NOT DESIGNATED FOR PUBLICATION

No. 110,593

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

SHAWN STEELE,
Appellee,

and

BRIANNA STEELE,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed April 25, 2014. Affirmed.

Jonathan M. Snyder, of Cook & Fisher, L.L.P., of Topeka, for appellant.

Kevin Shepherd, of Topeka, for appellee.

Before MALONE, C.J., MCANANY, J., and JAMES L. BURGESS, District Judge Retired, assigned.

Per Curiam: The mother, Brianna Steele, now known as Brianna Kern, appeals the decision of the district court placing the minor child, P.S, in the residential custody of the father, Shawn Steele. Brianna argues: (1) The district court failed to consider each relevant factor under K.S.A. 2013 Supp. 23-3203 (previously K.S.A. 2010 Supp. 60-1610[a][3][B]); (2) the district court abused its discretion in placing P.S. in the residential custody of Shawn; and (3) the district court abused its discretion in denying Brianna's

motion for reconsideration. Finding the district court made a reasonable decision after applying the correct legal standards, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Brianna and Shawn were married on November 21, 2007. P.S. was born in 2008. Shortly thereafter, the parties were divorced in 2009.

On May 8, 2009, the parties entered a separation and property settlement agreement. In the agreement, the court granted joint legal custody of P.S. to the parties. Shawn was granted residential custody, and Brianna was granted reasonable parenting time. On October 14, 2010, the parties entered into an agreement as to child custody and parenting time. According to the agreement, the parties would share joint legal custody of 2-year old P.S., with a specific parenting-time schedule that granted 50-50 parenting time to each of the parties and the flexibility to vary the parenting time according to the parties' work schedules. This arrangement worked for several months.

Less than 1 year after the divorce, Brianna moved to Minnesota to be closer to her family. At this time, the parties agreed P.S. would rotate residences every 2 months. This arrangement worked for about 1 year; however, after picking P.S. up from Shawn on May 2, 2012, Brianna informed Shawn he would never see P.S. again.

On May 30, 2012, Shawn filed a pro se motion to change/modify child custody and residency. Shawn requested he be granted residential custody of P.S., with Brianna to have reasonable parenting time. In support of his motion, Shawn noted that Briana threatened he would never see P.S. again and Brianna would not allow him to speak with P.S. on the telephone.

The district court ordered the parties to participate in conciliation with a court services officer for the purpose of reaching a settlement or, in the alternative, for the purpose of preparing a report concerning the parties' efforts to resolve their dispute.

At the October 11, 2012, evidentiary hearing, the judge heard testimony from Court Services Officer Laura Morrison, Shawn, Brianna, and Brianna's sister. Shawn was represented by counsel, and Briana appeared pro se.

Morrison recommended that P.S. reside with Shawn. Morrison's recommendation was based primarily on the fact Brianna made comments that she was unwilling to foster a relationship between Shawn and P.S. Morrison noted that Shawn found out after the divorce he is not P.S.'s biological father. Morrison noted Brianna made several comments that P.S. deserves to know his real father and "her current husband had as much right to [P.S.] as Shawn does." Morrison expressed concern that Brianna had refused Shawn parenting time, and Morrison thought Brianna was likely to do so again.

Shawn testified he became concerned about his custody arrangement when Brianna called him at work to tell him he would not be able to see P.S. again. Shawn testified he did not think anything had caused Brianna's change of heart except for the fact she was getting married and wanted to have P.S. with her at all times. Shawn testified that if he was awarded residential custody of P.S., he would ensure that P.S. would have a relationship with Brianna.

Brianna testified that she believed P.S. was better off in her care. She pointed to her stable home and the fact P.S. had two siblings at her residence. Brianna informed the district court she had denied Shawn his parenting time because she was getting married and wanted P.S. with her, stating, "I just didn't want him [P.S.] passed back and forth anymore." Briana pointed to the fact she could provide P.S. with a more stable routine

and structure because Shawn worked nights. Brianna admitted that Shawn has never tried to keep P.S. away from her.

Mariah Sharp, Brianna's sister, testified she thought P.S. belonged with his mother, pointing to Shawn's late work schedule and the fact she babysat P.S. on one occasion and P.S. had trouble falling asleep.

The district court took the matter under advisement. On March 26, 2013, the district court granted residential custody of P.S. to Shawn and granted Brianna reasonable parenting time. In its decision, the district court stated it had reviewed all of the factors relevant to child custody decisions under K.S.A. 2013 Supp. 23-3203 and had determined that the best interests of P.S. would be served by granting residential custody to Shawn.

On April 23, 2013, Brianna filed a motion for the district court to reconsider its ruling on custody. After holding a hearing, the district court denied Brianna's posttrial motion. Brianna appeals.

Did the district court err in its application of K.S.A. 2013 Supp. 23-3203?

Brianna first argues the district court did not consider all of the required factors as set out in K.S.A. 2013 Supp. 23-3203.

K.S.A. 2013 Supp. 23-3201 requires the district court to make custody or residency determinations of a child "in accordance with the best interests of the child." To aid the district court, K.S.A. 2013 Supp. 23-3203 provides a nonexclusive list of 11 factors the district court should consider if the factors are relevant to the custody and residency decision. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701-02, 229 P.3d 1187 (2010).

In the present case, the district court did not provide any substantive discussion of the relevant factors but specifically noted it had considered all of the factors as set out in K.S.A. 2013 Supp. 23-3203 before finding it to be in P.S.'s best interests to grant residential custody to Shawn. A district court is not required to provide explicit analysis on each factor listed in the statute. See *In re Marriage of Henry*, No. 105,861, 2012 WL 1450489, at *3 (Kan. App. 2012) (unpublished opinion). Brianna did not object to the journal entry or request more specific findings. See *In re Marriage of Bradley*, 258 Kan. 39, 46-50, 899 P.2d 471 (1995).

We find Brianna has failed to show that the district court did not consider the relevant factors under K.S.A. 2013 Supp. 23-3203. The district court expressly stated it had considered all of the relevant factors.

Did the district court abuse its discretion in granting residential custody to Shawn?

Brianna claims the district court abused its discretion in granting residential custody to Shawn.

Under K.S.A. 2013 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 primary consideration must be the welfare and best interests of the child. In light of the fact that the district court is in a better position to weigh witness credibility, we generally will not overturn such decisions unless the court abused its discretion. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d at 701. Challenges to specific factual findings in support of such determinations are reviewed to assure that they are supported by substantial competent evidence and they support the court's legal conclusions. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 420, 119 P.3d 684 (2005).

In *In re Marriage of Bradley*, our Supreme Court explained the appellate court's role in reviewing the district court's decision in child custody matters:

> "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." 258 Kan. at 45.

A district court's modification of an order of custody, residency, visitation, or parenting time is governed by K.S.A. 2013 Supp. 23-3218. We review a district court's order granting or denying such modification for an abuse of discretion. See *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006).

We have reviewed the record to determine if substantial competent evidence was available to the district court to support its decision. Rather than list each factor in K.S.A. 2013 Supp. 23-3203, we focus on Brianna's arguments on appeal.

Brianna first points to the relationship that P.S. has with his stepsiblings and with his stepfather. Brianna claims that placing P.S. with Shawn will not allow him to foster these relationships. Second, Brianna points to her sister's testimony that Shawn's home lacked the structure and routine necessary for P.S.'s well-being. Brianna claims she would be better able to provide P.S. with structure and discipline. Third, Brianna claims both she and Shawn are now willing to foster a relationship with the other parent. In support of her position, she points to the fact she testified she would grant Shawn liberal parenting time and that her sister said Brianna was open to the fact that Shawn would always be a

part of P.S.'s life. Finally, Brianna points to the fact the district court stated its decision would have been easier if Brianna had not behaved the way she did and had not failed to return P.S. when it was Shawn's turn to see him. Brianna claims that such substantial weight placed on one factor is contrary to K.S.A. 2013 Supp. 23-3203.

Having reviewed the evidence in this case, we find substantial competent evidence that supports the placement of residential custody with Shawn. The decision is supported by Morrison's testimony that Brianna expressed a reluctance to foster a solid relationship between Shawn and P.S. and the fact Brianna sought to terminate that parental bond by informing Shawn he would never see P.S. again. This is not a case where the evidence strongly points to placement with one parent over another. In this case, the district court was in the best position to determine the best interests of P.S. See *In re Marriage of Bradley*, 258 Kan. at 45. We find no abuse of discretion in the district court's decision.

Did the district court abuse its discretion in denying Brianna's motion to reconsider?

Finally, Brianna argues the district court abused its discretion in denying her motion to reconsider.

In Kansas, motions to reconsider are generally treated as motions to alter or amend under K.S.A. 2013 Supp. 60-259(f). See *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). The district court may grant a motion to reconsider for an abuse of discretion, when the decision is contrary to the evidence, or when there is newly discovered evidence relevant to the issue before the court. See K.S.A. 2013 Supp. 60-259(a). The standard of review of the denial of a motion to alter or amend is an abuse of discretion standard. *Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 441, 970 P.2d 526 (1998), *cert. denied* 526 U.S. 1112 (1999). The purpose of K.S.A. 2013 Supp. 60-259(f) is to allow the district court the opportunity to correct prior errors. *In re Marriage of Willenberg*, 271 Kan. 906, 910, 26 P.3d 684 (2001).

In her motion, Brianna pointed to her "dramatically improved" attitude toward Shawn's relationship with P.S. as newly discovered evidence. Brianna now claims that her previous view of Shawn's relationship with P.S. was "clouded by the hurt [she] felt due to [Shawn's] demand for residential custody of P.S." We note that Shawn did not demand residential custody of P.S. until after Brianna decided P.S. should stay with her permanently and she informed Shawn he would never see P.S. again.

In denying the motion, the district court expressed its hope that Brianna had "an epiphany" that both parents need to foster a relationship with P.S. However, the court did not find that Brianna's improved attitude justified a new ruling. A newly improved attitude does not meet the burden of establishing that the newly proffered evidence could not, with reasonable diligence, have been produced at trial. See *State v. Fulton*, 292 Kan. 642, 649, 256 P.3d 838 (2011). We also find that Brianna's improved attitude is not a factor which should be considered in a motion to alter or amend. Such a holding would encourage many unhappy litigants to adjust their attitudes prior to filing motions to alter or amend.

Brianna also points to the fact she chose to proceed pro se as support for her request to grant the motion to alter or amend the district court's ruling. Brianna notes she was confused about the legal action and did not have counsel to advise her of her rights and responsibilities. Brianna asserts that her decision not to hire counsel inhibited her ability to effectively cross-examine the witnesses and present additional evidence as to the best interests of P.S. Brianna points to the fact the district court stated her position could have potentially been different if she had hired counsel prior to the custody hearing. The district judge rejected this reasoning:

> "[I]f I were to follow the logic that's presented in this case, what that would mean is that in every case where we have a self-represented litigant they could come and ask[] for a

new hearing based on the fact that their decision caused them to not be able to advance their side of the case in the fashion that they'd like to.

"So every time a self-represented litigant is denied the relief they seek, they get another bite at the apple and I don't believe that's—I don't believe that's the approach that Kansas Courts will take."

The district court concluded that Brianna made the decision to proceed without counsel and any resulting confusion was a result of her own decision.

After reviewing the parties' briefs and the record on appeal, we agree with the district court's reasoning. The district court did not abuse its discretion in denying Brianna's request for reconsideration. Brianna's newly improved attitude and her decision not to hire counsel at trial do not qualify as newly discovered evidence warranting reconsideration.

Affirmed.