

NOT DESIGNATED FOR PUBLICATION

No. 106,751

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

BROOKE A. WILSON,
Appellant,

and

JAMES R. WILSON, JR.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC R. YOST, judge. Opinion filed May 25, 2012.

Affirmed.

Gerald J. Domitrovic, of Wichita, for appellant.

Bryon S. Wharton, of Wichita, for appellee.

Before GREENE, C.J., LEBEN and STANDRIDGE, JJ.

Per Curiam: Brooke A. Wilson appeals from the district court's postdivorce order granting a change in residential custody to her ex-husband, James R. Wilson, Jr. Brooke claims the district court erred in failing to specifically consider why the parties' previous parenting plan was no longer in the best interests of the children, as required by K.S.A. 2010 Supp. 60-1610(a)(3)(A). She also claims there was insufficient evidence to support the district court's custody ruling. Because we find no merit to either of Brooke's claims, we affirm the decision of the district court.

FACTS

Brooke and James divorced on May 11, 2004. The parenting plan attached to the divorce decree provided for joint custody of the parties' infant son, C.W. Brooke was given residential custody subject to reasonable parenting time with James, and James was ordered to pay \$125 per month in child support. Brooke and James continued to live together off and on in Wichita even after the divorce. In 2006, they had a daughter, T.W. Sometime thereafter, James moved to Overland Park, where he currently resides. Brooke continues to reside in Wichita. Although it is not clear from the record, it appears that the custody arrangement set forth in the parenting plan remained in place after James moved.

In June 2008, James filed a motion to change custody based on allegations that Brooke's boyfriend had abused T.W. The district court entered an order for limited case management and ordered that the children have no contact with Brooke's boyfriend, Matthew Bowles. Brooke subsequently filed an objection to the Limited Case Manager (LCM)'s recommendations and requested an evidentiary hearing on the matter. After James failed to appear at the October 2008 hearing, the district court adopted a parenting plan submitted by Brooke. Under the plan, Brooke maintained residential custody, subject to reasonable visitation by James. This plan had been proposed by Brooke's attorney via e-mail, and James indicated his approval in an e-mail response.

In January 2009, James filed another motion to change custody, alleging that Brooke was not providing a stable environment for the children because she had moved in with Bowles and that Bowles had hit C.W. with a belt. The district court denied the motion, but the parties agreed—and the court ordered—that the children would have no contact with Bowles.

In April 2010, James filed a motion to modify custody, parenting time, and child support. He requested residential custody of the children, alleging: (1) Brooke had

moved multiple times without providing him the required notice; (2) he was unaware of Brooke's current address; (3) Brooke had violated the no-contact order, as she and the children lived with Bowles; (4) Brooke did not answer James' phone calls when he attempted to call the children; and (5) Brooke did not have C.W. in counseling, as recommended by his teacher.

The district court entered another order for limited case management. The LCM ultimately recommended that James have primary residential custody, noting that Brooke did not attend a scheduled joint session and that Bowles had not made an appointment with the LCM, despite being requested to do so. James filed a motion to adopt the LCM's recommendation. The district court denied the motion due to the significance of a change in custody and instead set the case for an evidentiary hearing. The court ruled that the previous no-contact order with Bowles remained in effect and ordered Brooke and Bowles to schedule appointments with the LCM.

At the evidentiary hearing, James testified that he is a baker at Whole Foods and is taking college classes towards his teaching degree. He lives in a three-bedroom apartment with his girlfriend, where the children each have their own room. James stated that the children have several family members in Overland Park, including grandparents and cousins. James testified about the concerns he had with Brooke, including the following: she failed to show up to meetings with the LCM; she had moved several times in the last 3 years and did not tell him when she moved to Salina; she sometimes had difficulty meeting him to pick up the children in Emporia because she had no gas money; and he was unable to reach the children when he tried to call them on Father's Day and on T.W.'s birthday. In addition, James stated that Bowles was not a good influence on the children and that the children claimed Bowles spanked them and made them smoke and drink beer. James' girlfriend and mother also testified as to their belief that James should have residential custody of the children.

Brooke countered that James had missed visitations with the children and had failed to make child support payments in the past. Brooke claimed that she and Bowles did not attend appointments with the LCM because they could not afford to pay for the sessions. Brooke stated that C.W. was doing well in school, that he had been at the same school for 2 years, and that T.W. would also be attending the same school. Brooke testified that although Bowles was supporting her financially because she was not currently employed and had not been regularly employed for the last 4 to 5 years, this meant that she could be with the children at all times. Brooke stated that she had a 2-year-old child with Bowles. She acknowledged that the no-contact order against Bowles had been in place since 2008 and had been reinforced in February 2009 and July 2010. She further admitted that there had been allegations of abuse against Bowles, including one by her mother after seeing a bruise on C.W.'s arm. Brooke claimed that while Bowles could be strict, he treated the children well and was a supportive father figure. She denied that James had ever told her about the spanking allegations. Brooke agreed that she had been unable to meet James in Emporia on more than one occasion, that James was sometimes not able to reach the children by phone when they were with her, and that she had moved four times in a 9-month period.

Bowles testified that he lived with Brooke in a three-bedroom trailer home and was employed as a yard foreman at Auto Recyclers. Bowles admitted to disciplining the children once or twice with "[m]aybe a swat" but denied that the children were afraid of him. He further admitted to having contact with the children during the time period that the no-contact order had been in place.

After hearing the evidence, the district court granted James' motion, finding it was in the best interests of the children for James to have primary residential custody. Specifically, the judge reasoned:

"This is a motion to change custody filed by the father. Since the parties are currently operating off of an agreed order regarding custody and visitation, the standard for making this change is best interest of the two children. Boiled down to its essence, the father's argument is twofold. First, his house is—his home is more conducive and a better environment for which to live for the children. And two, the mother has ignored the court's previous orders regarding no contact between the children and Mr. Bowles. Both of these arguments have some merit and both are somewhat overrated.

"As for the home, material comfort and security are good things for children, but it is not a sin to be poor, as some of our greatest leaders have grown up in poverty.

"And as for the no-contact orders that were largely ignored, the court believes those orders were granted without a lot of evidence in the first place, but orders are orders, and it does not set well with this court that Mother ignored the orders of three previous judges.

"The court has not considered very greatly the LCM of Ms. Schoenhofer because not everyone participated. The court has not considered at great length the comparison between the school districts. I think I have already expressed myself on that. And the court frankly has not put a lot of weight on the difference in the material wealth of the two homes or on the court orders issue.

"If this were a motion in which a material change of circumstance was needed to sustain a change in custody, this motion would likely fail, but it is not. The best interest standard is a different standard. It is more easily met. The court simply needs to find, after consideration of all the statutory factors, that the court believes that the father's home is slightly more in the best interest of the children than the mother's home. Based on this court's review of those statutory factors, that is the finding of the court. It is in the best interest of the children that primary residential custody be with the father.

"Having said that, the court would also note that the only reason primary custody is being awarded to Father is that it is not practical to award shared custody when the parents live this far apart. Therefore, the court will also rule that if the Mother elects to move within 20 miles of Father, she will have shared custody. That shared will be week-to-week with exchanges being on Sunday evenings. In the absence of a move by the mother, she will exercise visitation one weekend a month from Friday to Sunday. The parties will meet in Emporia. Mother is to receive a \$150 credit against any child support for her travel costs. There is to be no smoking in either home when the children are present. And because the SRS investigation has failed to show any abuse by Mr. Bowles,

the no-contact order is lifted. Mr. Bowles is prohibited, however, from administering any physical punishment on the children. Child support is to be calculated on a primary schedule unless Mother moves, then it is to be calculated on a shared."

Brooke filed a motion to reconsider, alleging that the evidence presented at the hearing was overwhelmingly in favor of leaving the children in her custody and arguing that the no-contact order between the children and Bowles was not substantially related to the welfare of the children. The district court summarily denied the motion.

ANALYSIS

Brooke raises three issues on appeal: (1) the district court erred in failing to presume that the October 2008 parenting plan was in the best interests of the children, as required by K.S.A. 2010 Supp. 60-1610(a)(3)(A); (2) the district court did not have authority to modify custody in the absence of a material change in circumstances; and (3) there was insufficient evidence to support the district court's order modifying custody.

1. Presumptions Regarding the October 2008 Parenting Plan

Brooke contends the district court was required to presume the parenting plan adopted in October 2008 was in the children's best interests. She argues the court erred in modifying this plan without making specific findings that doing so would be in the best interests of the children, as required by K.S.A. 2010 Supp. 60-1610(a)(3)(A).

Whether the district court was required to comply with a statute involves a question of statutory interpretation over which appellate courts have unlimited review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009).

K.S.A. 2010 Supp. 60-1610(a)(3)(A) requires the district court to presume that the arrangements established in a parenting plan—to which both parties agreed—are in the

child's best interests. In order to overcome this presumption, the district court must articulate specific findings of fact detailing why the parenting plan is not in the best interests of the child. The statute provides:

"If the parties have entered into a parenting plan, it shall be presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreed parenting plan is not in the best interests of the child." K.S.A. 2010 Supp. 60-1610(a)(3)(A).

Kansas cases have held the presumption no longer applies if the circumstances have changed, the agreement does not provide for those changes, and a new agreement is not presented to the court. See *In re Marriage of Bradley*, 258 Kan. 39, 43, 899 P.2d 471 (1995); *Talbot v. Pearson*, 32 Kan. App. 2d 336, 340, 82 P.3d 854, *rev. denied* 277 Kan. 928 (2004). To that end, the record in this matter reflects that James moved for a change in custody based, in part, on the fact that Brooke violated the no-contact order by living with Bowles. The parties agreed at the evidentiary hearing that they currently were operating under the October 2008 child custody agreement/parenting plan. The parties further agree that the October 2008 parenting plan did not mention the no-contact order, the October 2008 parenting plan did not contemplate the consequences if Brooke violated the order, and there was no new agreed parenting plan presented to the court. Based on the Supreme Court's holding in *Bradley*, the facts here demonstrate that Brooke is not entitled to a presumption that the October 2008 parenting plan is in the best interests of the children.

2. *Modifying Custody in the Absence of a Material Change in Circumstances*

As a general rule, the district court may change or modify a prior custody or residency order only when a material change in circumstance is shown. See K.S.A. 2010 Supp. 60-1610(a)(2)(A). There is, however, an exception to this rule. Specifically, the

court may modify a custody order in the absence of a material change in circumstances if the original order was entered during a default proceeding or during a proceeding in which the facts were not substantially developed. *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 (1980). Stated another way, this exception applies only in circumstances where the written agreement presented by the parties was summarily and uncritically adopted by the court. *Johnson v. Stephenson*, 28 Kan. App. 2d 275, 280-81, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). Permitting the court to modify a custody order pursuant to this exception is consistent with the overarching principle that custody determinations should be based on the child's best interests. *In re Marriage of Kiister*, 245 Kan. 199, 202, 777 P.2d 272 (1989).

The record here reflects that the October 2008 child custody agreement/parenting plan was submitted by Brooke and then summarily and uncritically adopted by the district court after James failed to appear at an evidentiary hearing. Because the facts were not substantially developed at that time, we conclude James was not required to show a material change in circumstances before seeking a modification of the custody agreement.

3. *Sufficiency of the Evidence*

When an appellant challenges the sufficiency of the evidence to support a district court's findings regarding a child's best interests, this court reviews the evidence in a light most favorable to the prevailing party below to determine if the court's factual findings are supported by substantial competent evidence and whether those findings support the court's legal conclusions. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 420, 119 P.3d 684 (2005). "[T]he 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 Rayman*, 273 Kan.

996, 999, 47 P.3d 413 (2002); see also *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378, *cert. denied* 549 U.S. 954 (2006) (holding that whether a child custody order is to be changed or modified rests with the sound judicial discretion of the court). "[J]udicial discretion is abused only when no reasonable person would take the view adopted by the trial court. [Citation omitted.]" *Rayman*, 273 Kan. at 999.

Findings of Fact

Brooke asserts the district court erred in failing to make specific findings of fact, which are required by K.S.A. 2010 Supp. 60-1610(a)(3)(B) when the court modifies a child custody order. But Brooke has failed to preserve this issue for consideration on appeal because she did not object when the district court failed to make the referenced findings of fact as alleged. Although she claims that her motion to reconsider "invit[ed]" the court to make specific findings and to justify its decision in light of the nonexclusive factors set forth in K.S.A. 2010 Supp. 60-1610(a)(3)(B), we have reviewed the pleading and must disagree with Brooke's characterization in this regard. Kansas law imposes a duty on litigants to object to inadequate findings of fact and conclusions of law by the district court in order to preserve the issue for appeal. This provides the district court with an opportunity to correct the findings and conclusions. K.S.A. 2010 Supp. 60-252; Supreme Court Rule 165 (2011 Kan. Ct. R. Annot. 246); *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006). In the absence of an objection below, the appellate court ordinarily presumes the district court found all facts necessary to support its judgment. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009); *In re Marriage of Whipp*, 265 Kan. 500, 508-09, 962 P.2d 1058 (1998).

In any event, the district court's failure to explicitly reference each individual factor set forth in K.S.A. 2010 Supp. 60-1610(a)(3)(B) is not fatal. The statute only requires that the district court consider the factors; it does not require the court to make

specific findings on the record with respect to each factor. See K.S.A. 2010 Supp. 60-1610(a)(3)(B). Here, the district court's comments at the evidentiary hearing readily establish that it was aware of, and had considered, the relevant statutory factors.

Conclusions of Law

Finally, Brooke alleges the district court's legal conclusion that it was in the best interests of the children to award James residential custody is not supported by substantial competent evidence in the record. Specifically, Brooke claims the district court failed to consider evidence that James did not always exercise all of his visitation with the children, James had moved out of Wichita and away from the children in 2006, James had failed to pay child support on occasion, the children were afraid to visit James and felt that summer visits with James were too long, James and his girlfriend both worked during the week and were expecting another child in January 2012, the children had attended school in Wichita almost their entire lives and were doing well, and the children had a close relationship with their half-brother.

Brooke's claim essentially invites this court to view the evidence in a light most favorable to her, to reweigh the evidence, to pass on witness credibility, and/or to redetermine questions of fact presented to the district court. We decline to accept this invitation as none of these actions are appropriate for an appellate court reviewing a district court's custody determination. See *In re B.D.-X*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Viewing the evidence in a light most favorable to James (as we must, since the district court, which makes the factual findings, ruled in his favor), we find the record contains substantial competent evidence to support the district court's legal conclusion that it was in the best interests of the children to award James residential custody. James and his girlfriend are both employed and appear to provide a stable home for the children.

James' girlfriend has a good relationship with the children. The children have several other family members in Overland Park.

With respect to Brooke, the district court raised concerns about her violation of the no-contact order between Bowles and the children. Brooke and Bowles both admitted that this order had been violated. Additional evidence about Bowles was introduced at the hearing and included allegations of abuse and that he was a bad influence on the children. Neither Brooke nor Bowles attended required sessions with the LCM. Brooke relied financially on Bowles because she was not employed at the time of the evidentiary hearing and had not been regularly employed for the previous 4 to 5 years. Brooke moved four times within a 9-month period. James was sometimes unable to reach the children by phone when they were with Brooke.

As this court has explained, "[c]hild custody is one of the most difficult areas faced by a trial court. The paramount question for determination of custody as between the parents is what best serves the interests and welfare of the children. All other issues are subordinate thereto." *Johnson*, 28 Kan. App. 2d at 279. James and Brooke presented conflicting testimony about why it would be in the children's best interests to reside with one parent over the other. Given the conflicting evidence, the district court was faced with a difficult choice and ultimately decided to award custody to James. In order to find that the district court abused its discretion in making this decision, we must conclude that no reasonable person would have awarded custody to James under the circumstances. This is not a conclusion that we can make; thus, we find the district court did not abuse its discretion in awarding residential custody to James.

Affirmed.