

NOT DESIGNATED FOR PUBLICATION

No. 107,777

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JOSEPH ALLEN WHITCOMB,
Appellant,

v.

SHANNON LEIGH ANN WHITCOMB,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Opinion filed February 22, 2013. Affirmed.

Gerald J. Domitrovic, of Wichita, for appellant.

No appearance by the appellee.

Before STANDRIDGE, P.J., ATCHESON, J., and DANIEL L. HEBERT, District Judge Retired, assigned.

Per Curiam: Joseph Whitcomb appeals from the district court's postdivorce order granting a change in residential custody to his ex-wife, Shannon Whitcomb. Joseph contends the district court erred in modifying the previous custody arrangement because (1) the court failed to specifically consider why the parties' previous custody arrangement was no longer in the best interests of the children, as required by K.S.A. 2011 Supp. 23-3202; (2) no material change in circumstances existed to warrant a change in custody;

and (3) there was insufficient evidence to support the district court's custody ruling. Finding no error, we affirm.

FACTS

Joseph and Shannon were married on June 27, 2003, and have two sons, D.W. and Z.W. On July 23, 2009, Joseph filed a petition for divorce. At that time, both parties resided in Clearwater, Kansas, and the children were living with Shannon. The district court entered temporary orders granting the parties joint legal custody and shared residential custody, subject to a protection from abuse (PFA) order that Shannon had filed against Joseph. Although the exact timing is unclear from the record, sometime in 2009 Shannon moved away from Clearwater and voluntarily left the children in Joseph's custody. Shannon testified that she understood this to be a temporary arrangement.

In December 2009, Shannon filed a motion to modify custody and parenting time, requesting primary residential custody because Joseph was refusing to allow her access to the children. Following a hearing, the parties entered into agreed orders setting forth a continuation of an ongoing custody arrangement where the parties alternated custody of the children each week.

Shortly thereafter, Joseph filed a motion to review Shannon's parental access, claiming that there were issues related to the children's hygiene, health, and behavior at school. Joseph also alleged that Shannon had often left the children at his home during much of her parenting time in the previous several months. The district court subsequently entered an order for limited case management on the issues of residency and parenting time, although any recommendations obtained as a result are not included in the record on appeal.

On January 26, 2010, Shannon filed a motion to compel, alleging that Joseph was refusing to allow her access to the children and requested that he be ordered to comply with the current order allowing her parenting time every other week. Shannon then filed a motion to modify custody and parenting time, alleging that Joseph had refused to allow her access to the children, in violation of the temporary orders, the limited case manager's recommendation, and the PFA order. Shannon requested that the court modify the temporary order by granting her primary residential custody, subject to Joseph's parenting time every other weekend. On March 9, 2010, the parties entered into agreed orders regarding parenting time and exchanges that set forth a schedule alternating custody equally during the weekdays and weekends.

Joseph and Shannon's divorce was subsequently finalized on March 25, 2011. Issues related to child custody remained for resolution at trial. In the meantime, the court's previous custody orders remained in place. According to the pretrial order, Joseph alleged that he had maintained "de facto residential custody" of the children for the past year because Shannon had voluntarily not exercised much of her parenting time. In opposition, Shannon requested primary residential custody of the children, subject to Joseph's parenting time.

Shannon's trial testimony

At trial, Shannon testified that she and Joseph separated in June 2008 when she filed a PFA order against Joseph, which forced him to leave the marital home. Shannon filed the PFA order because during a therapy session, Joseph "came at [her] across the room in front of [the] children." Shannon later filed a second PFA order against Joseph after he tried to come into the house without her permission and he pushed her aside when she blocked the door. She later voluntarily dismissed both PFA orders so it would be easier to exchange the children. Following the separation, Shannon felt that she needed to leave Clearwater in order to get a job. She asked Joseph if the boys could stay

with him for a little while, with the understanding that they would eventually return to a shared custody arrangement. Shannon moved out of the marital home and moved in with a friend for a couple of months until she could "get back on [her] feet." Thereafter, Shannon moved to Derby in order to help take care of her grandmother who had cancer and lived there until January 2011. At that time, Shannon moved to Andover for approximately 6 months and then moved to Wichita for a better job that paid a higher salary.

Shannon lived in Wichita with her fiancé and his two daughters in a 3-bedroom house, where the boys had their own bedroom. Her fiancé's daughters were close in age to the boys. Shannon claimed that her fiancé got along well with the boys and that the boys got along well with his daughters. Shannon worked in the Wichita school district as a paraprofessional at Southeast High School. Shannon's fiancé was employed as an avionics electrician. Shannon had researched the elementary school the boys would attend in Wichita if she were awarded custody and had no concerns, but the children would probably need some before and after school care.

Shannon admitted that her driver's license had recently been reinstated after she had been caught driving without insurance but claimed that she always had a licensed driver to pick up the children while her license had been suspended. Shannon disclosed that she was taking Prozac for chronic depression.

Shannon testified that when she had been unable to take the boys on certain weekdays because of her job schedule, Joseph told her he would not let her see the boys. Due to this threat, Shannon agreed to a "de facto" schedule where she generally had custody of the boys every other weekend. Shannon claimed that Joseph has failed to show up when she has arranged to pick up the boys, and has refused to give her parenting time on certain occasions. Shannon also alleged that Joseph's mother was hindering her relationship with the boys. Shannon stated that when the boys were with Joseph, Joseph

and/or his mother did not answer the phone when she tried to call, and Joseph's mother would often call her back and put the boys on the phone to tell Shannon that they did not want to see her or talk to her. Once, when Shannon arrived to pick up the boys, Joseph's mother told her that they did not want to go with her. Shannon also claimed that Joseph's mother discouraged the boys from having a relationship with their maternal grandparents. Shannon stated that when she had the boys, she made sure that they tried to call Joseph.

Shannon expressed concern about the children staying with Joseph in Clearwater because she felt that they were being negatively influenced by Joseph's violent video game play. She claimed that the children talked only about video games and just wanted to play on the computer. Shannon was also concerned that Joseph's parents had taken over much of the responsibility for caring for the children. Shannon stated that she was thankful for their help but was ready to take back primary care of her children now that she was "on [her] feet," had her driver's license, and was working at a stable job.

Joseph's trial testimony

Joseph testified that when he left the marital home after Shannon filed the first PFA order, he moved in with his parents. He was unemployed and helped out on his parents' farm to pay for his room, board, and utilities. Joseph's only source of income was D.W.'s Supplemental Security Income. Joseph had previously worked in retail, as a grill cook, and as a delivery driver before he had back surgery in 2005. After the surgery, he worked off and on as a machinist and mowed lawns for a landscaping company. Joseph did not work from 2008 until the trial in 2011. Joseph stated that he was indebted to his parents for taking him in, and planned to stay there until his debt was paid, possibly 1 to 2 years. Joseph testified that he would like to get a job but did not know if it would be possible because he was supposed to have another surgery. If the surgery was successful, Joseph would like to get a job and eventually live on his own, but if the surgery was not successful, he would rely on disability and continue to live with his parents.

Joseph admitted that his driver's license was currently suspended due to multiple speeding tickets. His license had been suspended for "[a] couple years" because he could not afford to pay the tickets. Joseph claimed that he always had a licensed driver to drive the children; they would ride the bus to school and his mother would take them to activities. Joseph conceded that his parents were "greatly involved" in the boys' lives but denied that they were the primary caregivers. Joseph stated that he got the boys ready for school and helped with their homework.

Joseph testified that the parties had unsuccessfully tried multiple variations of shared custody over the previous 3 years and alleged that in many months, Shannon would only average 3 to 5 days of custody of the children. Joseph claimed that after visits with Shannon, the boys displayed an aggressive attitude and were also more excitable and agitated at school. Joseph denied that he had ever refused to bring the children to meet Shannon or that he or his mother had prevented Shannon from talking to the children. He stated that the children would not want to call Shannon, but he would encourage them to call her at least once a week.

Joseph agreed that when Shannon left him with residential custody of the children, it was with the understanding that it was a temporary situation. However, Joseph stated that this agreement was made when Shannon was still living in Clearwater; he no longer wanted shared custody because Shannon lived Wichita. Joseph claimed that Clearwater was a more stable environment for the boys, as their school and activities were there. Joseph stated that he has been to all of the children's conferences, while Shannon had not attended any in 2011 and had only been to one the previous year. Joseph admitted that both boys had recently been in trouble at school for hitting other students and had problems with aggression. But Joseph claimed that the children showed signs of aggression when they came back from their visits with Shannon. Joseph also claimed that D.W.'s behavior had improved over the last 2 years.

When confronted with notes from D.W.'s Individualized Education Plan indicating that D.W. tells "very graphic and violent" stories that reflect television shows he had watched or video games he had played, Joseph admitted to playing video games but denied that he played violent games when the children were home. Joseph claimed that Shannon forced D.W. to stay in the basement and watch television, and he alleged that D.W. had watched numerous R-rated movies at Shannon's house.

During Joseph's testimony, the judge asked him about a tattoo on his hand. Joseph stated that the tattoo is the logo of the Insane Clown Posse (ICP), a rap band of which he is an avid fan. Joseph admitted that ICP's music had violent lyrics but denied that he listened to this music around the children. Joseph also testified that he supported the legalization of marijuana and had been arrested for possessing marijuana. Joseph admitted that he had been convicted of felony burglary and that he had left 5-year-old D.W. home alone when he committed this crime.

Larry Whitcomb's trial testimony

Larry Whitcomb, Joseph's father, testified that Shannon's visitation with the boys had been very minimal over the previous 2 years. Larry denied that Joseph had ever kept Shannon from seeing the boys. Larry stated that the boys were disruptive before and after visiting Shannon and that they did not want to see her. Larry did not believe that their home environment played any role in the children's negative behavior. Larry admitted that he and his wife were involved with the boys' activities because they had to drive them but denied that they were the primary caregivers. Larry estimated that Joseph took care of the children 60 to 70 percent of the time.

The district court's ruling

After hearing testimony, the district court opined that it would prefer for the parties to share custody of the children, as both Joseph and Shannon had some negative factors weighing against them. However, due to the parties' geographic distance, the court found shared custody was not feasible, and granted the parties joint custody with Shannon receiving residential custody subject to certain parenting time with Joseph. In reaching this decision, the court made the following findings: (1) Joseph's home life was unstable, as his prospects for employment and place of residency were uncertain; (2) Joseph's mother played a significant role in the care of the children; (3) Joseph's driver's license suspension presented an ongoing barrier to parenting and Joseph was unable to fully parent the children without the assistance of others; and (4) D.W. had academic and behavioral issues at school dating back to March 2009. The court also noted that Shannon's decision to voluntarily give residential custody to Joseph was not necessarily a bad thing, as any parent who was incapable of caring for their children should take action to make sure that the children were taken care of.

Joseph filed a Motion to Reconsider and For More Specific Findings, alleging that the district court's decision was arbitrary, contrary to the evidence presented at trial, and given without explanation or rationale. Following a hearing on Joseph's motion, the district court granted it in part by making the following supplemental findings of fact: (1) Shannon's residential and employment situation from March 2009 until mid-2011 was unstable, but her current residential and employment status was sufficiently stable to warrant primary custody of the children; (2) it was uncontroverted that Joseph's parents were providing 30 to 40 percent of the children's care; (3) either Joseph or his parents had engaged in alienating the children from Shannon; (4) D.W. told very graphic and violent stories reflecting television shows or video games he played; (5) Joseph denied any negative influences in his home that could have contributed to D.W.'s stories and/or the children's behavioral issues, and instead claimed they were likely the result of the

children's limited time with Shannon; (6) D.W.'s academic and behavioral problems dated back to March 2009, around the same time Joseph began exercising de facto primary custody; and (7) Shannon currently had a valid driver's license, while Joseph could not provide a definitive time frame regarding when his driver's license would be reinstated.

ANALYSIS

On appeal, Joseph presents three arguments in support of his claim that the district court erred in awarding residential custody of the children to Shannon. First, Joseph contends the district court failed to presume that the parties' previous "de facto" custody arrangement was in the best interests of the children, as required by K.S.A. 2011 Supp. 23-3202 (previously K.S.A. 2010 Supp. 60-1610[a][3][A]). Second, he alleges the district court did not have the authority to modify custody in the absence of a material change in circumstances. Third and finally, Joseph claims there was insufficient evidence to support the district court's custody ruling. Shannon did not file a brief in response.

1. Presumptions regarding previous custody arrangement

Joseph alleges that prior to changing residential custody, the district court was required by K.S.A. 2011 Supp. 23-3202 to presume that the parties' previous "de facto" custody arrangement was in the best interests of the children.

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. 2011 Supp. 23-3202 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. 2011 Supp. 23-3202.

Kansas cases have held that 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).

Prior to Shannon's motion for change in custody, the parties were apparently operating under an oral "de facto" shared custody arrangement where Shannon had voluntarily given Joseph primary residential custody of the children. But Shannon argued at the evidentiary hearing that her circumstances had since changed and that she was in a better position to provide for the children. Additionally, Shannon claimed that this arrangement was always meant to be temporary and there did not appear to be a clear agreement as to how long this custody arrangement would last. Further, there was no new agreed parenting plan presented to the court. Therefore, pursuant to *In re Marriage of Bradley*, Joseph is not entitled to a presumption that the parties' "de facto" custody arrangement is in the best interests of the children.

2. *Modifying custody in the absence of a material change in circumstance*

Joseph contends that the district court failed to make any findings regarding a material change in circumstances that would justify a change in residential custody.

Joseph claims the only material change that occurred was Shannon's voluntary decision to move from Clearwater and that absent something significantly negative on his part, the court abused its discretion in awarding custody to Shannon.

As a general rule, a 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. 2011 Supp. 23-3218(a). There is, however, an exception to this rule. A 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). Whether or not this exception applies turns on "whether the prior custody proceedings were substantially developed and presented to the court or whether custody was arranged by a written agreement and merely 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). Allowing a 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).

Here, the record reflects that the "de facto" custody arrangement giving Joseph primary residential custody of the children was based on an oral agreement between the parties that was never officially incorporated into the agreed orders adopted by the district court. Moreover, the agreed orders presented to the district court that provided for shared custody were uncritically adopted by the court. Because the facts related to the parties' custody arrangements were never substantially developed before the district court, Shannon was not required to show a material change in circumstances before seeking a custody modification.

3. *Sufficiency of the evidence*

Joseph claims that the district court's ruling modifying residential custody was not in the best interests of the children because it was unsupported by the evidence presented at trial and was instead based on the court's own bias, opinions, and personal belief that parents who voluntarily give up custody of their children should not be punished.

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 (2007); 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." *Rayman*, 273 Kan. at 999.

In challenging the district court's custody ruling, Joseph claims the court ignored the positive evidence and emphasized the negative evidence presented on his behalf. Specifically, Joseph alleges that the court ignored improvements the children had made in school and instead focused on their behavioral issues, including D.W.'s graphic and violent stories. He also contends that the court improperly focused on the amount of help he had received from his parents rather than the fact that his parents had helped to

provide the boys with a good home. Despite the help he had received from his parents, Joseph argues that he had done more parenting than Shannon in the previous 2 years. To that end, Joseph claims that the court improperly viewed Shannon's decision to voluntarily give up custody of the children as positive, and did not consider the negative aspects of Shannon's failure to exercise all of her parenting time or the impact that moving to a new town, home, and school would have on the children.

Joseph essentially invites this court to view the evidence in a light most favorable to him, to reweigh the evidence, to pass on witness credibility, and/or to redetermine questions of fact presented to the district court. We should decline 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.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Viewing the evidence in a light most favorable to Shannon, as we are required to do, indicates that 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 Shannon residential custody. Shannon and her fiancé were both employed, appeared to provide a stable home for the children, and Shannon had a valid driver's license.

With respect to Joseph, the district court expressed concern that he could not take care of the children by himself, as he was unemployed and did not have a driver's license at the time of trial. The children had behavioral issues that Joseph and his father blamed on Shannon, despite the fact that the children had primarily resided with Joseph and his parents for most of the previous 2 years. There was evidence that Joseph and/or his mother were not facilitating the children's relationship with Shannon and her parents.

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. Joseph and Shannon 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 Shannon. It cannot be said that no reasonable person would have awarded custody to Shannon under the circumstances present here. Therefore, the district court did not abuse its discretion in awarding residential custody to Shannon.

Affirm.