NOT DESIGNATED FOR PUBLICATION

No. 109,850

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

TERESA LYNN BOS,
Appellee,

and

GEORGE BRIAN BOS,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID L. DAHL, judge. Opinion filed May 2, 2014. Affirmed.

Lynnette A. Herman, of Beall & Mitchell, L.L.C., of Wichita, for appellant.

Ross D. Alexander, of Alexander & Casey, Chartered, of Wichita, for appellee.

Before MALONE, C.J., ATCHESON and STEGALL, JJ.

Per Curiam: George Brian Bos appeals rulings of the Sedgwick County District Court denying his requests for a change in child custody and to set aside the decree of divorce dissolving his marriage to Teresa Lynn Bos. Both matters are entrusted to the sound discretion of the district court. Given that especially deferential standard, we affirm the rulings. Teresa has filed a motion to recover the attorney fees she paid in responding to the appeal. We deny that motion.

CHILD CUSTODY

The parties are familiar with the facts. We have no need to recount those facts in detail. And given the nature of some of the facts, we choose not to.

Both Teresa and George had been married and divorced before they met in late 2001. They entered into a committed, intimate relationship a few months after meeting and later married. They have a son, L.M.B., who was born in early 2004.

Teresa filed for divorce in May 2011. The district court entered a decree of divorce on September 1, 2011. The decree incorporated both a property settlement George and Teresa worked out and their proposed parenting plan. The district court granted George and Teresa joint legal custody of L.M.B. Teresa had primary residential custody of the child, and George had visiting time one evening a week and alternating weekends from Friday evening to Sunday evening.

In March 2012, L.M.B. apparently engaged in sexually inappropriate conduct with a 4-year-old boy who lived in the neighborhood. Teresa had a friend who works with children talk to L.M.B. about the incident. L.M.B. disclosed that an older boy in the neighborhood had sexually assaulted him about 3 years earlier. Teresa informed George that L.M.B. apparently had been the victim of a sexual assault and, in turn, had recently carried out a sexual assault. George quickly filed a motion to get physical custody of L.M.B. based on Teresa's purportedly inadequate supervision and parenting of the child. He later filed a motion to set aside the divorce decree under K.S.A. 2013 Supp. 60-260(b)(3) and (6), claiming Teresa had coerced his agreement and the terms were otherwise unjust.

The district court heard testimony on the motions for 3 days in February and March 2013. The evidence was decidedly mixed. Dr. Lance Parker, a psychologist, had

been assigned as a case manager in the divorce. Based on his review of the circumstances, Dr. Parker recommended that George and Teresa exercise shared physical custody of L.M.B. rather than leaving physical custody with Teresa. Lois Neace, a licensed clinical social worker providing counseling to L.M.B., testified that L.M.B. would be happy to spend more time with George and would likely benefit from that contact, especially when Teresa would otherwise be leaving the child with another caregiver.

L.M.B.'s most recent elementary school teacher testified that the child performed at grade level, presented no disciplinary problems, and seemed to be well adjusted. The teacher described Teresa as attentive to L.M.B.'s academic performance and noted her involvement in conferences and other school activities. In its written findings, the district court observed that George had been convicted in 1989 of a misdemeanor offense "involving improper sexual conduct with his 5[-]year[-]old step daughter [*sic*]." And, as the district court found, George had been arrested for soliciting a prostitute shortly before Teresa filed for divorce.

In its written order, the district court outlined numerous other facts some of which would tend to favor granting George's custody motion and some of which would tend toward denying it. We needn't catalogue those determinations here. But, more important to our review, we recognize the district court credited material evidence on each side of the custody issue.

Our review of the district court's ruling on the child custody issue is exceptionally deferential. The foremost consideration in any custody determination is a placement that is in the best interests of the child. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701, 229 P.3d 1187 (2010). When the divorcing parties agree to a parenting plan incorporated into a divorce decree, that plan is presumptively deemed to be in their child's best interests. See K.S.A. 2013 Supp. 23-3202 (formerly K.S.A. 2010 Supp. 60-

1610[a][3][A]); *Sparks v. Sparks*, 34 Kan. App. 2d 499, 504, 120 P.3d 376 (2005). Nevertheless, a child custody order may be modified at any time upon a showing of materially changed circumstances. K.S.A. 2013 Supp. 23-3218(a); see *Lewis v. Lewis*, 217 Kan. 366, 368, 537 P.2d 204 (1975) ("Before a custody order will be modified, the movant has the burden of showing the child can be better cared for if the requested change is granted."). The standard for appellate review of the district court's decision on a motion to modify child custody is abuse of discretion. *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006).

A district court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if the district court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). A district court errs in that way when its decision "'goes outside the framework of or fails to properly consider statutory limitations or legal standards.'" 288 Kan. at 299 (quoting *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 [2007]). Finally, a district court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support in the record. *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012) (outlining all three bases for an abuse of discretion).

Here, the district court applied the correct legal standard or framework, and its factual determinations had support in the evidence. It is not our call to reweigh that evidence on appeal. Ultimately, we are left to ask whether no other judicial officer would have come to the same conclusion. As we have said, there was evidence supporting a change in custody. But the evidence also showed L.M.B. was performing well in school and progressing in therapy, thus supporting the district court conclusions that he "is doing better" and "it is not in the child's best interest . . . to change the parenting plan."

Given the standard of review, we cannot say the district court abused its discretion in denying George's motion to change custody, even though members of this panel might have ruled differently. This is likely one of those cases—especially in light of the record evidence—that the district court could have ruled either way without abusing its discretion. See *McMahan v. Toto*, 256 F.3d 1120, 1129 (11th Cir. 2001) ("[U]nder an abuse of discretion standard there will be circumstances in which we would affirm the district court whichever way it went."); *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 101-02, 920 A.2d 606 (2007).

DIVORCE DECREE

For his other point on appeal, George challenges the denial of his motion, under K.S.A. 2013 Supp. 60-260(b), to set aside the divorce decree. George cites two of the six grounds in that statute. Under K.S.A. 2013 Supp. 60-260(b)(3), a judgment may be vacated if it is the product of "fraud . . . , misrepresentation, or other misconduct by an opposing party." And K.S.A. 2013 Supp. 60-260(b)(6) provides a catch-all entailing "any other reason that justifies relief." A district court's ruling on a 60-260(b) motion is reviewed on appeal for abuse of discretion. *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 495, 781 P.2d 1077 (1989), *cert. denied* 495 U.S. 932 (1990); *First Nat'l Bank in Belleville v. Sankey Motors, Inc.*, 41 Kan. App. 2d 629, 634, 204 P.3d 1167 (2009).

George alleged that as he and Teresa were negotiating the property settlement, parenting plan, and other aspects of their divorce, she told him that she would publicize his 1989 conviction in his workplace and elsewhere if he did not agree to what she wanted. But Teresa testified she simply told George that the conviction would likely come up in a court hearing if they could not agree on the terms of the decree. The district court did not resolve the discrepancy in those accounts of the conversation. Rather, the

district court found that whatever Teresa may have said to George did not materially affect the substantive provisions of the decree. Therefore, the district court ruled George had no legal basis for relief.

The evidentiary record supports that finding and conclusion. George initially testified that Teresa voiced the threat to him on August 24, 2011. Even assuming that date to be an approximation, the lawyer representing George in the divorce at that time testified at the hearing that she prepared a first draft of the decree on July 21 and transmitted it to Teresa's lawyer. Teresa's lawyer requested some revisions on August 12. George's lawyer testified that she and George accepted those changes promptly. On August 15, George asked her if they had received a final copy of the agreed decree from Teresa's lawyer. George's lawyer testified that she went ahead and incorporated the changes into the first draft she had prepared and sent a final copy to Teresa's lawyer on August 23. George's lawyer testified there were no more changes to the divorce decree. Thus, the evidence to that point in the hearing showed that the terms of the decree had been finalized before Teresa purportedly threatened George.

But George again took the stand after his former lawyer testified. While he conceded he never mentioned any threats from Teresa to his lawyer, he qualified the date on which Teresa threatened him by using his birthday—August 21—as a reference point. George testified the conversation with Teresa happened shortly after his birthday.

George's revised chronology didn't advance his legal position. The district court fairly concluded George could accurately place Teresa's alleged threat as coming before or after his birthday. He said afterward, meaning August 22 at the earliest. But according to the lawyer representing him then, she and George actually put the first written draft on the table in July, presumably incorporating what he and Teresa had discussed and agreed upon to that point. And Teresa's lawyer asked for changes on August 12, well before the alleged threat. Based on that timetable, the district court acted well within its discretion

and the evidence to conclude whatever Teresa said to George after August 21 did not affect the terms of the decree. George, therefore, failed to establish any basis for relief under K.S.A. 2013 Supp. 60-260(b)(3).

The broad, anything-else language of K.S.A. 2013 Supp. 60-260(b)(6) does not confer authority on a court "to relieve a party from a free, calculated, and deliberate choice." *Vogeler v. Owen*, 243 Kan. 682, 685, 763 P.2d 600 (1988). The Kansas appellate courts often look to federal authority construing Federal Rule of Civil Procedure 60(b), a legally indistinguishable provision, for guidance in applying K.S.A. 2013 Supp. 60-260. See *Montez v. Tonkawa Village Apartments*, 215 Kan. 59, 62-63, 523 P.2d 351 (1974). The United States Supreme Court has confined Rule 60(b)(6) to "'extraordinary circumstances'" warranting relief. *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

Apart from the coerciveness of Teresa's purported threat, George argues only that the terms of the property settlement in the decree were not "fair, just, or equitable" as a basis for his motion under K.S.A. 2013 Supp. 60-260(b)(6). George's argument fails in several respects. First, of course, any threat from Teresa did not influence the terms of the decree for purposes of K.S.A. 2013 Supp. 60-260(b)(6) any more than it did for subsection (b)(3). As a result, the content of the decree and the property settlement, in particular, look to be the product of George's voluntary acceptance, however much he may now regret that decision. Even assuming demonstrable inequity in a negotiated settlement were sufficient to establish relief from a judgment under K.S.A. 2013 Supp. 60-260(b)(6)—a proposition we seriously doubt—George has failed to articulate any specific way in which the agreement might be viewed as actually or arguably unfair to him. That lack of specificity also dooms his argument. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013) (a point incidentally raised but not argued is deemed abandoned).

Accordingly, we find the district court acted within its discretion in denying George's motion for relief from the decree under K.S.A. 2013 Supp. 60-260(b).

ATTORNEY FEES

After the parties briefed this appeal, Teresa filed a motion to recover her attorney fees for the appeal because a party to a divorce may be awarded legal expenses and because George's appeal was frivolous. See Supreme Court Rule 7.07(b), (c) (2013 Kan. Ct. R. Annot. 68). In response, George argues his appeal was not frivolous and Teresa filed her motion after the 14-day period allowed in Rule 7.07.

Although George correctly points out the fee motion was filed late, we do not rest our denial on the untimeliness of the request alone. The substantive grounds Teresa submits are also insufficient.

First, a district court may award legal expenses, including attorney fees, to a party in a divorce "as justice and equity require." K.S.A. 2013 Supp. 23-2715. While the circumstances of a particular divorce necessarily drive the allocation of assets and liabilities, including the legal costs of the proceeding itself, a district court's award of attorney fees should be incorporated into the overall financial division taking account of earning capacity and other economic resources. That is, any such award should be made as an integral part of a fair reconciliation of the divorcing parties' financial interests, and a significant factor must be the relative ability of the parties to bear those legal costs. See *Dunn v. Dunn*, 3 Kan. App. 2d 347, Syl. ¶ 3, 595 P.2d 349 (1979) (When considering a statutory award of attorney fees in domestic relations matter, the district court "must consider . . . the need of one party, weighed against the financial ability of the other to pay."). In her motion, Teresa neither provides factual information showing she is unable to pay her attorney fees while George could nor cites to any record evidence to that

effect. For that reason, we decline to award her fees under Rule 7.07(b) and K.S.A. 2013 Supp. 23-2715.

But the ability-to-pay factor does not override the authority of a district court or an appellate court to award attorney fees to a party in a divorce for having to respond to frivolous pleadings or other abusive litigation tactics. See *Dunn*, 3 Kan. App. 3d at 349. Teresa has alternatively argued that George's appeal was frivolous—without even a colorable basis—so she should be awarded fees under Rule 7.07(c). We disagree, particularly given how Teresa has presented her argument. She contends George should have known his appeal was doomed because our standard of review requires that he demonstrate the district court abused its discretion. But to accept that argument, we would be virtually holding that any unsuccessful appeal in the face of an abuse of discretion standard ought to require the appellant to pay the appellee's attorney fees.

Here, the child custody issue dominated the proceedings in the district court and consumed the vast majority of the briefing to us. George faced an uphill battle in showing an abuse of discretion. But, as our discussion of the merits demonstrates, the issue hardly could be characterized as frivolous, either in the district court or on appeal. See *Peoples Nat'l Bank of Liberal v. Molz*, 239 Kan. 255, 257, 718 P.2d 306 (1986) (court defines "frivolous appeal" as one presenting nothing more than a question "readily recognized as devoid of merit in that there is little prospect that it can ever succeed"). Teresa cannot recover attorney fees on that basis.

We affirm the district court's rulings and deny the motion for attorney fees.