NOT DESIGNATED FOR PUBLICATION

No. 112,016

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

VICTORIA RENEE SROUFE, a minor child, by and through her next friend and father, JERROD S. SROUFE,
Appellant,

v.

BETH PALMER,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DANIEL T. BROOKS, judge. Opinion filed August 7, 2015. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Jennifer M. Hill and *Katy E. Tompkins*, of McDonald, Tinker, Skaer, Quinn & Herrington, P.A., of Wichita, for appellee.

Before BRUNS, P.J., HILL and ARNOLD-BURGER, JJ.

Per Curiam: In 2009, Victoria Renee Sroufe (Victoria) was born to Jerrod S. Sroufe (Father) and Beth Palmer (Mother). After a time, Mother and Father separated, and Father filed a paternity action to help ensure continued visitation with Victoria. After the parties completed limited case management, the district court adopted the recommendations of the case manager as its temporary orders. However, Mother later filed a motion requesting that the district court grant her primary residency and allow her and Victoria to move to Colorado. The district court granted the motion, and Father

appeals. Father raises two issues on appeal. First, he asserts that the district court applied the wrong legal standard in ruling on Mother's motion for permanent residency. But the district court clearly used the standard of the best interests of the child, as required by statute. The fact that it may have used factors to determine the best interests of the child contained in other statutory provisions is of no import. Second, he asserts that Mother failed to present sufficient evidence for the district court to conclude that the move to Colorado was in the child's best interests. Again, we find when viewed in the light most favorable to Mother, as we are required to do, the evidence was sufficient to support the district court's finding.

FACTUAL AND PROCEDURAL HISTORY

The present appeal arises out of Mother and Father's tumultuous relationship, break up, and custody arrangements. The facts are lengthy and complicated but we will attempt to summarize them here.

Mother and Father were never married. A daughter, Victoria, was born to this relationship a little over a year after their relationship began. Mother also had an older daughter from a prior relationship. Over time the relationship soured and Mother and Father moved apart when their daughter was 2 years old.

Approximately 6 months after the couple separated, Father filed a petition requesting that the district court find that Father is Victoria's natural father and grant joint legal custody and shared residential custody between himself and Mother. In her answer, Mother admitted that Father was Victoria's natural father and agreed to joint legal custody, but she moved for primary residency with parenting time for Father. Although the file on appeal is somewhat incomplete, it appears that the district court ordered the parties to limited case management (LCM) and adopted the LCM report's

recommendations as temporary orders. However, Mother reserved the right for a full evidentiary hearing on the issue of custody.

Nearly a year after Father filed his petition with the district court, Mother filed a motion titled motion for primary residency and request to relocate with minor child. In her motion, Mother contended that shared residency was no longer in Victoria's best interests and that she should be granted primary residential custody. Mother alleged that Father failed to respect her relationship with Victoria and had not abided by the temporary orders. Mother also alleged an educational opportunity that had arisen in Denver that she could pursue if the district court awarded her primary residential custody.

The district court held an extensive 3-day evidentiary hearing on Mother's motion. The evidence presented can be highly summarized as follows:

- Victoria deeply loved both of her parents and wanted to be with both of them. She indicated no preference for one parent over the other and enjoyed living in each home. She had positive relationships with the whole of her family and extended family. Victoria has bonded with both parents. But, like many children, she harbors a desire for them to get back together.
- A large portion of both Mother and Father's extended family live in Wichita. Victoria has lived in Wichita her whole life and her service providers and church—which she attended with both parents—are also located there. Victoria and her parents lived with her paternal grandparents when she was born and she moved with her mother to live with her maternal grandparents when her parents separated, so she has close bonds with both sets of grandparents.
- Mother had no concerns about Victoria's safety when she was with Father, nor were any concerns raised about Victoria's safety when she was with Mother.

- Both Mother and Father are described by professionals and friends as good parents. Father also describes Mother as a good parent. But it was also clear that Victoria's increasing anxiety appeared to stem from the animosity between them.
- Mother and Father had numerous disputes about issues such as unpaid medical and preschool expenses, daycare providers and schedules, flexibility in the parenting schedule, and Father's calls to Victoria on Mother's parenting days.
- Custody exchanges were routinely unpleasant with Father. He unnecessarily prolonged goodbyes and called Victoria to tell her he missed her. Although others had encouraged him to shorten the goodbyes in the past, he failed to alter his behavior.
- Father frequently sent Mother negative text messages. Members of his extended family also sent her negative messages. Father's extended family had a tradition of making fun of spouses that were no longer part of the family or that they did not like at Christmas time when the children were around. They also made negative comments about former spouses on social media.
- Father subjected Victoria to secondhand smoke, even though she was at risk for asthma, and failed to take Victoria's other health concerns seriously, failing to give her medications as prescribed. He has also transported Victoria in his car without a car seat.
- Mother and Father's fighting caused Victoria to be anxious. Victoria's therapist recommended reducing the stress on Victoria by shortening their parenting exchange times and considering the effect of their behavior on Victoria. Victoria's anxiety appeared to stem directly from the continued animosity between them. Victoria regressed in potty training while being ferried between homes.
- Father has had episodic problems with alcohol and anger management. Father's therapist discussed Father's drinking and described it as "more like a negative coping skill than a perhaps long term dependence problem." However, she

acknowledged that Father's drinking contributed at times to both his anger and his trouble communicating with Mother.

- In spite of the animosity and toxicity of their relationship and even though the case manager's duties ended nearly a year before the hearing, he recommended that the parents continue to share residential placement with the resulting frequent parenting exchanges.

Evidence was also received specific to Mother's request to relocate with Victoria to Colorado. It can be summarized as follows:

- Mother resumed her college education while dating Father and after their split decided to pursue a radiology degree in the Denver area, where her new husband lived. Although the degree she wished to pursue was available both in the Wichita area and online, one was cost prohibitive and the other did not accept her. She denied that her marriage was her only justification for moving. Victoria would be living with her half-sister, Mother's new husband and his two children, ages 10 and 7, who live with him. Victoria has met them and spent time with them prior to the marriage.
- Father opposed the relocation, advocating instead for either maintaining the shared residency plan or keeping Victoria in Wichita *with both parents*. Father expressed fear that moving Victoria away from extended family would not only cause her separation anxiety, but would not be in her best interests.
- Victoria's therapist indicated that she did not believe the move to Colorado would be inappropriate.

After hearing all the testimony and arguments by counsel, the district court ordered primary residential custody to Mother and granted the request for relocation. Referring to the case as "heartbreaking," the district court observed that both parents loved Victoria and had the parenting skills to care for her, which turned the focus to

Victoria's best interests. Although noting that "both of these parents are precious to [Victoria]," the district court determined that their relationship was "toxic" and created an unhealthy situation for Victoria. Therefore, the district court reasoned that continuing the shared residency arrangement was not in Victoria's best interests.

When deciding which parent should serve as the primary residential parent, the district court observed that relocation with Mother would present a risk to Victoria's existing relationships. While recognizing that Mother's "defensive reactions" to Father's behaviors might interfere with Father's parental relationship, the district court also found that Father's tendency to be "quick to anger and retaliation," his history of handling stress poorly, his diminishment of some of the issues raised in the hearing, and his family culture presented a higher risk to Mother's parental relationship if he served as primary residential parent. Therefore, the district court ruled in Mother's favor.

The district court memorialized this ruling in a journal entry that established joint legal custody and authorized Mother's move to Colorado with Victoria. The journal entry concluded with the statement "[t]he Court finds that the findings and Orders made above are in the best interests of the minor child."

Father timely appealed.

ANALYSIS

The district court applied the correct legal standard in ruling on Mother's motion for primary residency.

Father first argues that the district court relied on the wrong legal standards when formulating its ruling. Father's logic is as follows: because he initiated the instant case by filing a paternity action, the district court needed to follow the standards for child custody

as they appear in the Kansas Parentage Act, K.S.A. 2013 Supp. 23-2201 *et seq.* (Parentage Act). But according to Father, the district court instead erroneously applied the child custody factors from the custody and residency section of the broader Kansas Family Law Code, K.S.A. 2013 Supp. 23-2101 *et seq.* (Family Law Code). By relying upon these factors and disregarding the Parentage Act, Father argues, the district court committed a reversible error of law.

In light of the district court's unique vantage point of what is often an emotionally charged situation, an appellate court generally will not overturn decisions concerning a child's custody, residency, visitation, or parenting time absent an abuse of discretion. See *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). A district court abuses its discretion if its action is arbitrary, fanciful, or unreasonable, based on an error of law, or based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). However, Father's argument on this particular issue concerns not the custody determination itself but rather the interpretation and applicability of two of our Kansas statutes. Statutory interpretation is a question of law over which this court exercises unlimited review. *Cady v. Schroll*, 298 Kan. 731, 734, 317 P.3d 90 (2014).

Generally speaking, the Parentage Act governs over any "[p]roceedings concerning parentage of a child." K.S.A. 2013 Supp. 23-2201(b). As such, the Parentage Act includes provisions concerning the establishment of parent-child relationships, the presumptions of paternity, and the procedure for actions to determine a child's parentage. See generally K.S.A. 2013 Supp. 23-2201 *et seq.* Accordingly, the district court is authorized to enter a number of orders concerning these issues. K.S.A. 2013 Supp. 23-2215. The specific subsection authorizing orders for child custody provides:

> "If both parents are parties to the action, the court shall enter such orders regarding custody, residency and parenting time as the court considers to be in the best interest of the child.
>
> "If the parties have an agreed parenting plan it shall be presumed the agreed parenting plan is in the best interest of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreed parenting plan is not in the best interest of the child. If the parties are not in agreement on a parenting plan, each party shall submit a proposed parenting plan to the court for consideration at such time before the final hearing as may be directed by the court." K.S.A. 2013 Supp. 23-2215(d).

However, the Parentage Act fails to define best interests of the child in this or any other section.

Like in the Parentage Act, the custody, residency, and parenting plan section of the broader Family Law Code requires that courts "determine custody or residency of a child in accordance with the best interests of the child." K.S.A. 2013 Supp. 23-3201. However, the Family Law Code is also more specific than the Parentage Act in defining best interests of the child. First, the Family Law Code includes a statute about agreed parenting plans that is substantially similar to the language present in K.S.A. 2013 Supp. 23-2215(d). See K.S.A. 23-3202. Second, the statute Father complains about, K.S.A. 2013 Supp. 23-3203, enumerates 11 nonexclusive factors that the district court is encouraged to consider when determining issues of custody, residency, and parenting time.

Father claims on appeal that the district court based its decision on the Family Law Code's statutory custody and residency factors rather than using the simple best interests of the child standard expressed in the Parentage Act. But a review of the record indicates that the district court did consider the best interests of the child. At the beginning of its oral ruling, the district court briefly mentions K.S.A. 2013 Supp. 23-3203 and lists the

statute as one of the many documents and exhibits it reviewed during a recess. However, despite this comment, the entirety of the district court's ruling is focused solely on Victoria's best interests. In fact, the district court repeatedly emphasized that it "focus[ed] only on what's best for this little girl" in terms of both her needs and her parental relationships. Apart from that single, fleeting reference, there is little language in the district court's ruling to suggest that it considered or weighed the factors Father now objects to, and the written journal entry is also devoid of any reference to the same. In short, Father's argument that the district court relied on this statute in formulating its ruling is unpersuasive. Moreover, even if the court did consider the factors in K.S.A. 2013 Supp. 23-3203, it would not be error to do so.

As is often stated, the most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875, 317 P.3d 770 (2014). When working to determine this intent, courts must consider the various provisions of an act in pari materia with a view of reconciling and bringing the provisions into workable harmony if possible. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1123, 307 P.3d 1255 (2013). Moreover, courts must construe statutes to avoid unreasonable or absurd results and must presume that the legislature does not intend to enact meaningless legislation. *Fisher v. DeCarvalho*, 298 Kan. 482, 495, 314 P.3d 214 (2013).

First, it is important to note that the Family Law Code, which is Chapter 23 of our Kansas Statutes, covers many subjects, including marriage, divorce, child support, and child custody and visitation. See K.S.A. 2013 Supp. 23-2101 *et seq.* An examination of the structure of the Family Law Code indicates that the Parentage Act is but one part of this larger statutory scheme. See K.S.A. 2013 Supp. 23-2201. With that in mind, it is clear from reviewing both the Parentage Act and the child custody and residency section of the larger Family Law Code that nothing in either section even suggests that the factors present in K.S.A. 2013 Supp. 23-3203 are somehow inapplicable to custody

determinations under the Parentage Act. As previously stated, the Parentage Act requires that the district court enter child custody orders in accordance with the best interests of the child standard. K.S.A. 2013 Supp. 23-2215(d). This standard is also used in determining the custody and residency portion under the broader Family Law Code. K.S.A. 2013 Supp. 23-3201. K.S.A. 2013 Supp. 23-3203 is simply a list of factors that may help the district court determine what is in a given child's best interests. Nothing in the Parentage Act defines, refines, or otherwise clarifies the meaning of the terms "best interests of the child"—and as such, nothing in those statutes run contrary to the factors present in K.S.A. 2013 Supp. 23-3203.

Additionally, nothing in the statutory scheme as a whole suggests that the custody, residency, and parenting plan section of the Family Law Code applies only to those actions that fall outside the Parentage Act. For example, in the statute concerning temporary parenting plans, there is a provision that provides: "If a proceeding for divorce, separate maintenance, annulment or *determination of parentage* is dismissed, any temporary parenting plan is vacated." (Emphasis added.) K.S.A. 2013 Supp. 23-3212(g). Obviously, inclusion of parentage actions in this list demonstrates that the legislature intended to include Parentage Act issues within the custody and residency section of the Family Law Code.

Moreover, our Kansas Supreme Court has previously approved the use of the factors present in what is now K.S.A. 2013 Supp. 23-3203 even in cases of unmarried parents. See *LaGrone v. LaGrone*, 238 Kan. 630, 632-33, 713 P.2d 474 (1986). There, the Supreme Court expressly held:

> "We conclude that an unwed parent, whether mother or father, should be treated the same as any other parent for the purpose of determining custody. The custody issue must be decided on the same criteria—primarily, the best interests of the child—regardless of the marital status of the parents." 238 Kan. at 632-33.

The court then reviewed the district court's decision by applying the factors from the applicable custody and residency statute. However, it is important to note that *LaGrone* preceded enactment of the Parentage Act, leaving the Supreme Court to rule on the issue prior to the explicit statutory mandate that custody and residency issues in parentage actions be decided based on the child's best interests. See 238 Kan. at 631.

This court recently followed *LaGrone* and applied the statutory factors when reviewing a father's challenge to the district court's decision on residency. *In re Hefley*, No. 97,216, 2007 WL 1461405, at *5 (Kan. App. 2007) (unpublished opinion). There, as here, the action originated as one to establish paternity. And although the father never challenged the district court's use of the factors—in fact, the father actually argued that the district court failed to consider those factors—this court showed no hesitation in reviewing the district court's decision in accordance with what is now K.S.A. 2013 Supp. 23-3203. 2007 WL 1461405, at *5-6.

In short, even if the district court relied on some or all of the factors in K.S.A. 2013 Supp. 23-3203, it is clear from both the statutory scheme as a whole and our Kansas caselaw that those factors are relevant to all custody, residency, and parenting time determinations regardless of whether the action initiated under the Parentage Act. The overarching standard is the same, and the factors simply serve to elucidate what concerns *may* weigh into the best interests of the child determination. As such, the district court applied the correct legal standard in ruling on Mother's motion for primary residency.

The trial court had sufficient evidence to support its finding that Mother should be granted primary residential custody and allowed to relocate to Colorado.

Next, Father contends that Mother failed to demonstrate that relocation was in Victoria's best interests. In fact, Father argues that Mother showed only that relocation served her own best interests and that she presented no evidence about the move's effect

on Victoria. As before, this court applies the abuse of discretion standard in considering a custody determination and the best interests of the child. *Harrison*, 292 Kan. at 672; In *re R.S.*, 50 Kan. App. 2d 1105, 1114, 336 P.3d 903 (2014) (best interests determination is a highly discretionary call).

A parent who wishes to move the child from Kansas to another state must notify the other parent prior to moving. K.S.A. 2013 Supp. 23-2225(a). Such a move may justify modifying any prior orders concerning that child's support, custody, or parenting time, and a court considering such a modification must consider the effect of the move on the best interests of the child, the effect of the move on the remaining parent, and the increased cost the move will impose on the remaining parent. K.S.A. 2013 Supp. 23-2225(c). Notably, the relocation statute under the custody and residency section of the broader Family Law Code is largely identical. See K.S.A. 2013 Supp. 23-3222; 1 Elrod, Kansas Law and Practice, Kansas Family Law § 7.22 (2014). As such, the cases that consider the broader relocation statute are persuasive when construing and interpreting the Parentage Act's version.

Importantly, neither statute definitively explains which party carries the burden in a relocation case. See K.S.A. 2013 Supp. 23-2225(c); K.S.A. 2013 Supp. 23-3222. But recently in *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 186 P.3d 852 (2008), this court attempted to clarify this issue as it applies to what is now K.S.A. 2013 Supp. 23-3222. There, this court reiterated the long-standing principle that in a postdivorce proceeding, the individual who moves for a change in custody bears the burden of establishing a material change in circumstances. 39 Kan. App. 2d at 1031. It also found that as the movant, the father continued to bear the burden of establishing that the relocation justified a change in the existing arrangement based on the factors present in the statute. 39 Kan. App. 2d at 1032. To put it another way, the father needed to demonstrate that the move would affect the child in such a way as to require the child reside with him rather than with mother. 39 Kan. App. 2d at 1032.

Grippin does differ from the present case in one important way: there, the order granting primary residential custody to the mother had been in place for approximately 10 years and was likely part of a permanent parenting plan set out in the parents' divorce decree. Here, the order from which Father appeals is the direct result of Mother exercising the rights to a final hearing she had reserved when the district court entered its temporary orders. In other words, there were no permanent orders in place, only temporary orders when Mother requested permission to move, which suggests that the factors in K.S.A. 2013 Supp. 23-2225(c) might not apply, and the general provisions regarding custody determinations in K.S.A. 2013 Supp. 23-2215(d) may be more appropriate. After all, those factors are to be considered only when there is a motion for a *change* in permanent orders as in *Grippin*; here, Mother's motion essentially requested permanent orders to replace the temporary ones. The issues of permanent residential custody and relocation were all tried and discussed together for the first time before the court in an effort to create permanent orders. In this case, Mother filed a parenting plan that contained two alternatives: primary residential custody with her in Colorado or primary residential custody with Father in Wichita. Remaining with both parents in Wichita, as suggested by Father, was never an option.

However, because Father's sole issue raised before the district court and on appeal is whether there was sufficient evidence to support a finding that the move was in Victoria's best interests, we need not decide whether K.S.A. 2013 Supp. 23-2225(c)(1) or K.S.A. 2013 Supp. 23-2215(d) is the applicable statute in this situation. Any way we slice it, under either statute, to affirm the district court's finding in this case there must be evidence, viewed in the light most favorable to Mother, to establish that the granting of permanent residential custody to Mother, which would include residential custody in Colorado, was in Victoria's best interests.

Father argues that Mother failed to provide any evidence concerning the move's effect on Victoria. In fact, Father argues that several witnesses testified only about the

move's negative impact, and that their testimony remained uncontroverted at the end of the hearing. But this characterization of the evidence is not entirely accurate. Viewing the evidence in the light most favorable to Mother, it is clear that the evidence—while not overwhelming in favor of either parent—demonstrated that the move would either maintain Victoria at the status quo or improve her current situation. Mother testified that Victoria had met her stepfather and stepsiblings and would be relocating along with her older sister, with whom she had lived since birth. She explained that even living in Colorado, Victoria would have Facetime contact with Father and that Mother would work to encourage their relationship despite the distance. Mother testified that she never spoke poorly of Father in Victoria's presence and never discouraged their relationship, which was supported by the evidence at trial. Victoria's therapist testified that although Victoria's present plan benefited her, she anticipated no long-term impact on changing the schedule. Several witnesses observed that each parent loved Victoria deeply and that Victoria reciprocated that love, suggesting that the move would likely not diminish the bond between Father and daughter. And while Father objected to the move, he also admitted that he did not believe that Victoria would benefit from Mother moving away and leaving Victoria in Wichita.

Moreover, the evidence at the hearing suggested that changing the residency and parenting time arrangement to one with fewer exchanges would positively impact Victoria. Victoria's therapist testified that she believed that Victoria's anxiety stemmed from the continued animosity between her parents. She emphasized that Victoria picked up on the tension between her parents and described a session in which the parents' sniping agitated Victoria to the point of pacing. Testimony from both Mother and Father also demonstrated their tense relationship, with each parent attempting to refute the other's account of medication mishaps, issues with appointments, the length and effect of parenting exchanges, and the topic of potentially problematic Facebook posts. Father's therapist testified that the parents struggled to communicate with one another and that, even with her help, they gained little ground. In short, the constant and quite obvious

tension between Mother and Father created an unhealthy, anxious situation for Victoria—a situation that would likely improve by separating Mother and Father. In fact, the district court noted in its ruling that the parties "don't have a relationship that makes it easy on the child to do shared custody." Therefore, the court opined that the decision to name a primary custodian rather than continue shared custody was not even close. So the next question became which parent would he award primary residential custody to: Mother in Colorado or Father in Wichita.

In short, the evidence of at the hearing demonstrated that, as a whole, the move would benefit Victoria and be in her best interests. Victoria would continue to have contact with Father—contact Mother supported and intended to facilitate. The animosity between Mother and Father, which Victoria reacted to throughout the shared parenting time schedule, would be reduced, and Victoria would be able to enjoy time with each of her parents in a less anxiety-ridden setting. The court found that Father's family culture fostered estrangement by making jokes regarding the absent spouses, even though there was no intent to be cruel. Father was quick to anger and retaliate. Moreover, his reaction to the stress the parental animosity caused to Victoria was to deny any problem. He does not handle stress well, responding by the use of alcohol, making the situation "infinitely worse." There was substantial competent evidence to support the district court's conclusion that it would be better for Victoria to be in Colorado with her Mother having primary residential custody, than with her Father in Wichita with primary residential custody.

As the district court pointed out in its decision, both parents in this case clearly love their daughter. Each possesses the requisite skills to parent her, each offers a network of involved and caring extended family members, and each provides her love, affection, and support. But in this case, this court's standard of review is inherently deferential, and it cannot fairly be said that no reasonable person would take the view adopted by the district court. See *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P. 3d

413 (2002). The court's decision was not based on an error of law or fact and it was not arbitrary, fanciful, or unreasonable, based on the evidence presented. Accordingly, the district court's order is affirmed.

Affirmed.