NOT DESIGNATED FOR PUBLICATION

No. 110,175

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of:

K.B., a Minor Child
by and through his Next Friend SARA D.,
and SARA D., Individually,
Appellees,

v.

HARRY B., JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Atchison District Court; ROBERT J. BEDNAR, judge. Opinion filed March 21, 2014. Affirmed.

Shaye L. Downing, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Lawrence, for appellant.

Robert D. Campbell, of Campbell Law Office, P.A., of Atchison, for appellee.

Before MALONE, C.J., BUSER, J., and HEBERT, S.J.

Per Curiam: This is an appeal by Harry Burton, Jr., the biological father of K.B. (Father), from the trial court's orders regarding residency, parenting time, and child support. Father contends he should have primary residency of K.B. rather than K.B.'s biological mother, Sara D. (Mother). Alternatively, Father argues for shared residency. Father also seeks additional parenting time and a modification of child support. Having

carefully considered the record and the parties' briefs and listened to their oral arguments, we affirm the rulings of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father never married. Their child, K.B., was born in the spring of 2010 and has lived with Mother throughout his lifetime. On February 18, 2011, the trial court determined paternity and approved and filed an agreed-upon parenting plan.

The parenting plan gave the parents joint legal custody, with primary residency to Mother and parenting time to Father. The agreement was fairly detailed. With regard to parenting time, Father was given time with K.B. in part "[e]very Tuesday and Wednesday from 12:00 noon until 6:00 p.m.," and "[e]very other weekend from 5:30 p.m. Saturday until 8:00 a.m. Monday." At first, Father was working a "swing shift" and this parenting time accommodated his work schedule. Subsequently, Father began working significant overtime, which interfered with his parenting time schedule. Mother was also working and testified "[her] schedule ha[d] changed several times."

Both the journal entry which adopted the agreed-upon parenting plan and the plan itself provided: "The parties are free to and are encouraged to [modify] the parenting plan as they may both agree." The parents freely implemented that provision by disregarding the scheduled parenting time and preferring to operate on a "day-to-day basis." Both parents testified their ad hoc arrangement worked for a while. By early 2013, however, scheduling conflicts arose which, together with other issues such as Mother's frequent moves, the presence of live-in boyfriends, and disagreements over daycare, led to increasing tensions.

Parenting disputes spilled over near the time of K.B.'s third birthday in April 2013. Mother testified to an "understanding I was supposed to pick [K.B.] up" for his birthday.

According to Father, however, he repeatedly tried to reach Mother without success. Father said he finally left for St. Joseph to do some errands and that Mother later called him from an unfamiliar number, stating her phone service had been discontinued. Mother testified she was unable to pick up K.B. until about 8:30 p.m. and "felt like [K.B.'s] birthday time was taken from [her]."

Two days later, Mother entered Father's house in order to retrieve K.B. Mother testified that Father began yelling and pulled K.B. from her arms, pushing her in the process. Mother called the police and reported that Father had pushed her.

Father testified that Mother did not contact him before arriving at the house. He said Mother entered the residence while he was undressed and peremptorily took K.B. Father denied pushing Mother but said he demanded that she give K.B. to him, which she did.

Father was not charged with domestic violence for this instance or any other. At some time, Mother was charged with domestic violence for striking Father, but that charge was dismissed, according to Father, at his insistence.

On May 2, 2013, Mother filed a "Motion to Modify Custody and Child Support." Despite its title, the motion did not address custody but almost exclusively discussed parenting time, suggesting a different schedule and further rules governing such things as the exchange of K.B. by his parents. Only at the end of the pleading did Mother pray "to modify child support based on current, extrapolated and/or averaged income." Of note, Father did not file a corresponding motion or any other responsive pleading.

On June 12, 2013, the parents appeared with their counsel for an evidentiary hearing. The trial court stated the hearing was on Mother's motion to modify parenting time and child support, to which Mother's counsel agreed. In his opening remarks,

Father's counsel said the evidence would show the parents "never abided by the court-ordered parenting time," and that "they had what amounted to a shared residential plan where they were sharing equal time with [K.B.]"

The parents testified to the facts related above. Additionally, Father testified that he and Mother each had K.B. "half the time." Father also claimed he was "the best residential custodial parent," because he was "the most stablest [*sic*] parent." Nevertheless, Father proposed, "I would say she could get him one week and I'd get him the next week and I'd pick him up after school."

In cross-examination, Mother's counsel first clarified that Father wants to "be residential custodian." Mother's counsel then inquired, "Did you file a motion or are you just dropping this on us today without us having any notice?" Father merely repeated, "I'm the most stablest [sic] parent."

In closing arguments, Mother's counsel insisted, "This is the first I've heard about wanting a change of residential custody. I don't think that that should be considered. It's really kind of a surprise. We should be notified about what they're asking for."

Father's counsel responded:

> "As far as [the] argument that there had been no motion filed to modify residency, quite frankly, the issue of custody and residency was brought up in their motion.
>
> "They clearly understood that that was going to be a topic of discussion for today.
>
> "My client's proposal is, essentially, that they would share time with [K.B.], with the caveat that he continued to be allowed to see [K.B.] every day, which they have been doing, by all accounts, for at least the last year-and-a-half."

The trial court took the matter under advisement mentioning to Father's counsel that the court "historically has been very much in favor of shared custody," and yet "people have to agree in order for shared custody arrangements to work."

On June 17, 2013, the trial court filed its journal entry. The trial court characterized the parent's requests as follows: "The [M]other has requested joint legal custody of [K.B.], with residential custody to her. The [F]ather has requested a shared custodial arrangement wherein [K.B.] would be rotated between each parent one week at a time." The trial court ordered that "the parties shall continue to have joint legal custody of the minor child" and "[t]he residential custody of the minor child shall remain with the [M]other, subject to [Father's] parenting rights," which it further specified. After making certain findings on financial matters, the trial court directed Mother's attorney to prepare a new child support worksheet and to submit it to Father's attorney for approval.

On June 26, 2013, Mother's counsel filed the child support worksheet with a signature by Father's counsel. No further argument appears in the record regarding the worksheet. Father filed a timely appeal.

THE TRIAL COURT'S ORDER CONTINUING PRIMARY RESIDENCY WITH MOTHER

Preliminarily, although the parties, their counsel, and the trial court repeatedly have referenced custody in this case, custody is not at issue. Mother and Father have always had "joint legal custody," see K.S.A. 2013 Supp. 23-3206(a), and the trial court continued that order. Neither parent appeals that ruling. To be clear, the principal issue in this appeal relates to residency.

Kansas law provides: "The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child." K.S.A. 2013 Supp. 23-3207(a). Although the phrase "primary residency" is not

found in the statute, it is referenced in caselaw, *In re Marriage of Hutchinson*, 47 Kan. App. 2d 851, 856, 281 P.3d 1126 (2012), and in the Kansas Child Support Guidelines § II.F.1 (2013 Kan. Ct. R. Annot. 126), Guidelines § IV.E.2 (2013 Kan. Ct. R. Annot. 138), and Guidelines § IV.E.3 (2013 Kan. Ct. R. Annot. 140). Mother has maintained primary residency for K.B. since the parenting agreement was filed on February 18, 2011. Father contends, however, that the trial court abused its discretion by continuing to allow Mother to have primary residency of K.B.

A trial court "shall determine . . . residency of a child in accordance with the best interests of the child." K.S.A. 2013 Supp. 23-3201. Where, as here, the parents entered into an agreed parenting plan, "it shall be presumed that the agreement is in the best interests of the child." K.S.A. 2013 Supp. 23-3202. A trial court may change or modify a final residency order, however, "when a material change of circumstances is shown." K.S.A. 2013 Supp. 23-3218(a); see also K.S.A. 2013 Supp. 23-3202 (recognizing trial court may depart from the presumption for an agreed parenting plan upon "specific findings of fact stating why the agreed parenting plan is not in the best interests of the child"). The trial court's refusal in the present case to change or modify its final order granting primary residency to Mother is reviewed for an abuse of discretion. See *In re Marriage of Phillips*, 274 Kan. 1049, 1058, 58 P.3d 680 (2002); *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006).

The abuse of discretion standard is well known:

> "Under an abuse of discretion standard, a district 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. An abuse of discretion may be found if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations." *Harrison v. Tauheed*, 292 Kan. 663, Syl. ¶ 2, 256 P.3d 851 (2011).

At the outset, Father contends the trial court abused its discretion "when it failed to consider Father's request that he be granted primary residency of the minor child." We first must decide, however, whether Father *asked* the trial court to award him primary residency of K.B. in response to Mother's motion. In this regard, the parties disagree regarding whether Father actually requested primary residency of K.B.

It is undisputed that Father did not file a verified motion to modify the agreed parenting plan to allow him to have the primary residency of K.B. K.S.A. 2013 Supp. 23-3219(a) requires that procedure:

> "A party filing a motion to modify a final order pertaining to child . . . residential placement . . . shall include with specificity in the verified motion, or in an accompanying affidavit, all known factual allegations which constitute the basis for the change of . . . residential placement. . . . If the court finds that the motion establishes a prima facie case, the matter may be tried on factual issues."

Having thoroughly reviewed the record, we are not persuaded that Father sought primary residency in the district court proceedings. First, prior to the hearing Father did not comply with K.S.A. 2013 Supp. 23-3219(a), which would have clearly informed the trial court and Mother if he was seeking primary residency of K.B. Second, during the evidentiary hearing, Father claimed he was the "best residential custodial parent" and yet he suggested an arrangement which was similar to shared residency. Father's counsel also appeared to argue for shared residency; but on appeal, that same counsel now asserts that she meant Father should have primary residency, "with Mother having parenting time every other week." Father's testimony and his counsel's arguments in the trial court were ambiguous on this point. Third, after the hearing, when the trial court stated Father's legal position in its journal entry, it memorialized his request for shared residency only. Importantly, Father failed to object to the trial court's understanding of his legal position stated in the journal entry that he was seeking shared residency of K.B.

On appeal, it is Father's responsibility to designate a record affirmatively showing error. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644-45, 294 P.3d 287 (2013) (burden to designate a record generally); *Hardenburger v. Hardenburger*, 216 Kan. 322, Syl. ¶ 3, 532 P.2d 1106 (1975) (The trial court's decision on best interests of child will not be disturbed "in the absence of an affirmative showing of abuse of discretion."). For the reasons stated, Father has not shown that the trial court's failure to make a specific finding on his claimed request for primary residency was error. And we will not decide the issue for the first time on appeal. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011).

In the alternative, Father contends the trial court abused its discretion by not awarding shared residency to the parents. Shared residency is not a statutory phrase but does appear in the Kansas Child Support Guidelines § III.B.6 (2013 Kan. Ct. R. Annot. 129), and in caselaw. See, *e.g.*, *In re Marriage of Atchison*, 38 Kan. App. 2d 1081, 1086, 176 P.3d 965 (2008); *Sparks v. Sparks*, 34 Kan. App. 2d 499, 502-03, 120 P.3d 376 (2005).

Although Mother's counsel asked the trial court not to consider a change in residency due to Father's failure to file a motion pursuant to K.S.A. 2012 Supp. 23-3219(a), the trial court considered and denied Father's oral request for shared residency. In addition to its brief comment after the hearing, the trial court explained its rationale in the journal entry:

> "Shared [residency] requires a high degree of cooperation, communication and co-parenting to be in the best interests of the child. Shared [residency] requires a joint commitment on the part of both parents. Both parents must demonstrate an affirmative commitment to equal sharing of parental responsibilities. Both parents need to show a willingness to foster the other parent's relationship with the child. There should be an absence of conflicts between the parents. There should be a demonstration of a cooperative attitude and mutual respect between the parents.

> "The evidence presented by the parties clearly shows that there [have] been degrees of cooperation, communication or co-parenting between the parents when it suited them but their relationship has not been [absent] of conflicts between the parents.
>
> "The Court finds that the high level of disagreement between the parents that exists is detrimental and not in the child's best interest and welfare."

It is apparent that the trial court found Mother and Father were not suited to shared residency because of the numerous conflicts between them. Father's argument in support of shared residency actually supports the trial court's determination when he claims the trial court "ignored . . . that the parties were successfully co-parenting utilizing a shared residential arrangement, except for when Mother became upset with Father and used the minor child as a pawn." Father's argument confirms the trial court's central point—the parents occasionally fought while implementing their ad hoc, shared residency arrangement. In essence, the parents had already tried shared residency and the results escalated in seriousness until the police were called and the matter returned to the trial court. Regardless of whether Mother or Father or both parents were responsible for this situation, Father does not show that a formal order of shared residency would have improved the underlying situation which the trial court found was detrimental to K.B.'s best interests.

Father also contends the trial court believed it "could not order a shared residential arrangement absent agreement of the parties." Father appears to allege that the trial court failed to apply the proper legal standards, but Father does not cite a particular passage from the hearing transcript or the journal entry. Contrary to Father's contention, we discern no indication in the record that the trial court believed that an agreement by Mother and Father to shared residency was required as a matter of law. We understand the trial court's remarks and findings as reflecting its belief that the agreeability of Mother and Father was a practical requirement for shared residency to work in the best interests of K.B.

The trial court's belief was not unreasonable. Shared residency would mean two homes for K.B., and where the parents controlling those homes have difficulty working together, one might expect increased difficulties for K.B. In this regard, we note the legislature included among its nonexclusive list of factors to be considered: "[T]he 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. 2013 Supp. 23-3203(f). Considering the evidence of record here, the trial court did not abuse its discretion by refusing to change or modify its final order of K.B.'s primary residency being with Mother.

THE TRIAL COURT'S ORDER REGARDING FATHER'S PARENTING TIME

Next, Father contends the trial court erred when his "parenting time was reduced from fifty percent (50%) of [K.B.]'s time to twenty-three percent (23%)." A trial court "may modify an order granting . . . parenting time whenever modification would serve the best interests of the child." K.S.A. 2013 Supp. 23-3221(a). Once again, the trial court's decision is reviewed for abuse of discretion. See *In re Marriage of Nelson*, 34 Kan. App. 2d at 883; *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 430, 119 P.3d 684 (2005).

The trial court made two modifications. First, it changed the schedule of parenting time to conform to Father's new work schedule. Father does not challenge this modification on appeal. Father claims error with regard to the second modification which he asserts reduced the total amount of parenting time he was allowed.

Initially, we note that Father's argument confuses the ad hoc shared residency arrangement he and Mother attempted under the agreed parenting plan with "parenting time," which is provided to a parent without residency. See K.S.A. 2013 Supp. 23-3207(b). In its journal entry, the trial court discontinued the parties' ad hoc arrangement

and reimposed primary residency with Mother and parenting time for Father. The trial court explicitly stated that "a new parenting plan is established," and this time the trial court did not repeat its language allowing the parties to make their own arrangements.

As for the amount of parenting time, the basis for Father's calculation of 23% is unknown. Father has not provided us with the basis for the calculation. Most importantly, Father has not shown in the record where there are facts to support any such calculation. Our rules provide that "[t]he court may presume that a factual statement made without a reference to volume and page number has no support in the record on appeal." Supreme Court Rule 6.02(a)(4) (2013 Kan. Ct. R. Annot. 39). Accordingly, we presume there is no factual basis for Father's 23% calculation.

Our independent review of the record suggests that under the agreed parenting plan, Father had 12 hours of parenting time every week, 38.5 hours every other weekend, and alternating holidays. The journal entry at issue here gave Father 6 hours every week, 48 hours every other weekend, and alternating holidays. Discounting the holidays and assuming 4 weeks in a month, Father had 125 hours of parenting time per month under the agreed parenting plan, and 120 hours per month under the journal entry at issue here.

This was not a substantial modification, and it does not support the premise of Father's argument. Father was "entitled to reasonable parenting time," K.S.A. 2013 Supp. 23-3208(a), and he does not show how the order of parenting time was unreasonable. We find no abuse of discretion.

THE TRIAL COURT'S ORDER REGARDING CHILD SUPPORT

Father contends "[t]he child support ordered by the district court is in error because it gives [M]other credit for health insurance that she is not required to provide and that she provides at no cost to herself, and because it requires Father to pay an

[inequitable] division of unreimbursed medical expenses." "An appellate court reviews a district court's order for child support using the abuse of discretion standard. Whether the district court correctly interpreted and applied the Kansas Child Support Guidelines is subject to unlimited review." *In re Parentage of Brown*, 39 Kan. App. 2d 26, Syl. ¶ 1, 176 P.3d 242 (2008).

Father submitted a child support worksheet into evidence at trial. In that worksheet, Father assigned $56 of the total "Health and Dental Insurance Premium" to himself, and he assigned $39 to Mother. Father acknowledged under questioning by his counsel that the "worksheet would then have [Father] continuing to pay all of [K.B.'s] direct expenses, including the health insurance."

Father's counsel then informed the district court in closing arguments that Father's worksheet "splits . . . down the middle" the "cost to insure [K.B.]" Counsel insisted that Father's figures were "equitable" and concluded by saying Father "would request that you adopt his plan."

The trial court complied with Father's request, stating in its journal entry that Mother "shall be allowed to use $39.00 per month for medical insurance she provides," and that Father "shall be allowed to use $56.00 per month for medical insurance he provides." The trial court also ordered these amounts to be used in the final child support worksheet. Father did not contest the order below.

Now, on appeal, Father challenges the district court's support orders regarding health insurance. Assuming there was error, a "party may not invite error and then complain of that error on appeal." *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003). We will not second guess figures Father provided to the trial court and the orders which Father requested from the trial court.

With regard to the unreimbursed medical expenses, Father contends the trial court "committed further error and abused its discretion when it maintained a portion of the previous order requiring Father to pay the first $1000.00 of unreimbursed medical expenses without maintaining the credit which was originally granted." Father, however, gave no evidence on this point, his counsel did not argue it, and the trial court did not address it. As a result, we agree with Mother's characterization of the argument: "Father complains that the trial court erred by not *sua sponte* modifying the original agreed orders as to his agreement to pay the first $1,000.00 of uncovered health costs."

Issues not raised before the trial court may not be raised on appeal. *Wolfe Electric, Inc.*, 293 Kan. at 403. We decline to consider the issue for the first time on appeal, especially because we cannot be confident the record contains all of the material facts necessary to analyze this claim. See *Friedman*, 296 Kan. at 644-45 (The burden is on the party making a claim to designate facts in the record to support that claim; without such a record, the claim of error fails.).

Affirmed.