

NOT DESIGNATED FOR PUBLICATION

No. 108,004

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MARISA C. WILSON,
Appellant,

and

MICHAEL R. WILSON,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed June 21, 2013. Affirmed.

Elizabeth E. Bernhart, of CornerStone Law, LLC, of Newton, for appellant.

Shawnah K. Corcoran, of Hutchinson, for appellee.

Before ARNOLD-BURGER, P.J., GREEN, J., and LARSON, S.J.

Per Curiam: This is an appeal of a change of residential custody order from the mother, Marisa Astuno, formerly Marisa Wilson, to the father, Michael Wilson. Based on our standard of review and the extensive 5 days of hearings involving the testimony of 14 witnesses, there was ample evidence to show a material change of circumstances and therefore the district court did not abuse its discretion in making its ruling. Consequently, we affirm the district court.

The extensive record in this case, highly summarized, shows the following facts and legal proceedings.

Marisa Astuno and Michael Wilson were divorced in 2009 in Reno County. The couple has one child, E.S.W., born in 2006. Under a settlement agreement, Astuno was to have residential custody of the child, with Michael having 2 days of parenting time each week.

In September 2011, the district court ordered the parents to agree on a therapist for the child and recommended Marcella Kille if they could not agree. Kille started seeing the 5-year-old child on November 9, 2011. On November 18, 2011, Astuno sent an e-mail to Wilson informing him that she and the child were moving from Hutchinson to Lyons and that the child would be changing schools. On November 30, 2011, Kille wrote a letter to Wilson's attorney that expressed concern for the child's safety while at Astuno's home and recommended that Wilson have residential custody of the child based on statements the child made in therapy.

The following day, Wilson filed a motion asking for an ex parte order to change residential custody based on emergency circumstances. The motion alleged, among other things, that the child told the therapist that Astuno spansks her and hits her in the back of the head. Wilson's motion included Kille's letter attached as an exhibit.

On December 2, 2011, the day following the filing of Wilson's motion, the district court informed both parents that it would not grant Wilson's motion to issue an ex parte order for an emergency custody change but would "set [the] matter for an evidentiary hearing." Wilson called seven witnesses in a hearing held over 3 days from December 19-21, 2011. Astuno called six witnesses in 2 days in the continued hearing held on December 28 and December 30. On January 6, 2012, the district court announced its decision to change residential custody to Wilson. The written order was filed January 27, 2012. Astuno appeals.

The district court did not abuse its discretion by changing residential custody

The ultimate issue is whether the district court erred by ordering a change of residential custody. This includes a determination of whether there was a material change in circumstances as required by statute. But first, Astuno argues that the confusing procedure followed by the district court resulted in Wilson not being required to carry his burden of proof to show a material change of circumstance that warranted a change of residential custody.

Specifically, Astuno argues that the district court abused its discretion by failing to assign the burden of proof to Wilson. Wilson counters by contending that his petition for an ex parte emergency change of custody and his evidence meet the requirements to carry his burden to show a material change of circumstances to justify a change in residential custody.

This court reviews a district court's ruling changing residential custody of a child for abuse of discretion. *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). The trial court is in the best position to determine the best interests of the child, and its judgment will not be disturbed on appeal unless there is an abuse of sound judicial discretion. 292 Kan. at 672. Under the abuse of discretion standard, the trial court's decision is upheld if reasonable people would disagree about the appropriateness of the decision as long as the discretionary decision is made within and takes into account the applicable legal standards. An abuse of discretion may exist if the trial court's decision fails to consider statutory limitations or goes outside the statutory framework. 292 Kan. at 672.

A. *Nothing in the record indicates the district court failed to require Wilson to carry his burden of proof of a material change in circumstances*

Astuno argues that the district court failed to adequately articulate the nature of the proceedings being held. Wilson's petition was filed under what was formerly K.S.A. 60-1628(b) asking for an emergency ex parte order to change residential custody. The next day the district court, with both parties present with counsel, declined to grant Wilson's motion, finding insufficient evidence to grant the emergency request, but set the matter for an evidentiary hearing. The court continued to refer to the proceeding as part of Wilson's motion for an emergency change in custody but treated the matter as a change in custody hearing.

After Wilson presented his evidence, the court denied Astuno's request to "treat it as a change of custody and put the parties in mediation" and stated that there was evidence sufficient "to sustain the burden to overrule [Astuno's] motion with regard to the possible emergency for this child." Astuno's closing argument was based on an emergency motion, and she continued to argue that there was no emergency.

When the district court announced its decision to change custody to Wilson, Astuno protested that there was no showing of an emergency. Then, the district court explained: "This was filed as an emergency asking me to act on an emergency basis meaning an ex parte order. I refused to do that. I ordered that—I required that I hear testimony and we've had a full-blown custody proceeding. What I'm ordering is that custody be transferred." The written order included a finding that it was not an emergency change of custody.

Wilson's motion was filed under what had been recodified as K.S.A. 2011 Supp. 23-3219(b) by the time of Wilson's motion. That subsection allows a party to ask a court to issue an ex parte order to change custody based on emergency circumstances. No such

order was ever issued in this case. Thus, Astuno argues the district court improperly considered whether to modify child custody under K.S.A. 2011 Supp. 23-3218 because Wilson never made a motion under that statute. That resulted, Astuno argues, in the district court failing to assign Wilson the burden of proof.

According to K.S.A. 2011 Supp. 23-3218(a), "the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown." The Kansas Supreme Court has noted that this statute vests the trial court with continuing jurisdiction to modify a custody order "to insure that the interests of the children are fully protected from an adverse change of circumstances." *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 (1998) (quoting *Simmons v. Simmons*, 223 Kan. 639, 642, 576 P.2d 589 [1978]). The plain language of the statute does not require or mention a motion at all. In fact, this court has upheld a motionless change of residential custody and rejected the argument that granting the change without a motion was an abuse of discretion. *Dickison v. Dickison*, 19 Kan. App. 2d 633, 639, 874 P.2d 695 (1994). In *Dickison*, the trial court originally denied the father's motion for a change of custody but later awarded him sole custody on its own without a motion. 19 Kan. App. 2d at 636. We upheld the change of custody after a review of the record showed that the district court had found a change of circumstances since its original decision, though it failed to use those exact words when it announced its decision. 19 Kan. App. 2d at 639.

It is clear that under the circumstances in this case, the district court had the statutory authority to consider modifying residential custody even though Wilson did not cite K.S.A. 2011 Supp. 23-3218 in his motion. This authority was triggered by a showing of a material in circumstances—Astuno changing the residence of the child. See K.S.A. 2011 Supp. 23-3222(c) (stating that a change of the residence of a child "may be considered a material change of circumstances" that justifies modification of residential

custody). In every child custody case, the court must determine custody or residency of a child in accordance with the best interests of the child. K.S.A. 2011 Supp. 23-3201.

Astuno further argues that the district court abused its discretion by failing to require Wilson to carry any burden of proof. In *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1032-33, 186 P.3d 852 (2008), cited by Astuno, this court reversed a change of residential custody because the district court improperly required the mother, the residential parent, to put on evidence to show that moving the child to Arizona was in the child's best interests instead of requiring the father, the party requesting the change of custody, to show that changing custody was in the best interests of the child.

But, there was no such shifting of the burden here. Wilson, the party requesting the change in residential custody, presented evidence, including calling seven witnesses and admitting eight exhibits in 3 days. Wilson's closing argument focused on the testimony of the child's therapist, who testified that she was concerned for the safety of the child because the child told her that Astuno, her mother, hit her. Wilson's closing concluded by asking the court to change residential custody because it was in the child's best interests.

Nothing in the record shows that the district court improperly placed the burden of proof on Astuno or shows that it failed to require Wilson to carry any burden of proof. Rather, the record shows that Wilson met his burden of showing that there was a material change of circumstance—Astuno's move to Lyons and the therapist's report of safety concerns—that justified changing residential custody based on the best interests of the child. The burden of proof was correctly placed on Wilson. Astuno's contrary argument is without merit.

B. *Evidence in the record supports the district court's order to change residential custody in the best interests of the child*

Astuno similarly argues that the district court abused its discretion because it failed to state sufficient reasons for a change in residential custody. Specifically, Astuno argues that the only reason the district court gave on the record for changing custody was so that the child could stay in the same school, which she says is illogical because Wilson does not live in the school's boundary. Wilson contends that the court heard 14 witnesses over the course of a 5-day hearing, giving the court enough information to support its decision, and its use of discretion was sound and reasonable.

The district court stated the following when announcing its decision:

"The motion before the Court is to change primary custody of [the child]. If these parties lived in the same location, which they don't any longer, I would be inclined to order shared custody. I feel they both can, have been and can be good parents. But weighing everything that I've heard and the current situation which is that the mother no longer lives in the Hutchinson area, I'm going to change custody to the father."

The written order does not list any reasons, stating only that "it is in the best interest of the minor child that the parties have joint custody of the minor child and that residential custody of [the child] is changed from Petitioner to Respondent."

The trial court's failure to specifically articulate the evidence that supports its finding in a child custody case is not fatal. *Whipp*, 265 Kan. at 508; *In re Marriage of Lawson*, No. 107,434, 2013 WL 1010406, at *4 (Kan. App. 2013) (unpublished opinion). In the absence of an objection to the trial court, omissions in findings will not support reversal because the court is presumed to have found the necessary facts to support its judgments. *Whipp*, 265 Kan. at 508-09. It is this court's function to review the record to

see if it supports the presumption that the trial court found all facts necessary to support its judgment. 265 Kan. at 509.

Here, the record contains sufficient evidence supporting the district court's decision that there was a material change of circumstances and that it was in the child's best interests to reside with her father. Astuno moving the child to Lyons provided the necessary material change of circumstances under K.S.A. 2011 Supp. 23-3222(c). The district court stated that it met with the child, heard all the testimony, reviewed all the exhibits, and weighed everything that it heard. The most persuasive evidence in the record is from the child's therapist, who expressed concern for the child's safety at Astuno's home and recommended that Wilson have residential custody. The therapist testified that the child told her that Astuno hits her in the back of the head and that she wanted to live with her father. The therapist also testified that at another session the child told her that Astuno had been upset, hit her, and yelled at her because she had told the therapist about Astuno hitting her before. That testimony alone would support the district court's decision to change residential custody. In any event, it cannot be said that the court's order reflects the decision of an unreasonable person. See *Harrison*, 292 Kan. at 672. The district court did not abuse its discretion in reaching its decision in this case.

Affirmed.