NOT DESIGNATED FOR PUBLICATION

No. 111,228

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

JANENE R. LARSON,
*Appellant,*

and

CARL L. LARSON,
*Appellee.*

MEMORANDUM OPINION

Appeal from Decatur District Court; PRESTON A. PRATT, judge. Opinion filed September 5, 2014. Affirmed.

*Daniel C. Walter* and *Andrew J. Walter*, of Ryan, Walter & McClymont, Chtd, of Norton, for appellant.

*Allen Shelton*, of Shelton Law Firm, P.A., of Oberlin, for appellee.

Before MCANANY, P.J., GREEN and BUSER, JJ.

*Per Curiam*: Carl L. Larson and Janene R. Larson were married in 2010, and they were divorced on September 20, 2011. The couple had one child, E.R.L. Later, the trial court determined that it would be in the best interest of E.R.L. if Carl had custody of the child during the school year and Janene had custody of the child during the school's summer vacation.

On appeal, Janene first argues that the trial court abused its discretion in determining that it was in E.R.L.'s best interest to reside with Carl instead of her during the school year. For reasons set forth later, we reject this argument. In the alternative, Janene contends that the trial judge should have disqualified himself from the case because he knew Carl's family and had conducted legal work for him at some point in the past. We disagree. Accordingly, we affirm.

Carl and Janene were married on February 20, 2010. The couple had one child, E.R.L., who was born in 2009. In early 2011, the couple separated. After they separated, Janene moved back to her hometown, Wilsonville, Nebraska. Meanwhile, Carl stayed in Kansas to work on the family farm, which was located near Oberlin, Kansas.

On May 16, 2011, Ken Eland, the couple's mediator, filed a mediation agreement with the trial court. The mediation agreement stated that Janene would become the "temporary residential custodial parent of [E.R.L.]" The mediation agreement stated that it would last for 4 months, after which, the couple agreed to "return to mediation to discuss a final custody and visitation plan." The mediation agreement, however, did not "preclude the parties from reaching their own agreement or continuing this temporary custody arrangement at that time."

On September 20, 2011, the trial court issued its decree of divorce. In its divorce decree, the trial court noted that the couple's previous mediation agreement "temporarily resolves the issues concerning parenting time." As a result, the trial court approved the agreement. Carl and Janene continued with discovery regarding the issues of custody and parenting time. On July 19, 2012, Carl and Janene entered into a new mediation agreement. Under the July 2012 agreement, Carl and Janene agreed to the following:

> "We agree that it is in the best interest of our minor child, that the responsibility for her care and custody be shared jointly. We understand that the term 'joint custody'

> means that each party has equal rights and responsibilities with respect to [E.R.L.] and that neither party's rights are superior. We further understand that this agreed custody arrangement is subject to the orders of the District Court of Decatur County, Kansas. The parties have not designated a custodial parent in this agreement."

The mediation agreement stated that Carl was to have custody of E.R.L. from Thursday at 6:00 p.m. until Monday at 6:00 p.m. for three consecutive weekends. The temporary custody arrangement was scheduled to last for 6 months. The mediation agreement also stated that Carl and Janene would return to mediation to discuss a final custody and visitation plan at the conclusion of the 6-month-time period.

On June 26, 2013, Janene moved to modify the parenting plan. Janene's motion alleged that a material change of circumstances justified modifying the current plan. Specifically, Janene maintained that the best interest of the child required modifying the plan because E.R.L. would "be attending preschool and the current parenting plan is not conducive to that arrangement." Two days later, Carl also moved to modify the parenting plan. Carl agreed with Janene that a material change of circumstances had occurred, but he disagreed with Janene's proposed parenting plan. Carl's motion stated that he would provide his proposed custody arrangement and suggested parenting plan in accordance with the trial court's scheduling order.

The trial court's scheduling order noted that Carl and Janene were unsuccessful in reaching a custody agreement during mediation. As a result, the trial court directed both parties to prepare and exchange an exhibit and witness list in preparation for trial. The scheduling order set August 26, 2013, as the trial date.

The case proceeded to trial as scheduled. After both parties rested, the trial judge announced for the record that he had had a conversation with both counsel in the hallway before the start of trial. Specifically, the trial judge noted for the record that he had

practiced law in Oberlin, Kansas, for 20 years before becoming a judge and that he knew Carl and his family. The trial judge went on to state that he had forgotten to advise counsel that he previously provided legal assistance to Carl's family. The trial judge declared:

> "I believe I actually prepared a couple of farm leases several years ago for Mr. Larson. One, I represented the landlord. He was the tenant, so he wasn't my client. But I think there may have been one where I actually represented him as the tenant. I don't really recall.
>
> "But that would have been before him and Janene would have met, and [before E.R.L.] would have been born. I haven't had any contact as far as attorney-client relationship on any of these matters."

Approximately 9 minutes after the trial judge made the comments regarding his relationship with the Larson family, he issued his custody ruling. Specifically, the trial judge determined that it was in the child's best interest for the child to reside with Carl during the school year. Janene was granted extended visitation during the summer.

Before the trial court issued the journal entry for its permanent custody ruling, Janene moved for a change of judge and for a new trial. On October 3, 2013, the trial judge who had presided over the trial held an informal hearing and denied Janene's motion for change of judge. On October 11, 2013, Janene filed an affidavit under K.S.A. 20-311d(b), and a different judge was assigned to hear her motion. Janene's motion for change of judge was denied in a memorandum decision dated November 4, 2013. In reaching its decision, the trial court reasoned that "[j]udges are part of their community, and particularly in smaller communities will be acquainted with many citizens. . . . [F]amiliarity with other inhabitants of the communities in which they live simply does not indicate bias or prejudice for or against any of those inhabitants." Further, the trial court reasoned that simply because the presiding judge may have done legal work for Carl's family at some point in the past, that fact alone was insufficient to show bias.

After Janene's motion for change of judge was denied, the trial court denied her motion for new trial.

*Did the Trial Court Abuse Its Discretion in Determining that It Was In E.R.L.'s Best Interest to Reside With Carl During the School Year and Janene During the School's Summer Vacation?*

On appeal, Janene argues that the trial court abused its discretion in determining that it was in E.R.L.'s best interest to reside with Carl in Oberlin during the school year. Under Janene's argument, she contends that "[a] district court may change or modify an existing child custody arrangement, only upon a showing of a material change in circumstances. K.S.A. 2013 Supp. 23-3218(a)." Carl contends that Janene has misconstrued the burden of proof in this case. Specifically, Carl contends the following:

> "[T]he judge's [custody] ruling on August 26, 2013, was the initial award of primary residential custody; it did not 'transfer' primary residence of the child from Janene because she never had primary residential custody. . . . This is simply not a 'material change of circumstances case, and Carl had no obligation or burden to prove such change in circumstances."

Carl's contention is correct. Janene did have custody of E.R.L. based on the terms of the parties' mediation agreements, but neither parent had been awarded or designated as the primary residential parent until the trial court held—following trial—that it was in the best interests of E.R.L. to reside with Carl during the school year. "A mediated custody agreement incorporated into a decree of divorce or other court order does not have the same effect as a court order that is issued after a hearing where evidence is presented and the trial court makes specific findings of fact." *In re Marriage of Jennings*, 30 Kan. App. 2d 860, 863, 50 P.3d 506 (2002), *rev. denied* 274 Kan. 1122 (2002). Indeed, "[a] trial court abuses its discretion when it finds that the petitioner must prove a material change of circumstances when no court hearing had ever been held on the issue

of child custody and support." *Jennings*, 30 Kan. App. 2d 860 at 863-64. Consequently, Carl did not have to show a material change in circumstances before the trial court placed E.R.L. with him for the school year.

Instead, the appropriate question for this court to determine is the following: Did the trial court err in determining that it was in E.R.L.'s best interest to reside with Carl during the school year and Janene during the summer school vacation? Various provisions of K.S.A. 2013 Supp. 23-3201 *et seq.*, guide a trial court's discretionary determination of a child's custody, residency, visitation, or parenting time. The paramount consideration in making such decisions is the child's welfare and best interests. In light of the trial court's unique vantage point of what often is an emotionally-charged situation, an appellate court generally will not overturn such decisions unless the court abused its discretion. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701, 229 P.3d 1187 (2010).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014) (criminal); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013) (civil). Challenges to specific factual findings in support of such determinations are reviewed to assure that they are supported by substantial competent evidence and that they support the court's legal conclusions. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 420, 119 P.3d 684 (2005).

In this case, Janene attacks the trial court's decision by arguing that it failed to consider all of the statutory factors set out in K.S.A. 2013 Supp. 23-3203. That statute directs the trial court to "consider all relevant factors, including, but not limited to" the following:

"(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."

According to Janene, the trial court "paid lip service to all of the above factors except [K.S.A. 23-3203](f)." Janene also cites to *In re Marriage of Grippin*, 39 Kan.

App. 2d 1029, 186 P.3d 852 (2008), to support her contention that the trial court failed to consider all the statutory factors; she argues that when the trial court in *Grippin* failed to address the factors set forth in K.S.A. 60-1610(a)(3)(B) (now codified at K.S.A. 2013 Supp. 23-3203), our court reversed and remanded the case for the trial court to detail its findings in the context of those statutory factors.

Janene's argument is misplaced. First, a review of the record leads us to the conclusion that the trial court considered the factors set forth in K.S.A. 2013 Supp. 23-3203. In fact, the trial court expressly stated that it considered those factors when reaching its decision. Specifically, the trial court stated the following:

> "Some factors that I have to look at in making that decision are set out by Kansas law. Those are set out in the statute, which is 23-3203. Now, a lot of these don't apply in this situation, but I'll read through those anyway, just to make sure everybody is aware that I have considered those."

After stating each factor, the trial court carefully weighed each factor one-by-one. Because most of the factors did not apply or were evenly weighed, the trial court gave more weight to Janene's decision to move to Nebraska. According to the trial court, Janene's decision to move away did not "respect the bond between [E.R.L.] and [Carl] because it was the decision to move [E.R.L.] farther away from her dad." Although the trial court essentially used K.S.A. 2013 Supp. 23-3203(f) as a tie-breaker when reaching its decision, its decision was made within the parameters of K.S.A. 2013 Supp. 23-3203.

In addition, the trial court also considered the work schedules of the parents. Specifically, the trial court noted that Carl's work schedule did not allow him to spend much time with E.R.L. during the summer. Because Carl was a farmer, his work schedule was much busier in the summer than during the school year. As a result, having custody of E.R.L. during the school year allowed Carl to spend more time with E.R.L. The trial

court's decision to grant Carl custody of E.R.L. during the school year was not arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact. *Mosher*, 299 Kan. at 3.

Second, Janene's interpretation of *Grippin* is inaccurate. In *Grippin*, our court reversed and remanded because the trial court placed the burden of proof on the wrong party. 39 Kan. App. 2d at 1032-33. Moreover, *Grippin* simply encouraged the trial court to detail its findings under K.S.A. 60-1610 (now codified at K.S.A. 2013 Supp. 23-3031) on remand. 39 Kan. App. 2d at 1034. Finally, our court did not suggest that the failure to consider or address all the statutory factors for determining child custody constituted reversible error. Accordingly, Janene's reliance on *Grippin* is misplaced and must fail.

To summarize, the trial court did not abuse its discretion when it determined that it was in E.R.L.'s best interest to reside with Carl during the school year and Janene during the summer school vacation. The trial court considered the necessary factors outlined under K.S.A. 2013 Supp. 23-3203 and also considered the parties' work schedule. The trial court's decision was not arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact. *Mosher*, 299 Kan. at 3. Accordingly, Janene's first argument fails.

*Did Reversible Error Occur Because the Trial Judge Did Not Disqualify Himself From the Proceedings?*

Next, Janene takes issue with the trial judge's refusal to disqualify himself. Specifically, Janene maintains that the trial judge should have disqualify himself under Supreme Court Rule 601B, Canon 2, Rule 2.11(A)(1) (2013 Kan. Ct. R. Annot. 741) because he had a personal bias or prejudice against her. Carl disagrees, arguing that Janene failed to meet her burden to establish that the trial judge was biased.

Kansas law contains at least three possible substantive bases on which a litigant may argue that a judge's recusal is required. The first basis is a list of statutory factors under K.S.A. 20-311d(c)(1)-(5). The factors read as follows:

> "(1) The judge has been engaged as counsel in the action prior to the appointment or election as judge.
>
> " (2) The judge is otherwise interested in the action.
>
> "(3) The judge is related to either party to the action.
>
> "(4) The judge is a material witness in the action.
>
> "(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists."

The second basis is under the Kansas Code of Judicial Conduct. Kansas Supreme Court Rule 601B, Canon 2 (2013 Kan. Ct. R. Annot. 735) states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.11 addresses disqualification: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Canon 2, Rule 2.11(A) (2013 Kan. Ct. R. Annot. 741). In part, a judge's impartiality might reasonably be questioned under circumstances where the judge has a personal bias or prejudice concerning a party or a party's lawyer. Canon 2, Rule 2.11(A)(1).

Finally, "a litigant seeking a judge's recusal may rely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v. Sawyer*, 297 Kan. 902, 906, 305 P.3d 608 (2013), citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868,

876-87, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (identifying four instances in which Due Process Clause requires recusal); see also *State v. Robinson*, 293 Kan. 1002, 1030-35, 270 P.3d 1183 (2012) (citing *Davenport Pastures v. Board of Morris County Comm'rs*, 291 Kan. 132, 144-46, 238 P.3d 731 [2010] [quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)]) (due process violated when, under all circumstances, probable risk of actual bias too high to be constitutionally tolerable).

The proper analysis for disqualification claims begins with the statutory framework and the Code of Judicial Conduct, which may eliminate the need for constitutional analysis. See *Wilson v. Sebelius*, 276 Kan. 87, Syl. ¶ 3, 72 P.3d 553 (2003) (appellate court should avoid making unnecessary constitutional decisions because a claim based on K.S.A. 20-311d and/or the Code of Judicial Conduct that is resolved in the claimant's favor would end the matter). Interpretation of statutes and Supreme Court rules raise questions of law reviewable de novo. *Thompson v. State*, 293 Kan. 704, 710, 270 P.3d 1089 (2011) (citing *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010) (statutes); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 901, 220 P.3d 333 (2009) (rules).

Our Supreme Court has developed a two-part test for analyzing an allegation of judicial bias:

> "First, the defendant must show that the trial judge has a duty to recuse. Second, the defendant must show actual bias or prejudice that warrants setting aside the conviction or sentence. But bias or prejudice will be presumed when, based on objective standards, the probability of actual bias is too high to be constitutionally tolerable." *Robinson*, 293 Kan. at 1032.

In this case, Janene has failed to show that the trial judge had a duty to disqualify himself. Janene argues that recusal was warranted based on the fact that the trial judge had represented Carl or his family several years ago. But the representation of Carl or his

family several years before the current trial by itself would not cause a reasonable person to question the judge's impartiality. Our court has reached the same conclusion under similar circumstances. See *State v. Goetz*, No. 108,539, 2013 WL 5187572 at * 6 (Kan. App.) (2013) (unpublished opinion) ("The asserted representation of the alleged victim in this case over 25 years prior to the current trial" was insufficient to establish the judge's impartiality.). As result, Janene has failed to meet the first prong of the test announced in *Robinson*, and we need not address the second prong. See *Goetz*, 2013 WL 5187572 at * 6, citing *State v. Sappington*, 285 Kan. 176, 190, 169 P.3d 1107 (2007).

For the foregoing reasons, the trial court did not err in denying Janene's recusal motion.

Affirmed.