NOT DESIGNATED FOR PUBLICATION

No. 110,386

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

GINNY LYNN MURPHY,
Appellant,

and

JERRY RAY MURPHY,
Appellee.

MEMORANDUM OPINION

Appeal from Crawford District Court; A.J. WACHTER, judge. Opinion filed May 23, 2014. Affirmed.

Frederick R. Smith, of Pittsburg, for appellant.

Larry A. Prauser, of Armstrong and Prauser, of Columbus, for appellee.

Before POWELL, P.J., LEBEN and ARNOLD-BURGER, JJ.

POWELL, J.: Despite having been divorced in Oklahoma in 2010, Ginny and Jerry Murphy continued to reside together and subsequently returned to Kansas. Within a year of their return to Kansas, Ginny filed for divorce, claiming a common-law marriage to Jerry and asserting it was in the best interests of their minor child that she have primary residential custody. After a trial on both issues, the district court found there was no common-law marriage and that it was in the best interests of the minor child to adopt the parties' agreed parenting plan from their divorce. Ginny appeals the judgment of the district court that no common-law marriage existed and claims there was insufficient

evidence to support the district court's custody ruling granting Jerry primary residential custody. We disagree and affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

While the record contains conflicting marriage dates, it appears that Ginny and Jerry were married on July 2, 2005, in Arma, Kansas, and have one child, M.M., born in 2004. Ginny also has two other children–A.G., born in 2001, and X.S., born in 2003–from two prior relationships. Ginny lived with X.S.'s biological father for 6 months before she began dating Jerry.

The parties subsequently moved to Oklahoma and were divorced on May 25, 2010. Based upon the parties' agreement, the Oklahoma district court granted primary residential custody of M.M. to Jerry and ordered Ginny to pay $169.46 per month child support. After the divorce, the parties continued to live together; in March 2011, they moved to Pittsburg, Kansas.

In January 2012, Ginny moved out of the parties' residence and in with her mother and stepfather. M.M. remained with Jerry. Shortly thereafter, Ginny filed a petition for divorce in the Crawford District Court asserting the existence of a common-law marriage. On February 21, 2012, the district court entered temporary orders granting her temporary primary custody of M.M.

In November 2012, Jerry filed a motion requesting stepparent visitation of A.G. and X.S. He alleged he raised A.G. and X.S. as his own during and after the parties' divorce and it was in their best interests that he have stepparent visitation. Three months later, Ginny amended her petition, claiming that in the event the court determined a common-law marriage did not exist, the court should grant her primary residential custody of M.M.

On March 4, 2013, the court conducted a trial on the contested issues and heard argument from counsel and testimony from the parties and four lay witnesses.

Ginny's trial testimony

Concerning the existence of a common-law marriage, Ginny testified that after the parties divorced in Oklahoma, they continued to live together. They did not divide property, and they shared caretaking responsibilities for M.M. Ginny claimed she only agreed to the divorce to prove her love to Jerry.

Ginny further testified the parties continued to cohabitate after they moved to Pittsburg in March 2011. She continued to introduce Jerry as her husband and told her family and friends they were married. Ginny treated Jerry as her husband, and they shared income and assets. Ginny claimed she never stopped holding them out as husband and wife. Moreover, she did not tell anyone she and Jerry were divorced until they separated in February 2012.

Ginny applied for benefits from the State of Kansas, Department of Social and Rehabilitation Services (SRS), and listed Jerry as her spouse. Ginny also testified she and Jerry had a joint Facebook account, which she used daily. Ginny cited three instances after the Oklahoma divorce when she referred to Jerry as her "hubby" or "husband" and once when she referred to herself as Jerry's wife.

After Ginny and Jerry separated, she and her children moved in with her mother and stepfather, notwithstanding the fact that as a teenager, Ginny alleged her stepfather sexually abused her. However, she did not know if the State had ever filed charges against him. A month and half later, Ginny moved into a rental home with her three

children. Ginny's new boyfriend stayed with them on and off for 10 months. She is currently unemployed but receives $140 per week in workers compensation benefits.

As to the child custody and parenting time issues, Ginny testified M.M. is doing "fine" in school. In the first quarter, M.M. had A's, B's, a C, a D, and an F. In the second quarter, M.M.'s grades dropped; he had a D in math, a C in social studies, and a D in science. Ginny testified she communicates with M.M.'s teacher once every 2 weeks and both she and Jerry attend parent-teacher conferences. M.M. has allergies and has to have breathing treatments. Nonetheless, Ginny smokes outside and inside her vehicle.

Since Ginny obtained the temporary order, Jerry sees M.M. every other weekend and has overnight visitation every Wednesday. The parties exchange M.M. at the Girard Police Department.

Ginny further testified Jerry had a good relationship with A.G. and X.S., but she objected to him having stepparent visitation. She testified that prior to the separation, Jerry told her A.G. needed to find somewhere else to live because he could no longer handle him and suggested A.G. could live with Jerry's mother. Ginny stated when A.G. would get in trouble, Jerry would make him stand in the corner for hours. On one occasion, Jerry whipped A.G. with a belt because he did not wash the dishes correctly. If A.G. and X.S. did not keep their rooms clean, Jerry would pull everything out of their toy boxes, dump it on the floor, and then tell A.G. and X.S. to clean it up. Since the filing of the divorce, A.G. and X.S. expressed no interest in spending time with Jerry.

Jerry's trial testimony

Jerry testified that during the Oklahoma divorce, the parties entered into an agreement, giving Jerry primary residential custody of M.M. and Ginny the household

furnishings. When the parties presented their agreement to the Oklahoma district court, the court ordered Ginny to pay Jerry child support.

After Ginny moved out, Jerry claimed they followed the Oklahoma parenting plan which provided that Ginny would get M.M. every other weekend. However, once Ginny obtained the temporary order that awarded her primary residential custody of M.M., this arrangement ended.

Jerry's 2009, 2010, and 2011 tax returns list him as single, head of household. Jerry admitted he told the tax preparer he and Ginny separated for a short period near the end of 2009, but they were still married; nonetheless, the tax preparer prepared the documents, listing him as single, which he signed. In 2011, Jerry claimed A.G. as his stepson dependant. Jerry again explained he told the tax preparer A.G. was his stepson who was still living with him at the end of 2011. Again, the tax preparer prepared the documents, which listed A.G. as his stepson dependent, and Jerry signed.

In September 2011, Jerry obtained car insurance. The insurance agent prepared the policy and brought it to their residence for signature, where Jerry signed it. The policy listed Jerry's and Ginny's marital status as "married." Jerry claimed he did not tell the insurance agent he was married and did not realize the document required their marital status. After Ginny filed her petition for divorce, Jerry changed vehicles on their insurance policy; the new policy again listed his marital status as "married."

Jerry testified that since the Oklahoma divorce, he has not held himself and Ginny out as married.

Jerry testified his relationship with M.M. was "wonderful," and they enjoyed doing outdoor activities together. He also had a good relationship with A.G. and X.S. and

wanted visitation with them so he could take them fishing. A.G.'s and X.S.'s biological fathers were not involved; Jerry supported both of them and cared for them day-to-day.

Jerry was employed full time and was not required to work overtime or weekends. He was also able to take M.M. to school.

Other witnesses

Three witnesses testified Ginny did not hold herself out as being married to Jerry. Charlie Dohle, Jerry's cousin, testified Ginny told him in August 2011 she and Jerry were not married. Haley Harris, Charlie's girlfriend, worked at McDonalds with Ginny. Harris testified after Ginny and Jerry got into a fight, Ginny told her, "I don't know why I even bother, because we are not even married." Thomas Marshall, Jerry's cousin, testified Ginny told him, "[S]he [didn't] know why everyone thought that they [were] married because they weren't."

Charles Carter testified Jerry and M.M. got along fine. Before the separation, A.G. and X.S. interacted with Jerry great. One night, however, Ginny's dog tore up Jerry's wallet; Jerry was intoxicated and told Carter he was going to take the dog outside and slice its throat. Carter had to stop him.

The district court's ruling

After hearing testimony and argument from counsel, the district court issued a written opinion, finding after the Oklahoma divorce the parties did not enter into a common-law marriage. The court then concluded there was insufficient evidence presented to allow the court to overcome the presumption that the Oklahoma parenting plan was not in the best interests of M.M. The court also concluded that all else being equal Jerry would provide a more stable living arrangement for M.M. In reaching this

decision, the court made the following findings: (1) Ginny has a history of short, unstable relationships with different men; (2) she moved her three children into her mother's home where a man she claimed sexually assaulted her as a teenager also lived; (3) Jerry once had to be restrained from killing a dog while intoxicated; and (4) Ginny viewed Jerry as a strict disciplinarian. The court also denied Jerry's request for stepparent visitation.

Ginny filed a motion to reconsider and/or clarification, alleging the district court's decision was contrary to the evidence presented at trial. First, Ginny argued the district court erred in classifying her relationships as "relatively short and unstable." As proof of the district court's error, she cited her 10-year relationship with Jerry. Second, Ginny claimed the fact that she moved in with her stepfather, who she previously accused of sexually abusing her, should not be held against her because while she continues to insist her accusations are true, the State chose to not file charges against him. Third, Ginny also requested the court to make a finding she did not owe Jerry child support because they cohabited. Following a hearing, the district court denied her motion. The court, however, did make a finding based upon the parties' agreement Ginny did not owe Jerry child support through August 1, 2013.

Ginny timely appeals. Jerry does not appeal the district court's denial of stepparent visitation.

DID THE DISTRICT COURT ERR IN DETERMINING THAT A COMMON-LAW MARRIAGE DID NOT EXIST?

Ginny argues she and Jerry were common-law married and claims on appeal that the district court erred in not so finding.

Standard of Review

Our Supreme Court has previously treated a district court's finding that a common-law marriage does or does not exist as a factual finding. *In re Adoption of X.J.A.*, 284 Kan. 853, 877-78, 166 P.3d 396 (2007). An appellate court shall affirm the district court's factual finding that no common-law marriage existed to determine if the finding is supported by substantial competent evidence. *In re Estate of Antonopoulos*, 268 Kan. 178, 193, 993 P.2d 637 (1999). In reviewing findings of fact, an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010). "Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion." *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). Moreover, an appellate court will not disturb negative factual findings absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *Hamel v. Hamel*, 296 Kan. 1060, 1078, 299 P.3d 278 (2013).

Analysis

> "To establish a common-law marriage in Kansas, a plaintiff must prove (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out to the public as husband and wife. [Citation omitted.] Each element must coexist to establish a common-law marriage. [Citation omitted.] . . . The burden to prove a common-law marriage rests upon the party asserting it. *In re Adoption of X.J.A.*, 284 Kan. 853, 877, 166 P.3d 396 (2007)."*Anguiano v. Larry's Electrical Contracting*, 44 Kan. App. 2d 811, 814, 241 P.3d 175 (2010).

1. *Capacity to marry*

> "Capacity to marry relates to whether or not a legal impediment exists to entering into a marriage contract. Included within the term are such diverse matters as mental or physical capacity, the absence of a spouse, whether or not the marriage would be incestuous, and the party being of sufficient age to marry." *In re Estate of Hendrickson*, 248 Kan. 72, Syl. ¶ 2, 805 P.2d 20 (1991).

In this case, the capacity of the parties to marry is not in dispute.

2. *Present marriage agreement*

Although common-law marriage need not be in any particular form, it is essential there be a present mutual consent to be married. *In re Estate of Antonopoulos*, 268 Kan. at 192. A present agreement may be evidenced by acts and conduct of the parties. *Dixon v. CertainTeed Corp.*, 915 F. Supp. 1158, 1160 (D. Kan. 1996).

Ginny argues she continued to introduce Jerry as her husband; told her family and friends they were married; treated Jerry as her husband; and shared income and assets. Jerry, on the other hand, consistently denied a marriage agreement.

The district court concluded Ginny failed to prove that the parties did mutually consent to a marriage after the Oklahoma divorce. Without reweighing the evidence or the credibility of the witnesses, we conclude there is substantial competent evidence to support this finding.

3. *Holding out to the public as husband and wife*

"To satisfy the third element of a common-law marriage, both parties must have held each other out to the public as husband and wife. [*Dixon*,] 915 F. Supp. at 1161."

Bahruth v. Jacobus, No. 94,713, 2007 WL 1041765, at *4 (Kan. App. 2007) (unpublished opinion).

"Many years ago in *Butler v. Butler*, 130 Kan. 186, 190, 285 Pac. 627 (1930), the Kansas Supreme Court discussed the concept of persons holding themselves out to the public as husband and wife and cited the following authority:

'Our own decisions take it for granted that some measure of publicity is a distinguishing feature, if not an essential attribute of, a common-law marriage. (*State v. Hughes*, 35 Kan. 626, 12 Pac. 28; *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534.) In *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, the parties concerned in a common-law marriage declared

'"We are man and wife, and will continue to be man and wife'; and it appears that thereafter they cohabited and otherwise lived together as such. They publicly acknowledged each other as husband and wife, assumed marriage rights, duties, and obligations, and have generally been reputed to be husband and wife in the community." (p. 599.)'

'In *Meister v. Moore*, 96 U.S. 76, 82, 96 L. Ed. 826, the [S]upreme [C]ourt quoted approvingly from an opinion by Judge Cooley in *Hutchins v. Kimmell*, 31 Mich. 126, 130, in part, thus:

'"Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations."' (p. 82)"

'In 1 Bishop on Marriage and Divorce (6th ed.), 222, 223, it is said:

"Habit and repute do not create the marriage. But it exists where, on the parties cohabiting as husband and wife, and being accepted in society and reputed as such, they are presumed, *prima facie*, to be married. . . . It is a holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and, when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise, and attend upon the cohabitation."'" *U.S.*

Bank Nat. Ass'n v. Estate of Dowty, No. 105,869, 2012 WL 1650159, *4 (Kan. App. 2012) (unpublished opinion).

Here, there is considerable evidence to support each of the parties' conflicting positions. During the pendency of and after the Oklahoma divorce, Ginny and Jerry continued to cohabitate until February 2012. After the Oklahoma divorce, they did not divide marital property; they shared caretaking responsibilities for M.M.; and in March 2011, they moved to Pittsburg, Kansas, together. Ginny continued to introduce Jerry as her husband and told her family and friends they were married. She treated Jerry as her husband, and they shared income and assets. Ginny claimed she never stopped holding out to the public that they were husband and wife, and she did not tell anyone the parties had divorced until they separated in February 2012 and she filed for divorce. After the parties moved to Kansas, Ginny applied for SRS benefits and listed Jerry as her spouse. In September 2011, the parties obtained automobile insurance, which listed their marital status as "married." Finally, Ginny claimed she and Jerry had a joint Facebook account which she used daily. Ginny also cited three instances after the Oklahoma divorce where she referred to Jerry as her "hubby" or "husband" and once where she referred to herself as Jerry's "wife."

Conversely, Jerry testified he has not held himself and Ginny out as husband and wife since the Oklahoma divorce. All of Jerry's witnesses testified at trial that Ginny told them she and Jerry were not married. Moreover, the parties did not file joint tax returns. In fact, Jerry's 2009, 2010, and 2011 tax returns listed him as single, head of household.

In *State v. Johnson*, 216 Kan. 445, 532 P.2d 1325 (1975), *overruled on other grounds by State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), during trial the defendant invoked the marital privilege, claiming a witness was his common-law wife. The witness testified she lived with the defendant on and off for 7 months; they lived together continuously without having gone through a marriage ceremony; others thought they

were legally married; her mother wanted her to marry the defendant; she never signed her name using the defendant's surname; prior to the defendant's criminal activity she intended to go through a marriage ceremony at a future date but after the defendant's criminal activities she no longer intended to do so; they referred to each other as husband and wife in the presence of the defendant's employer and their landlady; and the defendant told law enforcement he was staying with his girlfriend whom he identified as the witness. Based on this evidence, the district court concluded the parties "held themselves out to be man and wife only when it was advantageous to assume a marriage posture." 216 Kan. at 449; see also *In re Adoption of X.J.A.*, 284 Kan. 853, 877-78, 166 P.3d 396 (2007) (although there was some inconsistency in statements, the parties lived together as common-law husband and wife for 14 years, the wife believed under Kansas law they were married even though they were not married in a formal ceremony, and they called each other husband and wife).

Similar to *Johnson*, Ginny and Jerry held themselves out as "man and wife only when it was advantageous" to them, such as when they filed their taxes and when they applied for automobile insurance. Although there was evidence demonstrating Ginny and Jerry held themselves out as husband and wife, there was substantial competent evidence to support the district court's finding that they did not consistently hold themselves out as husband and wife.

The district court found Ginny failed to prove all of the elements of a common-law marriage. This is a negative finding which will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or reliance upon some extrinsic consideration such as bias, passion, or prejudice. *Hamel*, 296 Kan. at 1078. Ginny does not suggest and the record does not reveal the district court arbitrarily disregarded undisputed evidence or the district court acted out of bias, passion, or prejudice. Therefore, without reweighing the evidence or the credibility of the witnesses, we must

conclude there was substantial competent evidence to support the district court's finding Ginny and Jerry were not common-law married.

DID THE DISTRICT COURT ERR IN AWARDING RESIDENTIAL CUSTODY TO JERRY?

Ginny alleges the district court relied solely on the parties' Oklahoma custody agreement and ignored the statutory factors listed in K.S.A. 2012 Supp. 23-3203.

A. *Modification of child custody in the absence of material change in circumstances*

Generally, when a parent seeks to modify a preexisting custody order, the parent seeking the modification must show a material change in circumstances. K.S.A. 2012 Supp. 23-3218; *Simmons v. Simmons*, 223 Kan. 639, 642, 576 P.3d 589 (1978). However, there is an exception to this rule. A court can modify a custody order in the absence of a material change in circumstances if the original order was the product of default proceedings or during a proceeding in which the facts were not substantially developed. *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 (1980); *In re Marriage of Jennings*, 30 Kan. App. 2d 860, 863, 50 P.3d 506 (two prior custody agreements between parents were entered without evidentiary hearings), *rev. denied* 274 Kan. 1112 (2002). Whether this exception applies turns on "whether the prior custody proceedings were substantially developed and presented to the court or whether custody was arranged by a written agreement and merely uncritically adopted by the court." *Johnson v. Stephenson*, 28 Kan. App. 2d 275, 280-81, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). This exception is consistent with the overreaching principle that custody determinations should be based on the child's best interests. *Johnson*, 28 Kan. App. 2d at 282 (citing *In re Marriage of Kiister*, 245 Kan. 199, 203, 777 P.2d 272 [1989]).

Here, the parties executed a parenting agreement giving Jerry primary residential custody. Without a trial, the Oklahoma court uncritically adopted their agreement and

incorporated it into their divorce decree. The district court found, and we agree, that because the facts relating to the parties' custody agreement were never substantially developed before the Oklahoma court, Ginny was not required to show a material change in circumstances before seeking a custody modification.

B. *Presumption regarding previous custody agreement*

When determining the best interests of M.M., the district court relied in part on K.S.A. 2012 Supp. 23-3202, which creates a presumption that a parenting plan, agreed to by the parties, is in the child's best interests. To overcome this presumption, the district court must articulate specific findings of fact detailing why the parenting plan is not in the best interests of the child.

However, Kansas cases have found the statutory presumption is no longer applicable if the parties' circumstances have changed, the agreement does not provide for those changes, and a new agreement is not presented to the court. *In re Marriage of Bradley*, 258 Kan. 39, 43, 899 P.2d 471 (1995); *Talbot v. Pearson*, 32 Kan. App. 2d 336, 340, 82 P.3d 854, *rev. denied* 277 Kan. 928 (2004). The *Bradley* court found even though the parties had executed an agreement, the statutory presumption was not applicable because the parties' agreement did not provide for contingencies such as one party moving out of state. *In re Marriage of Bradley*, 258 Kan. at 42-43.

Similarly, in this case, the parties entered into a parenting agreement which clearly did not contemplate that the parties would continue to cohabitate and share parenting responsibilities for M.M., nor did it contemplate the parties would subsequently move out of state. As a result, Jerry is not entitled to a presumption that the Oklahoma custody agreement is in the best interests of the M.M., and the district court erred when it made findings that Ginny had not presented sufficient evidence to overcome the presumption that the parties' prior parenting agreement was not in the minor child's best interests.

C. *Sufficiency of the evidence*

Ginny claims the district court failed to consider the statutory factors listed in K.S.A. 2012 Supp. 23-3203(a)-(k) and suggests the court erred in applying a presumption in favor of the parenting agreement approved by the parties in their Oklahoma divorce. She also argues if the court applied these statutory factors, it would have found in her favor. Specifically, she argues M.M. has always lived with her; M.M. has a good relationship with his half-siblings, A.G. and X.S., who also live with her; M.M. is better cared for in her residence; and Jerry excessively punished the children.

In its memorandum decision, the district court made the following findings:

> "Both parties urge that the best interests of [M.M.] would be served if he were in their primary custody. However, the evidence supports that both [Ginny] and [Jerry] have issues: [Ginny]'s history of relatively short, unstable relationships with different men, and that [she] moved herself and her children into her mother's home where the man she claimed sexually assaulted her as a teenage also lived, suggests to this court that [she] would likely provide a less secure environment for children than [Jerry]. That [Jerry] once had to be restrained from killing a dog while drunk is inconsistent with this court's concept of an ideal father figure; however, that [Ginny] may perceive [Jerry] as a strict disciplinarian is not necessarily inconsistent with the responsibility of a parent – while the degree of discipline may be appoint of concern, that children need some discipline seems self-evident. *This court finds that not only is there insufficient evidence to overcome the presumption triggered by the agreement of the parties reflected in the Oklahoma decree, but the evidence also presented persuades this court that, all else being equal, [M.M.] is likely to have a more stable living arrangement with [Jerry] rather than [Ginny], which this court concludes is in [M.M.'s] best interests.*
>
> "Accordingly, the court finds the agreed parenting plan recited in the Oklahoma decree is in the best interests of [M.M.] and adopts that parenting plan by reference." (Emphasis added.)

First, we think the italicized portions of the district court's order conclusively show that the district court made its own independent findings that the parenting plan was in the minor child's best interests. Given this, the district court's findings regarding Ginny's failure to overcome the presumption that the parties' agreed parenting plan was in M.M.'s best interests are harmless error.

Second, when a litigant challenges the sufficiency of evidence to support a district court's finding regarding a child's best interests, an appellate court reviews the evidence in a light most favorable to the prevailing party below to determine if the court's factual findings are supported by substantial competent evidence and whether those findings support the court's legal conclusions. The primary consideration of the district court is the welfare and best interests of the child. The district court is in the best position to make this inquiry and determination, and, in the absence of abuse of discretion, its judgment will not be disturbed on appeal. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002) (quoting *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 [1998]); see also *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081 (whether child custody should be changed rests within sound judicial discretion of district court), *rev. denied* 281 Kan. 1378, *cert. denied* 549 U.S. 954 (2006). An abuse of discretion occurs if the judicial action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

To aid the district court in determining the best interests of a child, K.S.A. 2012 Supp. 23-3203 (a)-(k) provides a nonexclusive list of factors the district court may consider, including:

> "(a) the length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;
>
> "(b) the desires of the child's parents as to custody or residency;

"(c) the desires of the child as to the child's custody or residency;

"(d) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

"(e) the child's adjustment to the child's home, school and community;

"(f) 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 the other parent;

"(g) evidence of spousal abuse;

"(h) whether a parent is subject to the registration requirements of the Kansas offender registration act, K.S.A. 22-4901 *et seq.*, and amendments thereto, or any similar act in any other state, or under military or federal law;

"(i) whether a parent has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto;

"(j) whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, K.S.A. 22-4901 *et seq.*, and amendments thereto, or any similar act in any other state, or under military or federal law; and

"(k) whether a parent is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto."

Below, Ginny did not object to the district court's findings. Her motion to reconsider primarily challenged the district court's "classification of her relationships as relatively short and unstable" and the court's reliance on the fact that she moved in with a man who she accused of sexual abuse.

Supreme Court Rule 165 (2013 Kan. Ct. R. Annot. 265) charges a district court with the primary duty of providing adequate findings of fact and conclusions of law on the record. A party, however, must object to inadequate findings of fact or conclusions of law to preserve an issue for appeal. Such objections necessarily give the district court an opportunity to correct any alleged inadequacies. *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013). Without such an objection, appellate courts generally presume the

district court found all of the facts needed to support its judgment. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009); *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

Moroever, other panels of this court have held the district court's failure to explicitly reference each factor set forth in K.S.A. 2012 Supp. 23-3203(a)-(k) is not fatal. See *In re Marriage of Vandenburg*, 43 Kan. App. 2d 697, 703, 229 P.3d 1187 (2010) (district court's failure to reference each factor is not fatal). K.S.A. 2012 Supp. 23-3203(a)-(k) only requires that the district court consider these factors when determining the best interests of the child; the statute does not require the district court to make specific findings on the record with respect to each factor.

In reality, Ginny essentially invites us to view the evidence in a light most favorable to her, to reweigh the evidence, to pass on witness credibility, and/or redetermine questions of fact presented to the district court. None of these actions are appropriate for an appellate court. See *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Viewing the evidence in a light most favorable to Jerry, the record contains substantial competent evidence to support the district court's legal conclusion that it was in the best interests of M.M. to award Jerry primary residential custody. Jerry is employed full time and has continued to reside in the same residence since Ginny left in early 2012.

With respect to Ginny, there was substantial evidence in the record to support the district court's concerns about her history of relatively short, unstable relationships with different men, that she moved her children into a home where a man she claimed sexually abused her lived, and that she only lived there for a month and half before moving into a

rental home with her new boyfriend who has been staying with her and her children for the past 10 months.

Given the conflicting evidence, the district court was faced with a difficult decision. However, it cannot be said that no reasonable judge would have granted Jerry primary residential custody. See *Rayman*, 273 Kan. at 999. Accordingly, the district court did not abuse its discretion in awarding Jerry primary residential custody.

Affirmed.

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LEBEN, J., concurring in part and dissenting in part: I agree with the majority that the district court's conclusion that there was no common-law marriage is supported by the evidence. On the child-custody issue, I agree with the majority that Ginny did not have to show a material change in circumstances and that there was no presumption that the parties' agreement—entered in Oklahoma before the divorce decree was entered there—should still control.

In these circumstances, the district court had to make a decision about whether the parties' daughter should live with Ginny or Jerry. In doing so, the district court was required to consider the factors set out in K.S.A. 2012 Supp. 23-3203(a)-(k). But the district court improperly applied a presumption that the parties' Oklahoma agreement should control, and I cannot tell how the district court would have ruled absent that presumption. I would send the case back to the district court to reconsider the matter without any reliance on that presumption.

The majority opinion includes an excerpt from the district court's written ruling. Earlier in the opinion, however, the district court explicitly applied the presumption in

favor of the Oklahoma custody agreement—an assumption that the majority and I all agree should not have been applied:

> "K.S.A. 23-3202 provides: 'If the parties have entered into a parenting plan, it shall be presumed that the agreement is in the best interests of the child. This presumption may be overcome . . . if the court makes specific findings of fact stating why the parenting plan is not in the best interests of the child.' . . . Accordingly, this court concludes that the parties '. . . entered into a parenting plan . . .' and thus a presumption exists that such parenting plan is in the best interests of [the child]."

The district court then explicitly relied on that presumption in announcing that the evidence wasn't sufficient to overcome the presumption:

> "To overcome that presumption, this court must make specific findings of fact stating why that plan is not in the best interests of [the child]. However, the evidence presented is insufficient to make a definitive finding that such a parenting plan is not in the best interest of [the child]."

The majority opinion includes the next two paragraphs of the district court's decision. In it, the court first restates its conclusion about a presumption. The court then makes a best-interests finding that the majority treats as an independent conclusion—untainted by the district court's legally incorrect reliance on a presumption—that the child's best interests are met by living primarily with Jerry:

> "This court finds that not only is there insufficient evidence to overcome the presumption triggered by the agreement of the parties reflected in the Oklahoma decree, but the evidence also presented persuades this court that, all else being equal, [the child] is likely to have a more stable living arrangement with [Jerry] than with [Ginny], which this court concludes is in [the child's] best interests."

The majority reads much more into half a sentence of the district court's opinion than I am willing to. The district court did not mention any of the factors found in K.S.A. 2012 Supp. 23-3203(a)-(k). In the same sentence, the district court had again referenced the presumption that it had improperly applied. The district court also included the qualifier "all else being equal"—a qualifier that is hard to interpret.

When there is a substantial question about whether the district court applied the right legal standard, the proper course is to remand for consideration under the correct standard. See *State v. Garcia*, 295 Kan. 53, Syl. ¶ 5, 283 P.3d 165 (2012). Here, we know the district court applied an incorrect presumption. But the majority concludes that even if that presumption had been taken away, the district court still would have ruled the same way—based on part of one sentence in the district court's ruling. A child-custody decision is too important to be resolved this way. I would therefore remand the case for the district court to reconsider based solely on the statutory factors found in K.S.A. 2012 Supp. 23-3203(a)-(k).