

NOT DESIGNATED FOR PUBLICATION

No. 93,750

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

MICHAEL FELLOWS,
Appellant,

and

PAMELA FELLOWS,
Appellee.

MEMORANDUM OPINION

Appeal from Ellis District Court; JOHN E. WECKEL, judge. Opinion filed
November 18, 2005. Affirmed in part and dismissed in part.

Michael Fellows, appellant pro se.

Richard A. Buck and *Lowell C. Paul*, of Kansas Legal Services, for appellee.

Before GREENE, P.J., JOHNSON and MALONE, JJ.

Per Curiam: Michael Fellows appeals the district court's orders placing residential custody of his minor children with their mother, Pamela, and establishing a visitation schedule for Michael. Michael filed a pro se brief, from which we perceive his complaints on appeal are as follows: (1) The district court erroneously found a material change in circumstances based on Michael's relocation to Missouri when the parties had agreed that the children would relocate to Missouri after the end of the school year; (2) the district court abused its discretion in finding that it was in the children's best interests to change residential custody without any evidence to that effect; (3) the evidence was insufficient to support the district court's order changing residential custody; and (4) the district court erroneously adopted the case manager's proposed visitation schedule. We affirm.

We will not detail the considerable procedural history of this divorce case, some documentation for which is missing from the record on appeal. Nor will we set forth a detailed recitation of the parties' factual allegations, especially choosing to omit the respective shortcomings of each parent, as alleged by the other.

The current custody fight was precipitated by Michael's relocation to Missouri, because of his employment situation. The children had grown up in Hays and did not want to move to Missouri. The district court found that both Michael and Pamela were

good parents and interested in their children. However, the court opined that it was in the best interests of the children to remain in Hays and ordered joint legal custody with Pamela as the residential custodian. The court noted that it would reconsider that ruling if the children were moved to another community.

MATERIAL CHANGE OF CIRCUMSTANCES

K.S.A. 2004 Supp. 60-1610 controls custody or residency. The court may change any prior order of custody, residency, or parenting time, when a material change of circumstances is shown. K.S.A 2004 Supp. 60-1610(a)(2)(A). "[A] material change of circumstances" has no precise definition; it involves an alteration and passage from one condition to another and requires consideration of a variety of factors and circumstances; and the change must be of a substantial and continuing nature as to make the terms of the initial decree unreasonable. *Johnson v. Stephenson*, 28 Kan. App. 2d 275, 280, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). A twofold policy underlies the material change in circumstance rule. First, a reasonable degree of stability in a child's important relationships contributes to the emotional, intellectual, and moral development of the child. Second, the court generally favors one-time adjudication of matters and opposes repetitive actions. 28 Kan. App. 2d at 280.

Here, Michael contends that his move to Missouri cannot be considered a material change of circumstances, because Pamela had agreed that, after the school year had ended, the children could go live with him in Missouri. Michael also contends that the court should have looked at the circumstances for a longer period in the past to determine whether there had been a material change.

Regardless of what had happened before, Michael's relocation out-of-state was a life-changing event for everyone involved and, thus, was unquestionably a material change of circumstance. The district court was justified in revisiting its prior custody order.

CHANGED RESIDENTIAL CUSTODY/BEST INTERESTS OF THE CHILDREN

Although Michael separates his arguments challenging the district court's order changing the children's residential custodian and the court's findings that the change would be in the best interests of the children, the two issues are inextricably intertwined. We take the liberty of considering them together.

Our review of the district court's change in residential custody is subject to an abuse of discretion standard. *Johnson*, 28 Kan. App. 2d at 288. When custody lies

between the parents, a court's paramount consideration is the welfare and best interests of the child. *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 (1998). The district court is in the best position to make the inquiry and determination, and in the absence of an abuse of discretion, the appellate court will not disturb the lower court's judgment. 265 Kan. at 506. Judicial discretion is abused when no reasonable person would take the view adopted by the district court. *Johnson*, 28 Kan. App. 2d at 288.

The court shall determine custody or residency in accordance to the best interests of the child. K.S.A. 2004 Supp. 60-1610(a)(3). If the parties have an agreement, it is presumed to be in the best interests of the children. K.S.A. 2004 Supp. 60-1610(a)(3)(A). When determining custody, residency, and parenting time, K.S.A. 2004 Supp. 60-1610(a)(3)(B) provides relevant factors the court is to consider when determining what is in the best interests of the children. The relevant factors include:

"(i) 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;

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

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

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

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

"(vi) 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; and

"(vii) evidence of spousal abuse." K.S.A. 2004 Supp. 60-1610(a)(3)(B).

Michael contends that the parents' agreement, that the children would go to Missouri after the school year and when Michael had obtained suitable housing, established a presumption, under K.S.A. 2004 Supp. 60-1610(a)(3)(A), that the move was in the best interests of the children. The record would suggest that there is little, if anything, that Pamela and Michael agreed upon after the filing of the divorce. Indeed, it was Pamela's motion that brought the issue before the court. Michael's subjective belief that he had an agreement with Pamela is insufficient to establish a presumption.

The court made an independent determination and concluded: (1) the children wished to remain in Hays because of the children's friends, school, sports activities, and the oldest child's job; (2) the children appeared to be compatible with the mother's residential care and are well adjusted in Hays; and (3) that it is in their best interests for them to remain in the residential custody of Pamela in Hays. Michael argues that the children's wishes cannot control a determination of what is best for them. *Whipp and Dickison v. Dickison*, 19 Kan. App. 2d 633, 639-40, 874 P.2d 695 (1994), support that argument. Nevertheless, the children's desires are a statutory factor to be considered by the court. That factor is given more credence here because of the children's ages, their stormy relationship with Michael, and the fact that the alternative was to uproot them from their schools, their friends, their activities, and their familiar home. The court's determination that it was in the best interests of the children to remain in their mother's home in Hays was supported by the evidence and was not an abuse of discretion.

Michael also argues that (1) Pamela's failure to advise him of one child's surgery proves that she does not respect the bond between Michael and the children; (2) Pamela failed to proffer any evidence, other than the court-appointed case manager; (3) his due process rights were violated when the case manager failed to work with him and keep him informed of the case manager's recommendations; and (4) the statutory provisions regarding case managers violate his constitutional right to have the care, custody, and

control of his own children because he is required to rebut the case manager's recommendations. We summarily reject these arguments.

PARENTING TIME

Finally, Michael complains about the district court's adoption of the case manager's recommended parenting time of two, 2-week periods in the summer. Issues involving parenting time will not be disturbed absent an abuse of discretion. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 119 P.3d 684 (2005). A review of the record convinces us that the district court did not abuse its discretion in ordering parenting time. However, technically we do not have jurisdiction to review this issue. See *Hughes v. Valley State Bank*, 26 Kan. App. 2d 631, 633-34, 994 P.2d 1079 (1999), *rev. denied* 269 Kan. 932 (2000) (duty of appellate court to raise jurisdiction on its own initiative).

Parenting time was among the issues addressed in the journal entry of the custody hearing. However, Michael did not challenge that portion of the order until May 2005. His notice of appeal in this case was filed in December 2004 and particularly described the he was appealing the "decision rendered at [the] hearing on June 23, 2004[,] changing residential custody of his minor children to Pam Fellows." Michael did not file a

subsequent notice of appeal as to the district court's May 2005 parenting time order. The issue is not properly before this court for review.

Affirmed in part and dismissed in part.