

NOT DESIGNATED FOR PUBLICATION

No. 112,363

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:
CATHERINE DOLL, f/k/a CATHERINE ANDERSON,
Appellee,

and

TERRY L. ANDERSON,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; MERYL D. WILSON, judge. Opinion filed May 15, 2015.

Affirmed.

V. Linnea Alt, of Altenhofen & Alt, Chartered, of Junction City, for appellant.

Brenda J. Bell, of Brenda J. Bell, P.A., of Manhattan, for appellee.

Before ARNOLD-BURGER, P.J., POWELL, J., and MERLIN G. WHEELER, District Judge,
assigned.

Per Curiam: Terry L. Anderson appeals the district court's denial of his most recent motion to modify the principal place of residence of J.A. and G.A., the twin son and daughter of Anderson and Catherine Doll. Finding no reversible error, we affirm the decision of the district court and deny Doll's motion for attorney fees on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Family history

Anderson and Doll married on August 18, 2001. In December 2002, their twins, son J.A. and daughter G.A. were born. Both Anderson and Doll already had children from prior relationships.

Following their separation in 2005, a Mississippi court granted them a divorce in 2006. The settlement agreement of the parties was incorporated into the divorce decree. That agreement provided for joint legal custody with Doll being the primary residential custodian of the twins subject to Anderson's specific rights to telephone contact and periods of visitation, which they anticipated might vary depending upon the residence of the parties.

Anderson did not see the twins from 2006 until 2011, but the parties dispute the reason for that lapse. Doll contends that Anderson abandoned the children and made no efforts to contact or otherwise exercise his visitation rights after the divorce decree was entered. Anderson contends that Doll secreted herself and the two children from him resulting in failed attempts to contact or locate them. This dispute need not be resolved by this court and is mentioned solely to illustrate the obvious discord between the parties and provide a starting point for discussion of the custody modification proceedings which led to this appeal.

The first custody modification proceeding

In 2011, Anderson initiated his first custody modification proceeding in the Mississippi court that had granted the divorce. At that time, Anderson was living in Santa Fe, Texas, with his wife and son from a prior relationship. Doll had moved and was living in Manhattan, Kansas, with the twins, her husband, and her other children. The

Riley County District Court eventually assumed jurisdiction over the custody modification dispute involving the twins.

The parties' ongoing custody battles have largely centered on parenting J.A., who has special needs. J.A. has been diagnosed with attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, and adjustment disorder with mixed disturbance of emotions and conduct. A psychiatrist has described him as "a strongly emotionally reactive child with concentration and attention problems as well as a propensity to use hostility as a means of controlling his environment and his feelings." J.A. takes psychotropic medications, attends regular counseling sessions, and has an individual education plan (IEP) and a behavior intervention plan (BIP) at school. J.A. has shown academic progress when he is in a structured and consistent or stable environment. Conversely, his emotional and behavioral outbursts tend to escalate when he is taken out of his routine or placed in an unstructured setting. When school officials are unable to calm him down or control his physical aggressions, they follow a protocol under which they call mental health professionals, the police, Doll, or her husband to come to the school.

The parties were ordered by the district court to submit to a custody evaluation to aid in resolving their divergent positions regarding the residential custody arrangement for the twins. The psychologist's resulting 30-page evaluation sheds further light on the parties' relationship as it pertains to parenting their children. The psychologist detailed at length what he learned from meeting with the parties, their spouses, the twins, their siblings, counselors and therapists, and various other people involved in the twins' lives. The psychologist recommended that custody not be changed but that Anderson's visitation should be increased. The psychologist stressed the twins' strong connection to their family in Manhattan as well as the need for the twins and Anderson to have time to get to know one another without the "threat of being uprooted from their home," which could be facilitated by a longer summer visitation schedule. The psychologist also

stressed his concerns with the lack of tolerance and respect the parents have for each other, highlighting the detrimental effect their behaviors can and have had on the children and urging them to "examine their own behaviors in order to diminish the tension that their children feel, for the good of the children."

On June 26, 2013, the district court conducted an evidentiary hearing on Anderson's first motion to modify primary residential custody. Following the hearing, the district court denied the motion but granted Anderson additional parenting time, including 5 weeks during the summer break. In its ruling, the district found both parties were unwilling to foster the relationship between the other parent and the twins. Noting that J.A. is a child at risk, the district court expressed that both parents must be involved and that there are wrap-around services in place for J.A. that are working but could still use improvement. In addition, the district court found that both J.A. and G.A. have lived primarily with Doll and other siblings during their lifetime and, due to the anticipated adjustment, a move to their father's residence could be a setback for J.A. Neither party appealed the decision of the district court on this first custody modification proceeding.

The present custody modification proceeding

After completion of the first proceeding, the twins began attending a new school for the 2013-14 school year due to their age. G.A. adapted well to the new school environment, although she does suffer from an anxiety disorder that tends to magnify when she visits Anderson. Consistent with J.A.'s diagnosis, however, J.A. struggled with the change and at various times J.A. got into physical altercations with other students, physically attacked school staff, caused property damage, and was suspended once after bringing a BB gun to school. Despite these difficulties, however, J.A. demonstrated substantial academic progress and decreased verbal and physical aggression as the school year progressed. Unfortunately though, in March and April 2014, J.A. regressed and

started exhibiting increasingly unmanageable, physically aggressive behaviors, which some attributed to changes in his medication.

An incident at the school in late April 2014 led Anderson to initiate another motion to modify residential custody of the twins. In this incident, J.A. had become physically aggressive and destructive and the school officials called the police when they were unable to deescalate the situation. The responding officer placed J.A. into police protective custody and transported him to a hospital for evaluation. Based upon this incident, Anderson sought, and a different district judge entered, an *ex parte* order granting Anderson emergency physical custody of both children, whom Anderson then drove to Texas. Two weeks later, the assigned district judge granted Doll's motion to vacate that order for lack of notice.

At the hearing on his second motion to modify residential placement, Anderson argued that troubling events both prior to and since the district court's denial of his first motion established that it was now in the children's best interests to change primary residential custody to him. Anderson expressed fear that J.A. might end up in jail or prison if J.A.'s behaviors continued to escalate. Doll denied Anderson's allegations and contended that any escalating problems that J.A. was exhibiting resulted from his visitations with Anderson, which had disturbed his routine. Doll therefore asked the district court to reduce Anderson's visitation time.

At the evidentiary hearing on Anderson's second motion, the district court limited the facts it would consider to the 1-year time period that had passed since it denied Anderson's previous motion to modify residential custody, *i.e.*, between June 26, 2013, and June 26, 2014. Despite this limited time period, an extensive evidentiary hearing ensued which included testimony from law enforcement officers, teachers, the school principal, the twins' therapist, and social workers. Both Anderson and Doll testified, with each detailing a variety of deficiencies in the parenting of the other. The evidence

presented did not vary in substance from that presented in the previous hearing in that it showed that both parents lacked tolerance and respect for one another that continued to affect their children.

The district court's denial of Anderson's second motion was orally delivered at the close of the hearing. This ruling stressed the need for the parties to "just show a little respect for each other" and "act like reasonable adults and at least put on a facade for the benefit of [their] children." The district court's opinion also highlighted the difficult obligation to determine what was in the children's best interests (see K.S.A. 2014 Supp. 23-3201), noting that even the professionals intimately involved in their daily lives were not willing to give a definitive answer one way or another. The district court noted in its ruling that all of the professionals did agree that J.A. has a very difficult time dealing with transition or change. To highlight the quandary faced by the district court, the district judge made this observation:

"J.A. has been provided with a wealth of services and through no fault of the school, or professionals, or the others that have worked with him . . . an argument could be made that his current arrangement's not working. Perhaps an equal argument could be made though, that without those services that his situation would be much, much worse. Which is it? I guess that's the magic question."

Regarding G.A., the district court found that she was doing quite well and had a strong bond with her brother. The district court expressed concerns with her suffering the consequences of having her life uprooted just because something needed to change with J.A. The district court expressed its consideration of the statutory custody factors set out in K.S.A. 2014 Supp. 23-3203, particularly subsection (b) through (f) and the totality of the circumstances. The district court specifically noted that it could not "find with any confidence that a change of primary residence of [J.A.] or [G.A.] is in their best interests or would improve their mental or emotional health." These findings were reiterated in the district court's written judgment. Anderson timely appealed the district court's judgment.

ANALYSIS

In his sole issue on appeal, Anderson argues the district court erred in not granting his second motion to modify. Doll, of course, disagrees.

K.S.A. 2014 Supp. 23-3218(a) grants a district court the discretion to change or modify any prior order of custody, residency, visitation, or parenting time when a material change of circumstances is shown. This court reviews the district court's judgment on these issues for an abuse of discretion. See *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, rev. denied 281 Kan. 1378, cert. denied 549 U.S. 954 (2006). A judicial action constitutes 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. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, cert. denied 134 S. Ct. 162 (2013). As the appellant, Anderson bears the burden of proving the district court abused its discretion. See *Northern Natural Gas Co.*, 296 Kan. 906.

Anderson does not argue that the district court's decision was based on an error of law. Rather, in challenging the district court's finding that he did not meet his burden to establish a material change of circumstances sufficient to warrant a change of residential placement Anderson makes two arguments.

Anderson first suggests that the district court's judgment was based on an error of fact. He contends that the district court erroneously found that none of the witnesses, aside from the parents, testified about what residential placement was in the children's best interests. In support, he points to evidence that tended to show the police placed J.A. in protective custody because Doll had not been able to control him in the past and safety issues mandated the protective custody.

Anderson's argument misconstrues the district court's oral comments at the time of the delivery of its judgment. When commenting on the lack of testimony from the witnesses about what was in the children's best interests, the district court found that none of the witnesses, aside from the parents, testified about what residential placement was in the children's best interests. Rather, the district court commented that it did not hear any evidence from them that could lead it to conclude one way or another. These comments were based on the fact that most of the witnesses either hesitated or did not feel they were qualified to say one way or the other when they were asked whether the twins' best interests would be served in the primary residential custody of Doll or Anderson. Illustrating this finding is the statement of J.A.'s teacher who explained that J.A. is going to have behavior concerns "no matter where he is, no matter where he's educated." Summarized, the district court simply made the point that its obligation to determine the best interests of the children was particularly tough given the reluctance of those professionals most involved in their daily lives to definitively address the best interest question.

Anderson next argues that the district court's judgment was arbitrary, fanciful, or unreasonable because it was contrary to the evidence. With argument that highlights evidence in a light most favorable to him, Anderson points to evidence showing that J.A.'s behavioral problems escalated while in Doll's residential custody despite all of the services he was receiving, whereas he claimed that J.A. did not exhibit such problems while he was with Anderson. Anderson also highlights evidence allegedly demonstrating Doll's continuing attempts to undermine his relationship with the twins. He concludes by arguing that "[d]ue to the totality of the circumstances, [he] will do a better job of rearing the children and provide a better home environment free from the chaos as has been evident in [Doll's] home while the children have been in [her] care, custody, and control."

Anderson's argument is a challenge to the district court's findings that Anderson did not meet his burden of establishing that it was in the children's best interests to

modify residential custody due to a material change in circumstances. Such a finding that a party did not satisfy his or her burden of proof is a negative factual finding. See *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008). In reviewing negative findings, this court must determine whether the district court arbitrarily disregarded undisputed evidence or relied upon an extrinsic consideration—such as bias, passion, or prejudice—in reaching its decision. See *Hamel v. Hamel*, 296 Kan. 1060, 1078, 299 P.3d 278 (2013); *In re Marriage of Merrill*, 47 Kan. App. 2d 943, 953, 281 P.3d 559 (2012). Anderson fails to demonstrate any arbitrary disregard of undisputed evidence or reliance upon an extrinsic consideration by the district court. Rather, he essentially asks this court to disregard its standard of review and to reweigh the evidence in a light most favorable to him. This request disregards the proper function of this court when reviewing a claim that a district court's decision is contrary to the evidence. See *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

Keeping in mind that the district court had limited its temporal focus to the 1-year period that had passed since it denied Anderson's first motion to modify residential custody, a review of the record and particularly the oral findings of the district court demonstrate that it considered evidence on both sides of the custody issue, particularly as it relates to J.A.'s struggles. In addition, the district court's oral findings highlighted the risk that a change in custody would pose to the wellbeing of the other twin, G.A. Further, there is nothing in the record to suggest that the district court disregarded the evidence of either party.

Custody decisions are often hotly disputed and present conflicting evidence. In affirming a custody decision, this court recently stated: "[T]his 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." *In re Marriage of Bos*, No. 109,850, 2014 WL 1796155, at *3 (Kan. App. 2014) (unpublished opinion) (citing *McMahan v. Toto*, 256

F.3d 1120, 1129 [11th Cir. 2001]; *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 101-02, 920 A.2d 606 [2007]).

When it can be stated that a district court has considered all of the material evidence and simply decided the matter contrary to the wishes of one party, it cannot be said that the district court's judgment is arbitrary, fanciful, or unreasonable because it is contrary to the evidence. Accordingly, this court holds that Anderson has not shown the district court abused its discretion in denying his second motion to modify residential custody.

Doll's motion for attorney fees on appeal

Doll moved this court to order Anderson to pay her costs and attorney fees associated with her defense of this appeal. Doll's initial motion for attorney fees was denied by this court for lack of affidavit, but an amended motion with affidavit was timely filed. Anderson did not file a response to this motion.

This court has authority to award attorney fees for services on appeal in cases where the district court had authority to award attorney fees. Supreme Court Rule 7.07(b)(1) (2014 Kan. Ct. R. Annot. 70). In her motion, Doll summarily states "this is an appeal from a domestic action wherein the trial court has authority to award attorneys fees," but she does not identify the authority.

Prior to the revision and recodification of the family law code in 2011, there was little doubt that the district court had statutory authority to award attorney fees in cases involving child custody. See K.S.A. 60-1610(b)(4). However, following the 2011 revision and recodification of the Kansas Family Law Code under Chapter 23 of the Kansas Statutes Annotated, the provision granting the court authority to award costs and attorney fees is now found in K.S.A. 2014 Supp. 23-2715, which is the article governing

dissolution of marriage. No such authority is found under Article 32, which governs Anderson's postdivorce motion to modify residential placement. (See K.S.A. 2014 Supp. 23-3218 and K.S.A. 2014 Supp. 23-3219.) Other panels of this court have, however, cited K.S.A. 2014 Supp. 23-2715 as authority to award attorney fees to a party responding to an appeal from a denial of a motion to modify custody. See *In re Marriage of Bos*, 2014 WL 1796155, at *5; accord *In re Marriage of Katona*, No. 109,429, 2014 WL 1612458, at *14 (Kan. App. 2014) (unpublished opinion).

It is not necessary, however, for this court to consider the legal issue of whether the court has authority to award attorney fees to a party responding to an appeal from the denial of a motion to modify custody. This case presents a custody issue that the district court would have been within its discretion to decide either way. The parties' inability to respect one another for their children's sake and the entirety of their arguments and posture of the case as a whole compels this court to determine that an award of attorney fees is not required by justice or equity, and Doll's motion for an award of attorney fees and costs is therefore denied.

Decision of the district court is affirmed. Doll's motion for appellate attorney fees is denied.