2d 172, 183, 39 P.3d 675, *rev. denied* 274 Kan. 1113 (2002). Under the circumstances now before us, the propriety of the district court's order denying a continuance is moot.

The Calculation of Child Support

Mother claims that the district court erred as a matter of law in establishing her child support obligation because it denied her request for an adjustment based on her

extended summer parenting time with the child and the interstate pay differential.

We review a district court's order determining the amount of child support for an abuse of discretion. *In re Marriage of Branch*, 37 Kan. App. 2d 334, 336, 152 P.3d 1265, *rev. denied* 284 Kan. 945 (2007). We have de novo review over the interpretation and application of the Kansas Child Support Guidelines (KCSG). *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466, *rev. denied* 288 Kan. _____ (2009).

Mother concedes in her appellate brief that the court ordered an adjustment for long distance parenting time. With respect to the interstate pay differential, the child support guidelines make provision for a cost of living adjustment based upon the difference in average earnings between individuals in different states. The Guidelines provide that "the application of the Interstate Pay Differential is discretionary." 2008 Kansas Child Support Guidelines, § III. B. 9 (2008 Kan. Ct. R. Annot. 119). Table 1 in Appendix IV to the Guidelines shows that the average weekly pay in Kansas in 2006 was \$662, while the average weekly wage in Kentucky was \$656. 2008 Kan. Ct. R. Annot. 158. Wages in Kentucky were 99% of the wages in Kansas, the weekly difference being only \$6.

Mother has not calculated how this minor difference in the cost of living would affect her child support. The party claiming an abuse of discretion has the burden of establishing it. *Harsch*, 288 Kan. at 293. Considering the totality of the circumstances and the deference we afford trial judges in the overall disposition of disputes involving the placement and support of children, Mother fails to demonstrate any abuse of the district court's discretion in this regard.

The Order Changing Primary Placement

Finally, Mother argues that the district court abused its discretion in granting Father's motion for a change of the child's residential placement. Again, we apply the abuse of discretion standard. See *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002).

Mother argues that the district court erred in not considering evidence relating to the child's educational progress during the period between the two hearings. First, Mother argues that fluctuation in the child's grades was a constant pattern for a number of years, thus not constituting a change of circumstances. Then, she argues, somewhat inconsistently, that this ongoing fluctuation in grades (now on the downward slope, she claims, since the move to Kentucky) is evidence that the change in placement is not in the

child's best interest.

The child's school progress was only one factor relied upon by the court in finding a material change in circumstances warranting a change in placement. Mother and child moved numerous times in the 3 years before Father's motion. There was ample evidence of marital discord between Mother and her later husband which led to civil proceedings on three occasions, including a protection from abuse action filed by Mother's husband after Mother allegedly threatened his life. The court suggested that these problems in Mother's home may have contributed to the child's declining grades and increasing school absences. On the other hand, Father was in a stable, long-term relationship; did not move frequently; and could offer his son the academic assistance he needed.

Because the district court carefully and accurately considered the child's circumstances prior to the first hearing on Father's motion, its decision cannot be characterized as arbitrary, fanciful, or unreasonable. Furthermore, there is no indication the court's decision would have been any different had it taken into consideration the events occurring between the first and second hearings.

Viewing the evidence in the light more favoring the prevailing party below, the Father, there is substantial evidence to support the district court's findings, and we find no

abuse of discretion in changing the child's primary residential placement from Mother to Father.

Affirmed.