

NOT DESIGNATED FOR PUBLICATION

No. 112,930

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ANDREA L. RUSSOM,
Appellee,

and

WESLEY J. RUSSOM,
Appellant.

MEMORANDUM OPINION

Appeal from Osborne District Court; PRESTON-A. PRATT, judge. Opinion filed August 14, 2015.
Affirmed.

Tony A. Potter, of Potter Law Office, P.A., of Hill City, for appellant.

Philip W. Hardman, of Dietz & Hardman, of Osborne, for appellee.

Before GREEN, P.J., STANDRIDGE and POWELL, JJ.

Per Curiam: Wesley J. Russom appeals from the district court's decision denying his motion to modify residential custody of his children with his ex-wife, Andrea L. Russom. Wesley argues the district court abused its discretion in keeping the primary residence of the children with Andrea and in ordering that he pay Andrea's attorney fees.

FACTS

Wesley and Andrea were married in 2005 and divorced in 2010. Prior to the divorce hearing, the parties entered into a written marital settlement agreement and an agreed permanent parenting plan relating to the parties' children, one daughter (born in 2005) and one son (born in 2008). The parenting plan provided for joint legal custody and primary residential custody with Andrea in Osborne, Kansas, subject to parenting time with Wesley.

In September 2011, the district court modified the parenting plan in certain respects after Wesley moved from Portis, Kansas (near Osborne), to Phillipsburg, Kansas (about 55 miles from Osborne). At that time, the court entered detailed orders regarding parenting time during the school year, summer, and holidays.

In April 2012, the district court denied Wesley's motion to modify parenting time for the upcoming month of August but modified the parenting plan to reflect that no special provisions would be made for birthdays of the parents or children.

On May 17, 2013, Wesley filed a motion to change residential custody based on a material change in circumstance. Wesley alleged that it would be in the children's best interest to live with him for numerous reasons, including: (1) Andrea had failed to properly supervise the children; (2) Andrea had removed the children from school for 7 days and refused to tell him where they were; (3) the children were dirty, unclean, and were placed with childcare providers who put their health at risk; (4) the children did not have their own rooms at Andrea's house and Andrea had provided no information about her live-in boyfriend; (5) their son had behavior issues when he was with Andrea; (6) Andrea refused to follow doctor's orders concerning the care of the children; and (7) Andrea did not have the children bathe or brush their teeth regularly and dressed them inappropriately.

After several unsuccessful attempts to settle the matter, the parties appeared at a hearing before the district court on September 24 and 25, 2014. The following evidence was presented at that hearing.

Wesley's evidence

Wesley called six witnesses and also testified on his own behalf. Wesley's witnesses testified generally to his good character, his commitment to and bond with the children, and the good condition of his house.

Wesley testified in detail about his job, the good quality of his house in Phillipsburg where he lived with his fiancée and her daughter, and his activities with the children. According to Wesley, Andrea had moved several times after the prior custody orders had been entered, and she and the children had lived with different individuals with whom Andrea had been romantically involved. Wesley believed that these changes had an adverse effect on the children and that his home life was more structured and stable. Wesley also discussed his concerns with Andrea's current house, noting a lack of supervision and the fact that the children share a room. As evidence of Andrea's lack of supervision, Wesley introduced into evidence a photograph of their daughter on the roof of Andrea's house. A private investigator hired by Wesley had taken the photograph. Wesley also complained about the children's hygiene and health while in Andrea's care, including concerns about when the children should visit the doctor and the cleanliness of the bathroom at the children's former daycare. Wesley expressed concern over the children's education in Osborne and discussed conflicts he had with school officials. He claimed that the children could easily adjust to the good schools in Phillipsburg.

Andrea's evidence

Andrea called 16 witnesses and, like Wesley, testified on her own behalf as well. Andrea's witnesses were acquainted with her parenting and corroborated the close bond she shared with the children, her involvement in their lives, and that the children appeared happy and well cared for.

Several Osborne school employees testified about positive interactions with Andrea and the children's overall good performance in school. Some of the school employees testified regarding negative interactions with Wesley. For example, there was testimony that Wesley was required to have an escort when on school grounds based on his behavior at the elementary school and the district office on several different occasions. Other witnesses testified regarding Wesley's erratic, agitated behavior.

Caleb Maxwell, Andrea's former fiancé, also testified. Maxwell previously had lived with Andrea, her children, and his children. Although Maxwell and Andrea were no longer engaged, they had parted as friends and Maxwell still had contact with the children. While he lived with Andrea, Maxwell observed Wesley being dramatic and challenging during parenting exchanges with Andrea. In one instance, Andrea and Maxwell were late dropping the children off at Wesley's house after Thanksgiving. According to Maxwell, Wesley was extremely upset and was yelling at Andrea; when Maxwell stepped between the two, Wesley lunged into Maxwell and split Maxwell's lip. As a result, Wesley was arrested and charged with battery.

Andrea testified about her job, the children's daily routine, and her house. Andrea had moved more than once since the prior custody orders were entered, but the different residences were all within a 4-block radius. Andrea stated that none of the moves had altered or changed any aspect of the children's lives, as they remained in the same school and neighborhood. Andrea denied the allegations that she ignored any of the children's

health issues or that the children were ever unclean or dressed inappropriately. Andrea explained that Wesley had been concerned about the cleanliness of the bathroom at the children's former daycare and had taken pictures of the bathroom. Although the condition of the bathroom was at least in part related to the fact that the daycare provider had a child with medical issues, Wesley insisted the children be removed from the daycare. Andrea had difficulty finding another daycare and was forced to pay more for child care expenses. Andrea denied the general allegations that the children were unsupervised and specifically denied the allegation that their daughter was unattended on the roof. Andrea explained that her daughter simply had been helping her put up Christmas lights. Finally, Andrea testified that she believed it would be in the children's best interests to remain in her primary custody.

After considering all of the evidence presented at the hearing, the district court issued a 20-page order denying Wesley's motion. More specifically, the court concluded as a matter of law that Wesley had failed to establish a material change in circumstances sufficient to justify a change in residential custody. Finding that Wesley had failed to introduce any credible evidence to support the allegations in his motion, the court also concluded that Wesley's motion to modify the existing child custody order was frivolous and made for purposes of harassing Andrea. As a result, the court awarded Andrea attorney fees for the time spent at trial and for trial preparation.

ANALYSIS

Wesley raises two main issues on appeal. First, he argues the district court abused its discretion in denying his motion to modify custody. In support of this argument, Wesley contends the record does not support the district court's finding that he failed to present sufficient evidence to establish a material change in circumstances warranting a change in residential placement. Second, he argues the district court abused its discretion in ordering that he pay Andrea's attorney fees.

Motion to modify custody

This court's review of a district court's ruling on a child custody issue is extremely deferential. The foremost consideration in any custody determination is a placement that is in the best interests of the child. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701, 229 P.3d 1187 (2010). When the divorcing parties agree to a parenting plan incorporated into a divorce decree, that plan is presumptively deemed to be in their child's best interests. See K.S.A. 2014 Supp. 23-3202; *Sparks v. Sparks*, 34 Kan. App. 2d 499, 504, 120 P.3d 376 (2005). Nevertheless, a child custody order may be modified at any time upon a showing of materially changed circumstances. K.S.A. 2014 Supp. 23-3218(a); see *Lewis v. Lewis*, 217 Kan. 366, 368, 537 P.2d 204 (1975) ("Before a custody order will be modified the movant has the burden of showing the child can be better cared for if the requested change is granted."). This court has stated that a material change in circumstances ""must be of a substantial and continuing nature as to make the terms of the initial decree unreasonable." [Citations omitted.]" *Johnson v. Stephenson*, 28 Kan. App. 2d 275, 280, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). In reviewing a decision on a motion to change custody, an appellate court should only look to evidence supporting the decision of the district court and determine if there was an abuse of discretion. *In re Marriage of Whipp*, 265 Kan. 500, 502, 962 P.2d 1058 (1998).

A district court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if discretion is guided by an erroneous legal conclusion or goes outside the framework or fails to consider or to properly apply controlling statutory limitations or legal standards. *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013). Finally, a district court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support in the record. *State v. Ward*, 292 Kan. 541,

Syl. ¶ 3, 256 P.3d 801 (2011) (outlining all three bases for an abuse of discretion), *cert. denied* 132 S. Ct. 1594 (2012).

Finally, we review challenges to specific factual findings of a district court in custody determinations to assure 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). On review, this court should not reweigh the evidence, pass on witness credibility, or redetermine questions of fact that were presented to the district court. *In re Marriage of Vandenberg*, 43 Kan. App. 2d at 705.

Although acknowledging our review of this matter is extremely deferential to the decision made by the district court, Wesley claims we must reverse the district court's decision because the record does not support the court's finding that he failed to present sufficient evidence to establish a material change in circumstances. Specifically, Wesley argues the facts he presented on the following issues were sufficient to warrant a change in residential custody: (1) Andrea's change of residences on at least two occasions, which included living with, and exposing the children to, two different significant others; (2) Andrea's failure to properly supervise the children; (3) Andrea's inability to be home for her daughter when she arrived home from school; (3) Andrea's failure to provide proper support in the education of their children; (4) Andrea's failure to keep Wesley adequately informed on issues related to the children; (5) Andrea's decision to place the children in an unsafe and unsanitary daycare environment; and (6) Andrea's general failure to provide the stable physical and emotional environment he could provide for the children.

The district court ruled on these various matters in a comprehensive and well-reasoned opinion that thoroughly explained the district court's analysis of each issue set forth above. We have thoroughly examined the record on appeal and the district court's consideration of each issue. We find no error with respect to the district court's analysis on each of these issues. Accordingly, we affirm the district court's decision to deny

Wesley's motion for change in custody under Supreme Court Rule 7.042(b)(5) and (6). (2014 Kan. Ct. R. Annot. 67).

Attorney fees

Wesley argues the district court erred in *sua sponte* awarding Andrea attorney fees for the time spent at trial and for trial preparation.

The district court awarded attorney fees to Andrea pursuant to K.S.A. 2014 Supp. 23-2715, which provides that a court may award legal expenses, including attorney fees, "as justice and equity require." Other panels of this court have cited to this statute as authority to award attorney fees to a party responding to a motion to modify custody. See *In re Marriage of Bos*, No. 109,850, 2014 WL 1796155, at *5 (Kan. App. 2014) (unpublished opinion); *In re Marriage of Katona*, No. 109,429, 2014 WL 1612458, at *14 (Kan. App. 2014) (unpublished opinion). Where the district court has authority to grant attorney fees, its decision is reviewed under the abuse of discretion standard. *Rinehart v. Morton Buildings, Inc.*, 297 Kan. 926, 942, 305 P.3d 622 (2013). As previously stated, 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. *Ward*, 292 Kan. 541, Syl. ¶ 3.

In awarding attorney fees to Andrea, the district court found that Wesley's custody motion lacked credible evidence to support a change in custody, was motivated by retaliation for the battery incident with Maxwell, and amounted to harassment of Andrea. Specifically, the court stated:

"The credible evidence and reasonable inferences to be drawn therefrom is that Father's motion to change custody is not motivated by what is in the children's best interests but by retaliation for the battery incident with Mr. Maxwell. This incident occurred

11/24/2012. On 11/27/2012 Father's private investigator took the picture [of their daughter on the roof of Andrea's house]. The municipal court journal entry was filed 4/24/2013. On 4/17/2013 Father's first motion to change custody was filed, which was later dismissed for failing to establish a prima facie case. The timing of these incidents and the lack of credible evidence to support Father's motion to change custody supports the reasonable inference as to Father's motivation."

Wesley claims that the district court's attorney fee award was punitive and that there is nothing in the record to support its logic for entering the award. Given the evidence presented relating to Wesley's irrational and erratic behavior—including his altercation with Maxwell and the hiring of a private investigator—it is not unreasonable to believe that Wesley's custody motion was motivated by something other than the best interests of the children. In order to respond to Wesley's motion, Andrea's attorney was forced to prepare for a 2-day trial that involved 23 witnesses. As a result, we conclude the district court did not abuse its discretion in finding that an attorney fee award in this case was required by justice and/or equity.

Affirmed.