

NOT DESIGNATED FOR PUBLICATION

No. 108,945

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

JAMIE J. ROGERS,
Appellant,

and

BRENT A. ROGERS,
Appellee.

MEMORANDUM OPINION

Appeal from Seward District Court; BRADLEY E. AMBROSIER, judge. Opinion filed May 31, 2013. Affirmed.

Razmi Tahirkheli, of Tahirkheli & Farley, LLC, of Osawatomic, for appellant.

Linda Gilmore, of Gilmore & Shellenborger, of Liberal, for appellee.

Before MALONE, C.J., BUSER, J., and ERNEST L. JOHNSON, District Judge Retired, assigned.

Per Curiam: Jamie J. Rogers appeals from the district court's decision granting a post-divorce change in residential custody of the parties' minor children from herself to the father of the children, Brent A. Rogers. On appeal Jamie claims that the district court improperly placed the burden of proof on her rather than on Brent, the party seeking the modification of the custody arrangement. She also asserts that the district court did not consider the best interests of the children in making its decision but, rather, retaliated against her for moving away from Liberal, Kansas, the place where she, the children, and

Brent had all resided until her move. We disagree with Jamie's contentions and, finding no abuse of discretion, affirm the trial court's decision.

FACTS

Brent Rogers and Jamie Rogers married on February 17, 1996. They had three children during their marriage: sons Garrett, born in 1996, and Taylor, born in 1999, and daughter Saige, born in 2003. On April 9, 2007, Jamie filed her action for divorce. Jamie obtained temporary orders for custody of the children subject to alternating weekend parenting time to Brent. The parties entered into a Child Custody Agreement which was filed with the court on January 14, 2008. In the agreement the parties agreed to joint legal custody of the children with Jamie having primary residential custody subject to specified parenting time with Brent. On March 4, 2008, the district court granted the parties a divorce each from the other and approved the parties' agreed property division. In the decree of divorce filed March 24, 2008, the court adopted the child custody agreement filed January 14, 2008, finding that it was in the best interests of the children. The parties maintained separate residences in Liberal.

On April 12, 2012, Jamie caused to be filed with the clerk a copy of her letter to Brent stating that she and the kids were moving to Sedgwick, Kansas, as of June 1, 2012. Brent's regular summer parenting time of 8 consecutive weeks was scheduled to begin on June 1st.

On May 29, 2012, Brent filed his motion to modify custody. Specifically, Brent moved for primary residential custody. He asserted that Jamie's move was a material change of circumstances that could justify the court's modification of custody. The motion alleged numerous facts regarding his worthiness as a primary custodian, the benefits of keeping the children in Liberal as being in the best interests of the children and also for him, and the detriments to the children's best interests that would result from

their relocation 240 miles away to Sedgwick, an approximate 4-hour drive from Liberal. Brent alleged that Jamie's move was because Jamie's boyfriend resided there, and the move was not in the best interests of the children.

On June 12, 2012, Jamie filed her response to Brent's motion. Jamie asserted that, prior to sending the notice letter, she had told Brent of her plans and reasons for moving. She alleged that she was moving to Wichita [*sic*] because she had a job there and because her mother had bought her a house there. This all would improve her financial condition, which she had been struggling with since the divorce. She stated her intention of going back to school and alleged that there were better resources in her new location for adult education than in Liberal. She acknowledged that her boyfriend lived in the same town she had moved to and asserted that Brent was more motivated to file his motion to change custody by that fact than out of concern for the welfare of children. Jamie disputed Brent's abilities to coordinate the demands of his job with all of the needs of the children. While acknowledging the successes the children have had in Liberal, Jamie asserted that the children have done well in school because she successfully provided them an environment in which to succeed. She maintained that taking the children away from her and her home, even if it was in the new location, would not be in the best interests of the children.

The issues in this post-divorce custody matter were defined in the pleadings. The district court ordered mediation, but that effort to resolve the residential placement issues by agreement failed.

On August 3, 2012, the district court conducted an evidentiary hearing on the custody motion. More than a dozen witnesses testified at the hearing. The examination and cross-examination of the witnesses, and therefore the evidence for the district court, tracked closely the pleadings filed by the parties. At Jamie's request without apparent

opposition the district court interviewed each of the children individually in his chambers.

Brent's evidence

Brent's first four witnesses testified generally to his good character, his good work ethic, his commitment to his children, and his relationships with each child. Among them, Lorene Potts was the office manager at Brent's place of employment. She confirmed that, if Brent was awarded residential custody, she would help with after school arrangements for Saige in case Brent could not get away from work.

Brent testified in detail about his good job, the good quality of his residence and remodeling he would do to accommodate the children if he was granted custody, the things he does with the children for their and his benefit that would be compromised if they moved, his considerable satisfaction with the Liberal school system in which Saige and Taylor were excelling, his commitment to work with the school to improve the unsatisfactory performance of Garrett, his belief that maintaining the friendships the children had established in Liberal were in the children's best interests, his commitment to see that Saige could continue in her dance extracurricular activity in Liberal, his commitment to provide the boys' extracurricular work opportunities and the education that comes from those, and his commitment to make the well-being of his children his priority in spite of his work commitments. He maintained that Jamie's move to Sedgwick was only to be close to her boyfriend, who also lived in Sedgwick, and was done for Jamie's personal interests without regard for the best interests of the children and for his interests in parenting them. Brent also testified with some particularity about the increased parenting burdens to him and Jamie that would arise from Jamie's decision to move to Sedgwick. He said that he would have additional travel expenses to transport the children between homes. He also said that the parents would lose time with the children because of the need to transport the children such long distances. Brent stated that Jamie's

move with the children would affect his rights under the law because he would be deprived parenting time with the children and would not have the ability to easily travel to their activities. Brent's attorney, by her questions, elicited testimony from Brent supporting his motion on the factors a court must consider in deciding a custody change matter under K.S.A. 2012 Supp. 23-3222(c).

Brent acknowledged he had physically punished the boys. Brent explained his actions as being calculated to provide discipline and teach the boys respect. He also acknowledged that getting physical with the boys may not be the best approach. Jamie had called Kansas Social Rehabilitation Services (SRS) on two occasions regarding the punishment, but SRS investigated each incident and took no action.

Jamie's Evidence

Jamie called seven witnesses and testified for herself. Her witnesses were acquainted with her parenting. They corroborated the close bond that the children had with Jamie. They corroborated Jamie's deep involvement in the school and extracurricular lives of the children.

Jamie's boyfriend, Troy Lawrence, a resident of Sedgwick, also testified. He confirmed that he began dating Jamie while she was separated from Brent. Jamie frequently visited Troy in Sedgwick on the weekends when she did not have parenting time with the children. She also occasionally brought the children to Sedgwick. Troy would help pay Jamie's expenses for her trips. When Jamie and the children would visit Sedgwick they would stay in Troy's home. Troy agreed that the primary reason Jamie made her trips to Sedgwick was to see him. Troy works 8 a.m. to 5 p.m. during the work week for Aerospace Company in Wichita. He stated that he and Jamie have no plans to be married.

Jamie testified that she was surprised Brent moved for custody. She felt like, after a discussion she and Brent had in March, 2012, he knew her intentions to move but never voiced an objection.

Jamie testified in detail regarding her relocation. Said that her mother had purchased a home in Sedgwick for her in February 2012, that after some remodeling and a new roof the home was livable, that she waited to move to Sedgwick until the end of the school year, that the kids' school in Sedgwick is about five blocks away from the home, that she has talked to the school authorities about her children in general and, specifically, about Garrett's grade issues, and she had taken steps to obtain football eligibility for Garrett in spite of his poor grades. Jamie explained that relocating the children with her to Sedgwick would be in their best interests, that the environment there would be more stable, that the children were accustomed to being with her, that they would be subject to changes with her but establishing a new routine while being with their dad would be more difficult for the children than the adjustment to her new location, that she had wanted to leave Liberal and move to Sedgwick for years but stayed in Liberal until her father passed away, that there were more opportunities for her and the children in Sedgwick because it is close to Wichita, that she has family in Wichita and in Sedgwick, and that she could more easily finish her associates degree so that she could then obtain a bachelor's degree.

Jamie said that although being near Troy partly motivated her move, she was most interested in the opportunities in Sedgwick. She stated that, before her move, she visited Troy more often when she did not have the kids. She did not take the children with her to Sedgwick all that often because she did not like them spending that much time driving. She was aware that her relocation with the children would make it more difficult for Brent to attend activities of the children in Sedgwick. Her participation in their activities in Liberal would likewise be more difficult if Brent had custody. She confirmed that she was committed to the relocation even though it might cost her residential custody.

Jamie recognized that Saige was active in an elite dance group in Liberal and also involved in Girl Scouts, obviously groups that would not be available to Saige if she was relocated to Sedgwick. When asked about the children's friends in Liberal and how the children could miss spending time with them if they relocated, Jamie said she was not worried about Saige. She said that Saige would make new friends. Jamie testified that she is concerned that, if the children remain with Brent, he will not see to it that Saige participates in dance and that Taylor participates in baseball.

Jamie testified about the corporal punishment employed by Brent on the boys. She confirmed that Brent had described the events accurately in his testimony. Jamie stated that she was concerned about Brent's temper, that Garrett's behavior problems were because Brent was not around a lot, that when Brent was home he was a strict disciplinarian, that she and Brent were brought up differently and have different beliefs in the way kids should be raised, that she herself had difficulty exercising parental authority over Garrett, that she had also lost her temper and could scream and yell with the best of them, and that she had thrown a belt buckle at Garrett, hitting him, but did not leave a bruise. Brent disagreed with Jamie's efforts to get Garrett eligible for football without Garrett first improving his grades.

The District Court's interview of the children

The district court spoke in chambers with each of the children individually. Garrett made this statement to the district court about the possibility of living with his father:

"I don't know if dad can take on that responsibility of having us all around through the school year. He gets stressed out a lot, what not, whenever we're there, and that's without school work and having to pick us up from places and worrying about where we're going to be."

Taylor told the district court that he wanted to live with Jamie. He said that he was concerned that if he lived with his father, the children would be working all of the time and be unable to participate in sports. Saige said that she got along well with her father.

The District Court's Decision

After considering the evidence and hearing the arguments of counsel, the district court announced that it was granting Brent's motion for custody. In doing so the district court agreed with Brent's claim that the children were established in Liberal and it was in their best interest to remain there, with Brent, rather than be relocated to Sedgwick. The district court pointed out that it appeared that the two parties and the children had been doing fine since the divorce because of the absence of filings that required court intervention. The district court found it significant that Jamie decided to move when things for the children were going so well. The district court stated: "So things are going fine, and then you make a choice and you say 'I'm moving,' and that changes everything. That's the reality. So, I always have to say, why are we doing that? Because that tells me or gives me some insight as to what's going to be in the best interests of these kids." The district court then referred, item by item, to Jamie's claims of how the children would be better off in Sedgwick, and found them unpersuasive. It found that the opportunities Jamie claimed would be available to the children in Sedgwick were already available in Liberal. The district court then announced its decision: "So, that's what I've got, people. And based on what I have seen, I simply cannot find it's in the best interests of these children to move. I'm going to grant the motion, Ms. Gilmore [Brent's attorney]. It's for you to draft."

The district court also entered a written order confirming its decision to change custody. Jamie timely appeals.

ANALYSIS

Did The District Court Abuse Its Discretion By Placing The Burden Of Proof On Jamie, The NonMoving Party, To Show That Her Move Was In The Best Interests Of The Children?

On appeal, Jamie first argues that the district court committed reversible error by shifting the burden of proof from Brent to Jamie to show good reasons for her move. Brent maintains that the district court followed the correct legal standards and appropriately placed the burden of proof on him to show that staying with him in Liberal was in the best interests of the children.

Jamie is correct that the burden of proof in a custody change proceeding is on the party seeking the change. See *In re Marriage of Whipp*, 265 Kan. 500, 503, 962 P.2d 1058 (1998). She is also correct that a district court abuses its discretion when it misapplies the burden of proof in arriving at its decision. See *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 186 P.3d 852 (2008). Jamie argues that the court's announcement of its decision shows that it placed the burden on her to justify her relocation in order to retain custody. We note from the transcript of the hearing that the parties and court discussed the burden of proof before the court heard closing arguments. It is true that the district court directed many of its comments to Jamie, pointing out what Jamie's evidence failed to show regarding the children's best interests. However, the court specifically stated: "[B]ased upon what I have seen, I simply cannot find it's in the best interests of these children to move." It was Brent's burden of proof to show that the best interests of the children were better served by their remaining in Liberal, in his custody, than by remaining in Jamie's custody and relocating to Sedgwick. Brent's motion argued for that result and his evidence supported his motion. In furthering Brent's argument that the status quo in Liberal was superior for the children, his attorney's cross-examination of Jamie challenged her credibility, the validity of the reasons she claimed justified her

retention of custody in spite of the move, and her commitment to the best interests of the children.

In announcing its decision the district court repeatedly referred to the proper test to apply in making custody decisions, *i.e.*, the best interests of the child test. The citations to cases relied on by the district court in its evaluation of those best interests were to appropriate resources relevant to such a decision.

In *Grippin*, the custodial mother moved from Atchison to Arizona without providing the father proper statutory notice of the move. In changing custody to the father the district court stated: "Accordingly, the Court is denying the request of the mother to simply pick up the child and go without giving notice, without giving any warning to the father." *Grippin*, 39 Kan. App. 2d at 1032. This court reversed the change of custody. It found that the district court misapplied the burden of proof concerning the best interests of the child and granted the change of custody as a sanction against the mother for failing to give proper notice. 39 Kan. App. 2d at 1032-35.

The facts in this case are distinguishable from those in *Grippin*. Here there was no relocation without notice. Here there was a duly filed motion by Brent seeking a change of custody in anticipation of Jamie's move. In paragraph 15 of Brent's motion to modify custody he stated: "This move is not in the best interests of the children due to their strong bond with their father, family in the area and established friendships." In paragraph 18 he asserted: "It is in the best interests of the minor children that custody be modified to place the children in the primary residential custody of the respondent pursuant to the reasons stated in this motion" We are persuaded that the district court applied the burden properly and found that Brent met his burden of proof to show, as he alleged in his motion, that the move was not in the best interests of the children. Rather, the district court found that Brent had met his burden of proof and demonstrated that the

best interests of the children were served by ordering that they remain in Liberal in Brent's custody.

Did The District Court Retaliate Against The Mother, Rather Than Determining The Best Interests Of The Children, When It Granted Brent's Motion?

Jamie argues that Brent offered nothing to show why it was in the best interests of the children to change residential custody from Jamie to Brent. On the other hand she says she offered extensive evidence to show that custody should remain with her. She then concludes that the district court's order granting Brent custody must have been retaliation against her for moving. In short, Jamie, not surprisingly, disagrees with the district court's decision. Jamie asserts that the district court abused its discretion by failing to properly apply the test regarding the best interests of the children.

Under an abuse of discretion standard, "the trial court's decision is protected if reasonable persons could differ upon the propriety of the decision as long as the discretionary decision is made within and takes into account the applicable legal standards. . . . [A]n abuse of discretion may be found if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations." *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 (2007). Unless the appellate court were to conclude that no reasonable judge would have reached the result below, the district court's decision must be affirmed. *In re Marriage of Cobb*, 26 Kan. App. 2d 388, 392, 988 P.2d 272 (1999).

In reviewing the district court's decision for abuse of discretion, we look only to evidence supporting the decision. *In re Marriage of Whipp*, 265 Kan. 500, 502, 962 P.2d 1058 (1997). Jamie as the party asserting an abuse of discretion bears the burden of establishing such abuse. *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007). Our Supreme Court has stated our function and its limitations in the following:

"Our function is not to delve into the record and engage in the emotional and analytical tug of war between two good parents over two good children. The district court was in a better position to evaluate the complexities of the situation and to determine the best interests of the children. Unless we were to conclude that no reasonable judge would have reached the result reached below, the district court's decision must be affirmed. As there were good reasons and sufficient evidence supporting the district court's decision, and the district court understood and applied the correct, controlling legal principles, we find no abuse of discretion." *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995).

K.S.A. 2012 Supp. 23-3218(a) allows a district court to consider modifying a prior custody order "when a material change of circumstances is shown." K.S.A. 2012 Supp. 23-3222(c) states that a change of the residence of the child "may be considered a material change of circumstances which justifies modification of a prior order of legal custody." That statute requires a district court, on a motion for modification of a prior order based on a change of residence, to consider "all factors the court deems appropriate." The following factors must be considered by the district court:

"(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 under this article; and (3) the increased cost the move will impose on any party seeking to exercise rights granted under this article." K.S.A. 2012 Supp. 23-3222.

In addition, K.S.A. 2012 Supp. 23-3203 provides a list of nonexclusive factors that are to be considered by the district court in each child custody case. Relevant here, the list includes:

"(b) the desires of the child's parents as to custody or residency;

"(c) the desires of the child as to the child's custody or residency;

"(d) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

"(e) the child's adjustment to the child's home, school and community;

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

K.S.A. 2012 Supp. 23-3201 states that the court shall determine issues of child custody in accordance with the best interests of the children.

We have reviewed the record and find that the district court was well aware of these applicable legal standards and principles. Next we review the evidence that supports the district court's decision.

Much of the testimony focused on each child's adjustment to life in Liberal. It was undisputed that Saige and Taylor were doing well in school in Liberal, as evidenced by their grade cards. All of the children had friends in Liberal and were involved in activities outside of school. Saige was part of an elite dance team from Liberal. School continuity, friendships in Liberal, the dance team would all be eliminated if the children did not remain with Brent. Brent had a plan for caring for the children. Lorene Potts would make sure Saige was brought back to the office if Brent was unable to pick her up from school. The children would be able to hunt, fish, scrap, and learn things from him if they remained with Brent. Brent had a reasonable plan to deal with Garrett's poor school performance. Brent had taken steps to get the children enrolled in school. He was absolutely sure he could make the children a priority. His opportunity to play an important role in the lives of the children would be diminished if he were required to travel to Sedgwick, or halfway to Sedgwick, for parenting time. Neither party believed it was good for the children to spend considerable amounts of time on the road. Brent testified that the move would greatly increase the costs involved to each party in order to exercise their parenting time, including travel, travel time, fuel, money and a reduction in, essentially, quality time. Brent would make the children available to Jamie for her

parenting time, and he would also make the children available for visits with Jamie's family.

This is all competent evidence under K.S.A. 2012 Supp. 23-3222 and K.S.A. 2012 Supp. 23-3203. This evidence supports the decision of the district court granting Brent custody of the children. There were good reasons and sufficient evidence supporting the district court's decision, and the district court understood and applied the correct, controlling legal principles. Jamie has failed in her burden to show that the district court abused its discretion in its decision.

Finally, Jamie claims that the district court erred by not considering the timing of Brent's motion to modify residential custody. Jamie incorrectly asserts that Brent had a 30-day window to object after receiving Jamie's notice that she intended to move. She apparently relies on K.S.A. 60-1620(a), which has been recodified as K.S.A. 2012 Supp. 23-3222, the so-called "move-away" statute. This statute states that a parent with residential custody of a child must give written notice to the other parent not less than 30 days before changing the residence of the child. K.S.A. 2012 Supp. 23-3222(a) contains no statutory time limitation on when a motion to modify residential custody may be filed.

The judgment of the district court is affirmed.