NOT DESIGNATED FOR PUBLICATION

No. 107,579

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of:
ADAM DENLINGER,
Appellee,

v.

PAMELA GOOD (NOW SCOTT),
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed November 16, 2012. Affirmed.

Ronald P. Wood, of Clyde & Wood, L.L.C., of Overland Park, for appellant.

Christina E. Gondring, of Kansas City, Missouri, for appellee.

Before ARNOLD-BURGER, P.J., MCANANY and LEBEN, JJ.

Per Curiam: Whether a child custody order can be changed or modified rests with the sound judicial discretion of the district court. *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006). In this case, following a protracted paternity action brought under the Kansas Parentage Act (KPA), K.S.A. 2011 Supp. 23-2201 *et seq.* (formerly K.S.A. 38-1110 *et seq.*), the district court found that it was in the best interests of D. to grant Father sole legal custody and primary residential custody. Mother alleges in this appeal that the district court abused its discretion in changing custody.

Following the custody change, Father requested that D.'s surname be changed from Mother's surname to his surname under the authority of K.S.A. 60-1401 *et seq.* The district court granted the request over Mother's objection. Mother also appeals this ruling on the basis that any change of D.'s surname is governed solely by the KPA, which allows a child's name to be changed as part of a paternity action only when both parents agree.

Because we find that the district court did not abuse its discretion in changing the custody arrangement between Mother and Father and because we find that the KPA is not the exclusive avenue by which a child's name may be changed, we affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

On August 29, 2005, Father filed a petition under the KPA to establish paternity of the child expected to be born to Mother the following month (case No. 05CV06827). Mother admitted telling Father that their child had already been born, despite giving birth to D. after Father's paternity action was filed. Mother subsequently stipulated to paternity, and the district court approved Mother and Father's mediation agreement as being in the best interests of D. The agreement provided that D. would live with Mother, but Mother and Father would share joint legal custody; Father could have parenting time, including overnight parenting time once D. turned 18 months; and Father would reimburse Mother for his share of D.'s medical expenses.

Two years later, Father filed a motion seeking to modify custody and the parenting plan. Mother objected and testified at the evidentiary hearing on the motion that she believed Father would harm D. if he had overnight parenting time. She believed Father

would take naked pictures of D. and masturbate to them. Mother testified that she was not willing to co-parent with Father.

Upon completion of the hearing, the district court noted that Mother had a history of not sharing information and acting unilaterally. The district court acknowledged that it seriously considered an August 2009 home study report which recommended that primary residential custody be changed to Father. The court felt that such a change would be extreme for D. The judge told Mother that if she could not co-parent then he would have Father make the decisions. So instead, in October 2010, the district court entered an order finding a material change in the circumstances warranting a modification of the parenting plan and child support. The district court ordered that Mother and Father would continue to share joint legal custody but neither would be designated as the primary residential custodian. The district court implemented a shared residential custody and parenting time schedule.

Six weeks after the evidentiary hearing, Mother called the police alleging that when D. showed up for parenting time she was upset and stated that her dad said he would kill her if she did not call him during the visit. Mother also contacted Kansas Department of Social and Rehabilitation Services (SRS) alleging that Father and his wife had abused D. by locking her in their bathroom. This complaint led to the SRS investigating whether D. had been emotionally abused by Father and his wife.

The following month, Mother contacted SRS to allege that Father had sexually abused D. As a result, D. was temporarily removed from Father's home to Mother's home, a child in need of care case was initiated, and the police and SRS began an investigation. Father filed a motion to modify custody, the parenting plan, and child support. The next day, after an interview at Sunflower house, D. was placed into a foster home under SRS custody. When SRS found Mother's allegations to be unsubstantiated and the police declined to file charges, D. was placed in Father's primary custody with

Mother being subjected to a more limited parenting schedule than originally outlined in the court's October 2010 order.

Six months after becoming D.'s primary custodian, Father filed a petition under K.S.A. 60-1401 for change of name for minor child. The district court appointed Christian Webb as guardian ad litem (GAL) to represent the best interests of D. Mother filed a motion to modify parenting time in which she accused Father of watching D. in the shower. On May 17, 2011, the district court consolidated Father's K.S.A. 60-1401 name-change action (11CV04002), with the existing paternity case (05CV06827).

The district court received evidence and testimony over a 3-month time span on the two motions. After taking into account the entirety of the evidentiary hearing, the district court ruled that there was a substantial enough material change in the circumstances from the October 2010 paternity case orders warranting a modification of the custody and parenting plan and child support. The district court granted sole legal custody and primary residential custody to Father, adopted the GAL's proposed parenting plan, set child support, and awarded Father $6000 in attorney fees. The district court also approved Father's request under K.S.A. 60-1401 to change D.'s surname to his surname. Mother timely appeals.

ANALYSIS

The district court did not abuse its discretion in granting Father sole legal and primary residential custody of D.

Mother claims the district court abused its discretion in granting Father sole legal and primary residential custody of D. and adopting the GAL's parenting plan.

The paramount consideration when determining a custody issue between the parents is the welfare and best interests of the child. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). Whether a child custody order can be changed or modified rests with the sound judicial discretion of the district court. *In re Marriage of Nelson*, 34 Kan. App. 2d at 883. Because the district court in a custody modification proceeding has the advantage of seeing the witnesses and parties, its judgment may not be disturbed in the absence of an abuse of discretion. *Talbot v. Pearson*, 32 Kan. App. 2d 336, 342-43, 82 P.3d 854, *rev. denied* 277 Kan. 928 (2004); see also *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 419, 119 P.3d 684 (2005) (the judgment of the district court regarding visitation will not be disturbed absent an affirmative showing of abuse of discretion).

An abuse of discretion occurs when the action is arbitrary, fanciful, or unreasonable. This abuse means no reasonable person would have taken the action of the district court. *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). In other words, if this panel concludes that no reasonable judge would have reached the same result below, the district court's decision must be reversed. *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995). Mother bears the burden to establish that the district court abused its discretion in granting Father's motion. See *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Here, Mother does not challenge the district court's factual findings or the sufficiency of the evidence supporting its findings regarding D.'s best interests. Other than Mother's conclusory statements defining the nature of her appeal, Mother makes no effort to meet her burden to explain or establish how the district court allegedly abused its discretion in granting Father sole legal and primary residential custody of D. and adopting the GAL's parenting plan. Instead, Mother's only argument on appeal, that she acted out of anxiousness and fear towards Father in her efforts to protect D. from Father, asks this court to reweigh the evidence and assess witness credibility. *See LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007) (an appellate

court does not reweigh conflicting evidence, evaluate the witnesses' credibility, or redetermine questions of fact). Regardless, the facts of this case simply do not support Mother's conclusory statements.

Generally, the district court may only change or modify a prior custody or residency order when a material change in circumstance is shown. See K.S.A. 2011 Supp. 23-3218(a). Here, the district court acknowledged that in October 2010, it found that Father would have the final decision in all major issues if the parties could not jointly co-parent. The district court then went on to find that the evidence since that last hearing confirmed "there have been changes in the circumstances so substantial and continuing in nature such that a modification of the custody and parenting plan and child support is warranted." The district court considered Mother's repeated allegations of sexual abuse against Father resulting in the SRS investigations and emergency custody placement of D. and held they "established a clear pattern that goes beyond what the Court feels in a reasonable apprehension or fear of harm to [D.]"

The record supports the court's finding. SRS found Mother's allegations unsubstantiated and noted that the police declined to press criminal charges. Further, D.'s longstanding play therapist testified that she had seen no evidence or indication from D. that Father had abused her. In addition, there was some question regarding Mother's veracity. Mother testified before the district court that she took D. to a walk-in clinic in Paola to have her examined for sexual abuse and that at the clinic a nurse talked to D. and recommended Mother take D. to Children's Mercy Hospital. But the nurse at the walk-in clinic testified and produced records indicating that she only spoke to Mother over the phone. Moreover, the investigating detective testified that Mother told him that she attempted to go to the walk-in clinic in Paola but it was closed when she arrived.

Although Father testified that he believed he could co-parent with Mother, making joint decisions in a timely manner without involving attorneys had become a problem. In

contrast, Mother testified that she was not willing to co-parent with Father. D.'s play therapist testified that from her interactions with both parents, "[Father] has demonstrated a better ability to take in input and be able to make a decision that's best for [D.]" and that it would be in D.'s best interests to primarily live with Father. The therapist, who diagnosed D. with anxiety disorder with disruption in emotion and behavior, further testified that the intensity of D.'s anxiety increases the more time she spends with Mother. Moreover, she testified that since D. left foster care and had resided primarily with Father D. has opened up more and shown improvements developmentally. She agreed that D.'s progression would cease if D. went to live primarily with Mother. Finally, the GAL noted that D. "has done very well" since being placed in Father's home and recommended that Father remain the residential parent and be granted sole legal custody due to the parent's inability to work together in a timely manner on major issues.

Based upon the evidence before it, the district court did not abuse its discretion in finding that it was in the best interests of D. to grant sole legal custody and primary residential custody to Father and adopt the GAL's proposed parenting plan. We find that any reasonable judge could have easily reached the same result. See *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995).

The district court had the statutory authority to change D.'s surname.

Mother challenges the district court's statutory authority to change D.'s surname without her approval. Mother argues that Father could not request a name change under K.S.A. 60-1401 *et seq.* because their case is controlled by the KPA, which only allows the district court to change a child's name if both of the parents consent.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Harsch*, 288 Kan. at 286. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Unruh*, 289 Kan. at 1193.

The two Kansas statutory schemes at issue here are K.S.A. 60-1401 *et seq.*, and K.S.A. 2011 Supp. 23-2223 of the KPA K.S.A. 60-1401 provides that the district court shall have authority to change the name of any person in Kansas that wishes to do so. A minor may file a petition, through a next friend, to obtain a name change under K.S.A. 60-1401 *et seq.*, and there is no legal impediment to the district court granting the request. *In re Application to Change Name*, 10 Kan. App. 2d 625, 627, 706 P.2d 480 (1985). In contrast, in paternity actions brought under the KPA, K.S.A. 2011 Supp. 23-2223 provides that the district court can amend a birth certificate to change a child's last name upon the request of both parents. It contains no discussion about what to do if the request comes from only one parent or if both parents do not agree.

Here, Mother argues that because this is a paternity action the KPA, specifically K.S.A. 2011 Supp. 23-2223, controls any attempt by Father to change D.'s surname. Relying on *Stabel v. Meyer*, 45 Kan. App. 2d 941, 952, 259 P.3d 737 (2011), in which this court held that the KPA provides no authority for a district court to consider a parent's request to change the child's name over the objection of the other parent, Mother reasons that the district court did not have statutory authority to change D.'s surname because she objected.

Father agrees that based upon this court's decision in *Stabel*, the district court would not have had jurisdiction had he sought relief under the KPA But Father reiterates the district court's finding that *Stabel* is distinguishable because the father in *Stabel* requested a name change under the KPA whereas here Father requested to change D.'s last name under a separate action filed under the authority of K.S.A. 60-1401. Mother fails to acknowledge that *Stabel* addressed that very option. A closer examination of *Stabel* is necessary.

In declining to follow *M.L.M. v. Millen*, 28 Kan. App. 2d 392, 394-95, 15 P.3d 857 (2000), which found that notwithstanding the language of the KPA the district court had the authority to grant a name change if the best interests of the child demanded it, the *Stabel* panel stated the following in dicta:

> "*M.L.M.'s* reasoning that to find a district court lacks such authority without both parents' consent would allow a parent or court to be held hostage or without recourse wholly disregards the fact that there are other statutory means for changing a minor's name. *For example, we have recognized a minor can petition for a name change through a next friend under K.S.A. 60-1401 et seq. In re Application to Change Name,* 10 Kan. App. 2d 625, 627, 706 P.2d 480 (1985)." (Emphasis added.) *Stabel*, 45 Kan. App. 2d at 951.

The *Stabel* panel went on cite *In re Marriage of Killman*, 264 Kan. 33, 38-40, 955 P.2d 1228 (1998), in support of the existence of dual statutory schemes governing name changes. *Stabel*, 45 Kan. App. 2d at 951. Although *Killman* involved a divorce action rather than a paternity action, the analysis is the same, so a brief review of *Killman* is also important here.

In *Killman*, the district court found that because it had jurisdiction to determine custody of a child in a divorce action, it also had statutory authority to determine the child's last name. 264 Kan. at 34. The Supreme Court disagreed. Applying the maxim *expressio unius est exclusio alterius*, the court found that K.S.A. 1996 Supp. 60-1610 specifically listed the orders that may be included in a divorce decree, and changing the child's name was not included in the list. Therefore, it was not allowed. 264 Kan. at 43. The Court cited with approval *Mayor v. Mayor*, 17 Conn. App. 627, 554 A.2d 1109 (1989), that similarly found that Connecticut's divorce statute did not allow a name change as part of a divorce but that a parent wishing to change a child's name must proceed under the general statute in Connecticut authorizing name change actions. *Killman*, 264 Kan. at 41. Our Supreme Court pointed out that, like Connecticut, Kansas

also has a general name change statute at K.S.A. 60-1401 which gives the court the authority to change any person's name in an action brought under it. 264 Kan. at 41.

Here, Father used the other statutory means suggested by *Stabel* and *Killman* to request a change of name for a minor child—K.S.A. 60-1401 *et seq.*—and we agree with those cases that the district court had the authority to rule on his request under that statute.

This court reviews the district court's decision to change a child's name for abuse of discretion. See *J.N.L.M. v. Miller*, 35 Kan. App. 2d 407, 412, 130 P.3d 1223 (2006). In granting Father's request to change D.'s surname, the district court cited to *In re Application to Change Name*, 10 Kan. App. 2d at 628-29, and acknowledged that it had weighed the best interests of the parents and the best interests of the child. The district court applied four of the six considerations recognized in *J.N.L.M.* as being helpful in applying the best interests test. It considered (1) the effect a name change would have on the development and preservation of D.'s relationship with both Father and Mother; (2) the length of time D. has used the Mother's surname; (3) the possibility that the continued use of Mother's surname may cause insecurity and lack of identity given that Mother has remarried and uses a different last name than D. anyway; and (4) the motive or interests of Father as the custodial parent. See *J.N.L.M.*, 35 Kan. App. 2d at 413.

Mother does not make any argument that the district court abused its discretion in concluding it was in D.'s best interests to have the surname of her Father or that the district court's findings of fact in support of changing D.'s surname are not supported by substantial competent evidence. She merely argues that it lacked the statutory authority to do so. See *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 281, 225 P.3d 707 (2010) (an issue not briefed by the appellant is deemed waived and abandoned). Nonetheless, we have no hesitancy in also finding that the district court did

not abuse its discretion in granting Father's request to change D.'s last name to Father's surname.

Accordingly, the decision of the district court is affirmed.