

NOT DESIGNATED FOR PUBLICATION

No. 109,083

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAYDEN RYAN BURGARDT, a minor child by and through her father and next friend
KELLY BURGARDT,
Appellee,

v.

LACEY ROSE WILLINGER,
Appellant.

MEMORANDUM OPINION

Appeal from the Finney District Court; MICHAEL L. QUINT, judge. Opinion filed August 30, 2013. Reversed and vacated.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

John M. Lindner, of Lindner & Marquez, of Garden City, for appellee.

Before BRUNS, P.J., HILL, J., and ERNEST L. JOHNSON, District Judge Retired, assigned.

Per Curiam: Kelly Burgardt, the father, and Lacey Rose Willinger, the mother, are the natural parents of the minor child Jayden Ryan Burgardt. They could not reach an agreement on residential placement of the child so they submitted that issue to the court. After the trial the district court entered an order granting the parents shared residency. Neither party appeals that decision. The district court also entered, *sua sponte*, an order that vacates its shared residency order effective the first Saturday of August 2015 and places Jayden's primary residency with Kelly. Lacey appeals. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Jayden Ryan Burgardt was born in late 2010 while Lacey and Kelly were living together in Kelly's home in Garden City, Kansas. In late 2011 the parties ended their cohabitation. Lacey and Jayden moved from Kelly's home. In December 2011, Kelly filed this lawsuit under the Kansas Parentage Act (KPA), K.S.A. 2011 Supp. 23-2201 *et seq.*, to establish his parental rights.

After the separation Lacey eventually moved to Winfield, while Kelly remained in Garden City. For several months during the pendency of the case the parties, by agreement, alternated Jayden's residency on a shared basis. However, they could not agree on a permanent parenting plan.

Eventually the case came to trial October 22, 2012. The parties agreed that each parent should have joint legal custody of Jayden. Each party sought residential placement of the child. During the first day of trial Kelly testified and presented the testimony of his witnesses. The following day Lacey testified and presented the testimony of her witnesses.

Kelly's Evidence

Kelly testified that, since Jayden's birth, he had been the primary caretaker of the child and primary homemaker because Lacey often slept past noon. Kelly, a full-time fireman, regularly worked three consecutive 24-hour shifts followed by 9 days off. He acknowledged that Lacey had provided care for Jayden while he worked. Kelly testified that he had concerns about Lacey's parenting because of her lack of cleanliness. He was also concerned about her instability, citing Lacey's inability to hold a steady job and frequent relocations after Kelly asked her to move out of his house. Kelly alleged that

Lacey had been violent with him, hitting him in anger and punching holes in the wall and the bedroom door.

Kelly testified that his retired father currently provided care for Jayden when Kelly was working. Kelly testified that his father would continue to be available, when necessary, once Jayden started school. Kelly's father testified that the main reason he retired was to watch Jayden. Kelly and his witnesses testified about Kelly's close extended family in Garden City and Jayden's interactions with her grandparents, aunts, uncles, cousins, and family friends. Kelly agreed that Lacey was an important part of Jayden's life and they should spend time together. However, he did not believe that Lacey would respect his parental bond with the child.

Other family members and friends testified in support of Kelly's parenting commitment and skills. Witnesses corroborated instances where Lacey hit Kelly. Sarah Miranda, a friend of both Kelly and Lacey, testified that Lacey asked her to lie and say that Kelly drove drunk with Jayden in the car. She also testified that Lacey told her she would do whatever it took to get custody of Jayden.

Lacey's Evidence

Lacey testified that she was Jayden's primary caregiver. She pointed out that she was the one who would get up with the baby and breast-feed her. Lacey acknowledged that her relationship with Kelly was volatile. She alleged that Kelly would hit her, although she acknowledged that she had hit Kelly. According to Lacey it was Kelly, not she, who punched the holes in the wall. Lacey also testified that Kelly occasionally used "weed" and cocaine. She alleged that he had used steroids but stopped about 6 months before she became pregnant. Lacey further claimed Kelly would drink until he was drunk up to 3 to 4 times a week. She claimed that Kelly, after drinking, had driven with Jayden in the car.

At the time of the trial Lacey was renting a home in Winfield and working from home for an internet based business. She also worked part-time for EMS. Lacey testified her home is in an area with a school 3 1/2 blocks away and a preschool 2 blocks away. According to Lacey, Jayden played with two children who lived across the street. Jayden also interacted with Lacey's sister, who resided in Winfield, and her children. Lacey stated that her sister, who operated a state-licensed day care center out of her home, would be available to watch Jayden when necessary. Lacey's mother, who lived 36 miles away in Wichita, came to Winfield most weekends. Lacey acknowledged that Kelly should have a good relationship with his daughter.

The District Court's Orders

After the district court heard the testimony and the arguments of counsel, the court took the matter under advisement. Before closing the record the district court pointed out to the parties that Jayden, who was then just 2 years old, would start school in the future and the parents' geographic separation would make the current shared residency arrangement unworkable.

On November 1, 2012, the district court issued its written decision. The court entered an order for Jayden's shared residency, which states as follows:

"Neither parent is unfit and both have shown a proven ability to properly care for the child. The child will be turning two years old in the coming week and the court finds that it is practical and in the child's best interest for the Parties to share custody at this time on a biweekly basis."

The court then established the specific parameters of that biweekly shared residency plan. Neither party appealed the shared residency orders.

However, the court went further, ordering a future automatic change of Jayden's residency, to become effective in August 2015. That order prospectively set aside the shared residency plan referred to above and granted Kelly primary residency of Jayden. The court's order states, in relevant part, as follows:

"Beginning the first Saturday of August, 2015, the custody of the child shall move to a more traditional custodial, noncustodial arrangement with the father being designated the custodial parent. This selection is made due to the wider support group available in the Garden City area for the child, the school system, and the child's acclimation to Garden City over the last two years. The father's family support seems to be solid and consistent and better able to give the child everything she needs as she grows into her formative educational years. This residential custody vesting in the father shall be subject to reasonable and liberal visitation with the mother"

Lacey appeals this future automatic change placing Jayden's primary residency with Kelly in August, 2015.

ANALYSIS

On appeal, Lacey frames the issue as a question: "Did the District Court err in making future custody and residency findings when there was no evidence to support the best interest of the child three years hence?" Of course, implicit in her question is her contention that there was, in fact, no such evidence. Kelly responds that there was such evidence and, in light of that trial evidence, the district court's decision was appropriate when considering the natural progression of a child from before school age to kindergarten age.

Under K.S.A. 2011 Supp. 23-3201, a district court must make decisions regarding the custody or residency of a child in accordance with the best interests of the child. When the residency dispute is between the parents, the court's paramount consideration

must be the welfare and best interests of the child. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). K.S.A. 2011 Supp. 23-3203 provides a nonexclusive list of 11 factors that the district court must consider, if they are relevant, in determining custody and residency. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701-02, 229 P.3d 1187 (2010).

Here, the district court made a residency determination which includes the future primary placement of Jayden with Kelly. An appellate court will overturn a district court's residency determination only upon an affirmative showing by the appellant that the court abused its sound judicial discretion. *In re Marriage of Rayman*, 273 Kan. at 996. A judicial action constitutes an abuse of discretion

"if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

Implicit in the prospective order changing residency is a finding that the change will be in Jayden's best interests in August 2015. We have reviewed the trial record to determine if substantial competent evidence was available to the district court to support that decision. We first analyzed the evidence in light of the nonexclusive factors in K.S.A. 2011 Supp. 23-3203. Rather than list each factor, we summarize: The trial evidence at most provides a basis only for speculation as to whether the factors will be relevant in August 2015 and, if any are, what the outcome of their consideration might be then. For one example, the trial evidence does not suggest any conclusion on what the child's residential preference would be then. For just one more example, the evidence does not suggest any conclusion on how the child will interact with her parents and others in 2015.

The statutory list is not exclusive, and the court is to consider all relevant factors. The district court only referred to three factors to justify its future change of residency to Kelly: Kelly's support structure in Garden City, the school system there, and the child's acclimation to the community during the first 2 years of her life. There was certainly evidence regarding the support Kelly was receiving from family and friends at the time of trial. That the same degree of support will be available in 2015 is a matter of speculation. Concerning the schools in Garden City, neither party introduced any evidence regarding the quality of those schools. While the court pointed to the child's acclimation to Garden City at the time of trial as a factor in its decision, the child was only 2 years old. How acclimated and comfortable the child will be in Garden City, or Winfield, or wherever the parents may reside in 2015, is speculation.

The trial record demonstrates that each party, through his or her attorney, geared that party's case to that party's request for Jayden's immediate residency. Neither party adduced evidence concerning circumstances the party expected to exist in 2015 other than the party's hope for continued family support. Neither party, from the record, was on notice that the district court intended to make rulings on the anticipated best interests of the child in 2015.

The district court referred, minimally, to some factual bases for its future placement of Jayden's residency with Kelly in August 2015. Lacey did not challenge the factual bases in district court so, ordinarily, we would presume that the court found the facts necessary to support that judgment. However, before we apply the presumption we review the record to determine if it contains evidence that supports the application of the presumption. See *In re Marriage of Whipp*, 265 Kan. 500, 509, 962 P.2d 1058 (1998).

We are unable to find substantial competent evidence that supports the future placement of Jayden's residency with Kelly. The decision appears to be based on speculation rather than trial evidence. We recognize that the district court intended to

make residency orders that would reduce future litigation. But even that intention was based on the court's speculation that, when Jayden turns 5, the parties will live in geographically distant homes. It may be that Lacey will relocate back to Garden City. It may be that the present shared residency arrangement the court ordered will be successful. The parties may well do those things that are in the best interests of the child such that a change in the child's residency when starting school would do more harm to the child than good. The district court's best interests of the child finding, on which it based its future placement of Jayden in Kelly's primary custody, is not supported by substantial competent evidence. Again, the trial court can abuse its discretion if the factual foundation for its decision lacks substantial support in the record. *Ward*, 292 Kan. 541, Syl. ¶ 3. The district court's decision to change Jayden's residency with Kelly in August 2015 is based on an error of fact and is in error.

We note with interest Kelly's citation to an Idaho case where its Supreme Court approved a prospective change in custody. *State v. Hart*, 142 Idaho 721, 132 P.3d 1249 (2006). In *Hart*, the trial court granted the parents, who had never married, equal shared physical custody of their 3-year-old child, with an automatic change to residential placement with the father when the child started kindergarten. The court had the benefit of custody evaluations from expert witnesses in reaching its decision. The *Hart* court found the evidence supported a finding that the father would do a better job of fostering a strong parental bond with both parents and, thus, the trial court did not abuse its discretion when it ruled the child should live primarily with her father during the school year. 142 Idaho at 725-26.

We also note that Idaho is in the minority on the issue of automatic change of custody and residency orders. The Vermont Supreme Court faced a similar situation to the one here and in *Hart*, in *Knutsen v. Cegalis*, 187 Vt. 99, 989 A.2d 1010 (2009). The parents there had never been married to each other, but, like here, they had lived together and had a child together. The child was born in 2005. In 2006 they moved apart, with the

child residing with her mother. In the parentage action the court awarded primary residency to the mother but made an automatic change order placing the child with the father in 2010 when the child began kindergarten. The *Knutsen* court found that an overwhelming majority of courts that have considered the question have found that automatic change provisions in custody orders are impermissible. See 187 Vt. at 105 n.2. It noted that only two courts had upheld such provisions, one being the Idaho court in *Hart*. The Vermont court vacated the future automatic residency change order. The court concluded that a change in custody must be based on a real-time determination of the child's best interest. The court stated that a "best interests determination cannot be made in the absence of all the necessary facts. What those facts may be when the child enters kindergarten are matters of speculation." *Knutsen*, 187 Vt. at 106.

At any rate, we have not been asked to decide the issue of the propriety of automatic custody or residency change orders. We have been asked to determine whether substantial competent evidence supports this district court's decision that the automatic residency change order is in Jayden's best interests. Finding that evidence lacking, we reverse the district court and vacate the order that was to become effective in August 2015 granting Jayden's residency with Kelly.