

NOT DESIGNATED FOR PUBLICATION

No. 110,007

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JEANNA S. CHENEY and JUSTINE R. POORE, by her Mother and Next Friend,
JEANNA S. CHENEY,
Appellant,

v.

ZACHARY POORE,
Appellee.

MEMORANDUM OPINION

Appeal from Rawlins District Court; GLENN D. SCHIFFNER, judge. Opinion filed May 2, 2014.
Affirmed.

Andrew J. Walter, of Ryan, Walter & McClymont, Chtd., of Norton, for appellant.

Charles A. Peckham, of Brown, Creighton & Peckham, of Atwood, for appellee.

Before MCANANY, P.J., STANDRIDGE and STEGALL, JJ.

Per Curiam: Jeanna S. Cheney appeals from the district court's decision to award residential custody of minor child Justine R. Poore to Zachary Poore.

FACTS

Jeanna and Zachary started a relationship in March 2006. At the time they began the relationship, Jeanna was pregnant with another man's child. That child, Joselyn, was born in November 2006, and the biological father's name was not put on the birth certificate. Zachary acted as Joselyn's father from the time she was born.

In December 2009, Jeanna gave birth to Zachary's child, Justine. The parties resided together with both children in Colby, Kansas, and later in McDonald, Kansas, from the summer of 2006 until the end of their relationship in September 2012. During the course of the relationship, the parties contemplated separating and actually did separate several times. At one point while the parties were living together, Jeanna found a suicide note written by Zachary. He was later found in the middle of a field with his gun. Zachary testified that he did not bring any ammunition with him to the field and that he wrote the note because he wanted to scare Jeanna; he never intended to kill himself. Jeanna testified that Zachary attempted to kill himself on several occasions.

After this incident, the parties attended counseling. Jeanna ultimately was diagnosed as bipolar and placed on a variety of medications. Jeanna's mother and brother testified that Jeanna was sad, depressed, tired, and unmotivated when on these medications. Jeanna's sister testified that Jeanna was a "zombie" and was sad, nervous, and withdrawn when on the medications. Zachary testified that all Jeanna did when she was not at work was sleep. He also said Jeanna would drink once or twice a week while on the medication. Jeanna admitted she drank at least once a week and drank excessively at least once a month, even though she was aware she should not mix alcohol with her medication.

In September 2012, Jeanna voluntarily admitted herself to Valley Hope for detoxification and counseling for polysubstance abuse. The counselor said Jeanna chose to endure withdrawal symptoms rather than take medication to help with the detoxification process and was very motivated to recover because of her children. She said Jeanna was committed to her future and recovery when she left Valley Hope in September 2012 and appeared to have been very successful in continuing care after her discharge.

The children stayed with Zachary in September 2012 while Jeanna was at Valley Hope. During that time, Zachary met his current fiancée Wanda McCain and began a relationship with her. Jeanna testified that while she was at Valley Hope, she called the children, one of whom said they were watching television with their "new mommy." Zachary, however, testified that the children said Wanda, not "new mommy."

After Jeanna left Valley Hope, both children lived with Jeanna at her mother's house. In October 2012, Jeanna filed a petition to establish Zachary's paternity and a motion requesting temporary custody of Justine. The district court granted Jeanna temporary custody of both children subject to Zachary's right to reasonable parenting time. Zachary filed an answer and counterpetition requesting residential custody of Justine and a continuing relationship with Joselyn.

On January 4, 2013, the parties agreed to an amended temporary order, pursuant to which Jeanna had residential custody of both children and Zachary had parenting time with them.

The trial was held on May 21, 2013. There were witnesses who testified that Jeanna and Zachary were devoted to the children, kept them safe, and made them a priority. There were also witnesses who testified to the contrary. Particularly relevant to the legal issue presented on appeal, several witnesses testified about the effect of Jeanna and Zachary's separation on Jocelyn:

- Jeanna's brother testified that after Joselyn found out Zachary was not her father, there was a rift between Joselyn and Justine, as well as between Justine and Jeanna.
- Jeanna's sister testified Joselyn felt like her father did not love her and felt like an outcast because Zachary and Justine shared secrets without her.

- Jeanna testified that Joselyn told her Justine and Zachary were hanging out a lot and she did not feel welcomed.
- Zachary's mother testified that Joselyn said she was going to live with Jeanna so that Jeanna would not be lonely while Justine was living with daddy.
- Zachary testified Joselyn told him that she wanted to live with Jeanna so Jeanna was not so lonely. He further testified that Justine told him every weekend that she wanted to live with him because she got "treated nicer."

At the close of evidence, the district judge made a finding—as requested in the petition—that Zachary was the biological father of Justine. Thereafter, Jeanna stated that the only issue remaining for the judge to decide was that of parenting time related to Justine. Jeanna specifically noted that she would object to the judge making any findings regarding Joselyn. In response, the judge advised the parties that he would take the matter under advisement. In so doing, the judge commented, "I think it's too bad, because I think it's in Joselyn's best interests to remain with her sister, and obviously, [Zachary] has parenting rights to her sister. So there's no way I can keep them together, unless I have legal authority to order it." The judge said that before Jeanna indicated that she would lodge an objection to any findings regarding Joselyn, he was going to grant custody to Zachary when school was out during the summer and to Jeanna when school was in session with parenting time for both parties, but only if the children could be together.

In a memorandum decision filed May 28, 2013, the district court found that Zachary was the natural biological father of Justine, that both parents dearly loved the children, and that both were fit to be awarded the joint legal custody of Justine. The decision also noted that Zachary was the only father Joselyn had ever known but that he had no standing to request parenting time with her because he was not the biological father or stepparent. The court held, however, that it could divide custody of the children in an exceptional case and that this was an exceptional case. The court went on to state:

"That to have both [Joselyn] and [Justine] principally reside with [Jeanna] with only [Justine] allowed to singly leave the home to exercise visitation with [Zachary] who is the only father both girls know would be less favorable and more stressful than to have [Justine] principally reside with [Zachary] and then return to [Jeanna's] home to exercise visitation with [Jeanna] and her older sister."

Finding it was in the best interests of Justine to do so, the court granted residential custody of Justine to Zachary.

ANALYSIS

Jeanna makes two arguments to support her claim that the district court abused its discretion in awarding residential custody of Justine to Zachary: (1) The district court failed to make findings of fact to support its legal conclusion that there were exceptional circumstances under K.S.A. 2013 Supp. 23-3207(b) to justify dividing custody of Justine and Joselyn, and (2) the district court's decision to award residential custody of Justine to Zachary was arbitrary, fanciful, or unreasonable. We address each of Jeanna's arguments in turn.

Exceptional circumstances under K.S.A. 2013 Supp. 23-3207(b)

Under K.S.A. 2013 Supp. 23-3207, the court has various options in awarding residential custody so long as the court's determination is based on the best interests of the child. The first of these options is one in which the child resides with one or both parents. K.S.A. 2013 Supp. 23-3207(a). "In an exceptional case, the court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other." K.S.A. 2013 Supp. 23-3207(b). Given the language of the statute, we agree with Jeanna that the district court would not have discretion to divide the residential custody of children amongst each parent absent a showing of exceptional circumstances. See *In re Marriage of Williams*, 32 Kan. App. 2d 842, 848, 90 P.3d 365

(2004). But this same language begs the question of whether the statute even applies to a situation where, as here, one or more of the children subject to the divided residency arrangement is the child of just one parent (*i.e.*, half sibling or stepsibling of the other children). For purposes of the child with just one parent, residential custody cannot be divided amongst "each parent" because there is only one parent. Moreover, there would be no "other parent" for such a child to spend parenting time as directed by the statute.

Our research reveals no published Kansas decisions applying the "divided residency" standard in situations such as the one presented here. There are published cases, however, in which panels of this court have applied the subsection when awarding residency and parenting time to multiple children of a marriage. See *LaGrone v. LaGrone*, 238 Kan. 630, 631-33, 713 P.2d 474 (1986) (two siblings *with the same parents* separated by divided custody decision upheld under the facts of this case); *In re Marriage of Williams*, 32 Kan. at 848-49 (upholding modification of custody placing the son with father and the daughter with mother). In making residency determinations under this statute, both of these panels found the controlling factor to be the best interests of the child. See *LaGrone*, 238 Kan. at 632-33; *Williams*, 32 Kan. App. 2d at 848.

Albeit in unpublished decisions, two panels of our court have considered divided custody in the context of half siblings. In *In re Thompson & Cotter*, No. 103,715, 2010 WL 4157103, at *4 (Kan. App. 2010) (unpublished opinion), the panel found there was no abuse of discretion in suggesting a parent's interests are paramount to those of half siblings. The panel held the district court's decision to change custody to the other parent who remained in the child's hometown with extended family and familiar surroundings was supported by substantial evidence. The panel noted that the district court did not ignore the sibling relationship and the benefit of preserving the family unit because it considered the benefits of the child's moving out of state with one parent and half siblings. 2010 WL 4157103, at *4. Nevertheless, the court did not directly address

whether K.S.A. 2013 Supp. 23-3207(b) applied to half siblings in coming to this conclusion.

In *In re Marriage of Taylor*, No. 106,143, 2012 WL 1352867, at *2 (Kan. App. 2012) (unpublished opinion), however, the panel specifically found the legislature did not intend to include half siblings and stepsiblings in the divided custody statute (then K.S.A. 2010 Supp. 60-1610[a][5][B]). The panel noted that the legislature has not hesitated to use the terms stepparent, stepbrother, stepsister, or half siblings in drafting statutes when it intends to include those individuals. 2012 WL 1352867, at *2; see K.S.A. 2013 Supp. 21-5604(b) (aggravated incest statute specifically including biological, step or adoptive relatives, and half siblings); K.S.A. 2013 Supp. 21-5926(e) (Medicaid fraud statute defining family member to include biological, step or adoptive relatives, and half siblings); K.S.A. 2013 Supp. 23-3301 (allowing stepparents and grandparents to be granted visitation rights of minor child in divorce cases); K.S.A. 2013 Supp. 44-508(c)(2) (Workers Compensation Act statute defining members of a family to include stepparents, stepchildren, and stepsiblings); K.S.A. 2013 Supp. 72-1046b(a)(3) (school transportation statute defining member of family to include half siblings and stepsiblings).

Notwithstanding its legal conclusion that K.S.A. 2013 Supp. 23-3207(b) does not require district courts to make findings of exceptional circumstances before dividing custody of half siblings or stepsiblings, the *Taylor* panel held that separating a child from a half sibling is a factor that should be considered in a custody or residency determination, keeping in mind the most important factor is the best interests of the child. See *In re Marriage of Taylor*, 2012 WL 1352867, at *2. In support of its holding, the panel noted that K.S.A. 2010 Supp. 60-1610(a)(3)(B)(iv) recognizes that one factor in determining child custody and residency is the "interaction and interrelationship of the child with the parents, siblings and any other person who may significantly affect the child's best interests." 2012 WL 1352867, at *2; see K.S.A. 2013 Supp. 23-3203(d). The panel found that half siblings and stepsiblings, especially those residing with a parent, clearly may have a significant impact on a child's life and therefore must be considered by the court,

even though the most important factor to consider is the best interests of the child. 2012 WL 1352867, at *2.

We agree with the analysis set forth in *In re Marriage of Taylor* and adopt its reasoning in concluding that K.S.A. 2013 Supp. 23-3207(b) does not require district courts to make findings of exceptional circumstances before dividing custody of half siblings or stepsiblings. Accordingly, there is no merit to Jeanna's claim that the district court abused its discretion in failing to make findings of fact to support its legal conclusion that this was an exceptional circumstances case under K.S.A. 2013 Supp. 23-3207(b) that justified dividing custody of Justine and Joselyn.

Arbitrary, fanciful, or unreasonable

In her second point of error, Jeanna argues the district court's decision to split residency of the half sisters and award custody of Justine to Zachary was arbitrary, fanciful, and unreasonable based on the facts presented. In the absence of statutory authority on the issue of separating half siblings, we agree with the panel in *In re Marriage of Taylor* that separating a child from a half sibling or stepsibling is a factor to be considered in a custody or residency determination, keeping in mind the most important factor is the best interests of the child. See 2012 WL 1352867, at *2.

In custody disputes between parents, our primary concern is always the welfare and best interests of the child. "The trial court is in the best position to make the inquiry and determination, and in the absence of abuse of sound judicial discretion, its judgment will not be disturbed on appeal. [Citations omitted.]" *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002); see *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, rev. denied 281 Kan. 1378, cert. denied 549 U.S. 954 (2006). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court,

then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009).

"[An appellate court's] function is not to delve into the record and engage in the emotional and analytical tug of war between two good parents over [their child]. The district court [is] in a better position to evaluate the complexities of the situation and to determine the best interests of the child. Unless we [are] to conclude that no reasonable judge would have reached the result reached below, the district court's decision must be affirmed." *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995).

Under K.S.A. 2013 Supp. 23-3201, the court shall determine custody or residency of a child in accordance with the best interests of the child. The Kansas Legislature has given the court a nonexclusive list of factors to consider when awarding custody. The factors relevant to this case include the desires of the parents; the interaction and interrelationship of the child with the parents, siblings, and any other person who may significantly affect the child's best interests; the child's adjustment to home, school, and community; the 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 other parent; and evidence of spousal abuse. K.S.A. 2013 Supp. 23-3203(b), (d)-(g).

In its memorandum opinion, the district court found that after the parties attended marital counseling, Jeanna was diagnosed as bipolar and put on a regimen of medications that made her feel foggy, tired, depressed, and lonely. The court also found Jeanna voluntarily admitted herself into Valley Hope to receive treatment for drug addiction and has since maintained 6 1/2 months of sobriety. The court found each parent had made disparaging remarks about the other's parenting skills. Although the district court was incorrect when it stated the parties were married, the rest of its findings are supported by the record. Jeanna herself testified she was diagnosed as bipolar and placed on multiple medications. Several witnesses, including Zachary, testified that Jeanna was tired and

depressed while on the medication. Jeanna testified that she voluntarily checked herself into Valley Hope to receive treatment for her drug addiction.

With regard to conclusions of law, the district court correctly cited to the applicable statutory authority governing custody determinations and found both parties fit to have joint legal custody. The evidence presented at trial supports the court's findings regarding fitness. As to Jeanna, she held several jobs during the relationship and worked in a nursing facility at the time of trial. She watched the children by herself for weeks at a time when Zachary was gone for his work in telecommunications. There was also testimony by Jeanna's family that Jeanna did much of the housework. Jeanna testified that she primarily bathed and groomed the children, purchased their clothes, set up their medical care, and arranged their social events. Although there was clearly evidence that Jeanna had a longstanding drug addiction, she testified that she had been clean and sober for 6 1/2 months. Jeanna's counselor at Valley Hope testified that Jeanna was very committed to her recovery and appeared to achieve successful continuing care after her discharge. Jeanna testified that she was participating in a 12-step program and regularly communicated with her sponsor. Jeanna's family testified that since she left Valley Hope, she had been happier and more active and had a great relationship with the children.

As to Zachary, the evidence presented at trial reflects that he had worked throughout the parties' relationship and owned his own business. Zachary acted as Joselyn's father from the time she was born. His mother testified that he always wanted to be a father and did many activities with the girls. Zachary testified that when he and Jeanna were together, he put the children to bed and helped with the housework. The children's daycare provider testified that when Zachary would drop the children off, they were appropriately dressed and clean. He also had custody of the children while Jeanna was at Valley Hope. Although Jeanna and her family presented testimony that Zachary's house was unsafe, Zachary testified that he had taken steps to make the home safe during

its construction. He also testified that each girl had her own bedroom in his house and that he was building the girls new bedrooms and a bathroom in the basement.

Without disputing any of the factual findings set forth above, Jeanna claims the court's decision to split residency and award custody of Justine to Zachary was based solely on an error of fact, *i.e.*, that substantial competent evidence did not support the court's finding:

"That to have both [Joselyn] and [Justine] principally reside with [Jeanna] with only [Justine] allowed to singly leave the home to exercise visitation with [Zachary] who is the only father both girls know would be less favorable and more stressful than to have [Justine] principally reside with [Zachary] and then return to [Jeanna's] home to exercise visitation with [Jeanna] and her older sister."

As a preliminary matter, we reject the notion that the court's decision to split residency and award custody of Justine to Zachary was based solely on the court's statement set forth above. The memorandum opinion filed in this case reflects that the court knew it had a statutory duty under K.S.A. 2013 Supp. 23-3201 to determine custody or residency of Justine in accordance with the best interests of the child. The opinion further reflects that the court knew it was required to consider the statutory factors set forth in K.S.A. 2013 Supp. 23-3203 in determining child custody, residency, and parenting time and, in fact, listed each of those factors out in its order. There simply is no question here that the court knew the overriding factor in deciding custody was the best interests of the children.

Thus, we construe the finding in paragraph 20 of the court's memorandum opinion—that awarding Justine to Jeanna and keeping the girls together would be less favorable and more stressful in terms of Justine's visitation schedule with Zachary—to be one factor considered by the court in deciding to split residency and award custody of Justine to Zachary. As to Jeanna's claim that the finding is not supported by substantial

competent evidence in the record, we disagree. Both Jeanna and Zachary testified that Zachary assumed the role of father to Joselyn and was the only father she had ever known. Jeanna's brother testified that after Joselyn found out Zachary was not her father, there had been a rift between Joselyn and Justine. Jeanna's sister said Joselyn felt like her father did not love her and felt like an outcast because Zachary and Justine shared secrets without her. Jeanna testified that Joselyn had told her Justine and Zachary were hanging out a lot and she did not feel welcomed. A reasonable person could conclude from these facts that allowing Justine to singly leave the home to exercise visitation with Zachary—who is the only father both girls know—would be less favorable and more stressful than to have Justine principally reside with Zachary and then return to Jeanna's home to exercise visitation with Jeanna and Justine.

Our standard of review precludes us from reweighing the evidence. See *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007) (an appellate court does not reweigh conflicting evidence, evaluate the witnesses' credibility, or redetermine questions of fact). Thus, the question here is not whether this court would have reached the same conclusion as the trial judge. The question is simply whether that decision strays so far from what might be considered reasonable that we would conclude no judge should have reached that result. There was no abuse of discretion in this case, as the decision to award custody to Zachary was not arbitrary, fanciful, or unreasonable. The district court had competent evidence before it to award custody to either Jeanna or Zachary. The award to either parent would have been well within the court's discretion.

Affirmed.