NOT DESIGNATED FOR PUBLICATION

No. 106,143

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF:

REGGIE TAYLOR,
Appellant,

and

HAROLD TAYLOR,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; PAUL E. MILLER, judge. Opinion filed April 12, 2012. Affirmed in part and remanded with directions.

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

Arvid V. Jacobson, of Jacobson & Jacobson, Chtd., of Manhattan, for appellee.

Before MARQUARDT, P.J., PIERRON, J., and JEAN F. SHEPHERD, District Judge Retired, assigned.

SHEPHERD, J.: This appeal involves a post-divorce custody dispute arising when one parent moved away from the community where both parents and the only child of the marriage lived. The mother, Reggie Taylor n/k/a Reggie Voboril, the moving parent, sought to change the existing agreed parenting plan, requesting primary residential parenting time of the child, E.R.T. Voboril now appeals from the district court's order granting primary residential parenting time to the child's father, Harold Taylor. We find that Voboril's various evidentiary and substantive legal challenges, including her claim of

judicial bias, fail to establish reversible error. Due to the district court's inadequate journal entry, however, we are unable to confirm whether the court applied the correct legal standards and adequately weighed all the factors required by K.S.A. 2010 Supp. 60-1610(a)(3)(B). Therefore, we vacate and remand for additional findings of fact and conclusions of law elucidating the district court's decision.

The facts in this case are well known to the parties and will only be detailed here to the extent necessary to explain our decision. Voboril filed for divorce from Taylor when their only child, E.R.T., was 3 years old. During the later part of the marriage and immediately following the divorce action, the parents and E.R.T. lived in Manhattan, Kansas, where both parents worked as physicians. Ultimately, the parents agreed to a joint custody arrangement and E.R.T. spent equal or nearly equal residential time with each of her parents; custody and parenting time had not been litigated by the parties before this hearing. Less than a year after signing the parenting agreement, Voboril accepted employment in the Kansas City metropolitan area and became engaged to a man who resided in Lenexa. Voboril filed a motion to change the parenting time arrangement to allow her to move E.R.T. to Lenexa, to grant her primary residential parenting time, and to allow Taylor more limited parenting time.

Following a custody evaluation and a trial, the district court denied Voboril's motion in a three-page opinion. The court awarded primary residential parenting time of E.R.T. to Taylor, with more limited parenting time to Voboril. Voboril filed a timely motion to alter or amend the judgment and requested additional findings of fact and conclusions of law. The district court denied this motion and Voboril appealed.

On appeal, Voboril first challenges the court's interpretation and application of K.S.A. 2010 Supp. 60-1610(a)(5), claiming the court's decision resulted in divided residency. When determination of a legal issue requires interpretation of a statute, the

appellate court has unlimited review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009).

In making child custody decisions, the district court may order residential arrangements in which one or more children reside with each parent and have parenting time with the other. Such an order, however, is to issue only in "exceptional case[s]." K.S.A. 60-1610(a)(5)(B). Voboril contends the district court improperly ordered divided residency in this case because it separated E.R.T. from her stepsiblings—her new husband's three children—and from her infant half-brother, who was born 6 months after Voboril filed the motion to modify.

There are no published Kansas decisions applying the "divided residency" standard in cases where there is only one child from the marriage at issue. Instead, this subsection comes into play when awarding residency and parenting time to multiple children of the marriage that is the subject of the domestic case. See *LaGrone v. LaGrone*, 238 Kan. 630, 633, 713 P.2d 474 (1986) (two siblings *with the same parents* separated by divided custody decision upheld under the facts of this case); *In re Marriage of Williams*, 32 Kan. 842, 848-49, 90 P.3d 365 (2004). (upholding modification of custody placing the son with father and the daughter with mother). See also 2 Elrod and Buchele, Kansas Law and Practice, Kansas Family Law § 12.33, p. 200 (1999) (discussing divided custody, stating "[i]f the children are from different marriages and are half siblings or stepsiblings, there may not be as strong a reason to keep them together.")

Voboril contends that the "logical" interpretation of K.S.A. 60-1610(a)(5)(B) would be to include half-siblings and stepsiblings. We disagree. The legislature has not hesitated to use the terms stepparent, stepbrother, stepsister or half-siblings in drafting statutes when it intends to include those individuals. See K.S.A. 21-3603 (aggravated incest statute specifically including biological, step or adoptive relatives); K.S.A. 21-3845 (Medicaid fraud statute defining "[m]embers of a family" to include step relatives

and half-siblings); K.S.A. 44-508 ("[m]embers of a family" under Workers Compensation Act includes stepparents and step-siblings); K.S.A. 72-1046b (school transportation statute includes half-siblings and step-siblings as "members of a family"). In divorce cases the legislature has recognized stepparent/child relationships in K.S.A. 60-1616(b) allowing stepparents and grandparents to be granted visitation rights of a minor child. Because the legislature has recognized steprelationships and half-siblings in other contexts, its failure to include such relationships in K.S.A. 2010 Supp. 60-1610 (a)(5)(A) leads us to conclude that the legislature did not intend the type of case before us to be a divided custody case in which the "exceptional case" standard of that subsection applies.

This is not to say E.R.T.'s relationship with her new stepsiblings and half-brother is not a relevant consideration in this decision. K.S.A. 60-1610(a)(3)(B)(iv) recognizes that one factor in determining child custody and residency is the "interaction and interrelationship of the child with the parents, siblings and *any other person who may significantly affect the child's best interests*." (Emphasis added.) Clearly, stepsiblings and half-siblings, especially those still residing with a parent of the child in issue, may have a significant impact on a child's life. Therefore, the nature of these existing and potential relationships should be considered by the court. As always, however, the "most important factor to consider" in making a residency or custody decision is "what will serve the best interests and welfare of the child." *LaGrone*, 238 Kan. at 631-32; K.S.A. 2010 Supp. 60-1610a(3).

In this case, the district court did not limit Voboril in submitting evidence regarding E.R.T.'s bond and developing relationships with her new stepsiblings and half-brother. Voboril and her nanny both testified that E.R.T. had quickly developed a bond with the other children in Voboril's Lenexa home. Moreover, the court's brief opinion clearly considered Voboril's new family as a positive factor for E.R.T. Accordingly, we

reject Voboril's claim that the district court erred in failing to adequately consider E.R.T.'s new relationships in its decision.

Voboril next claims the district court exhibited bias and prejudice in its various comments, rulings, and decisions. Specifically, Voboril contends that the judge made comments during a motion hearing 8 months before the trial that reflected anger and bias towards her, and the judge "exploded" at her attorney in chambers at a pretrial meeting. She also points to comments and evidentiary rulings made by the judge during the trial and in its subsequent journal entry that she believes reflected a gender and personal bias against her. Although Voboril raised these claims of bias in her posttrial motion, she never filed a motion seeking the judge's recusal under K.S.A. 20-311d. Voboril had a meaningful opportunity to file a motion and affidavit under K.S.A. 20-311d prior to trial. The first instance of which she complains occurred in May 2010; the second instance occurred less than a week before the January 2011 trial. She failed to file a recusal motion, thereby bypassing the procedure established by the Legislature for raising claims of judicial bias. None of the allegations of bias asserted by Voboril are of a nature to justify her failure to comply with the statutory procedures. A litigant who perceives a judge is biased against him or her should not be permitted to "roll the dice," by waiting for the trial's outcome and then seeking reversal if it is not to his or her liking. *Cf. Catholic Housing Services, Inc. v. State Dept. of SRS*, 256 Kan. 470, 476, 886 P.2d 835 (1994), holding that a party cannot create a procedural problem at the agency level to gain an advantage thereby on judicial review.

Although Voboril did not pursue her bias claim properly at the trial court level, this was a trial to the court, and we will review the claims to determine whether the judge's comments and rulings were improper, and, if they were improper, whether Voboril's right to a fair trial was prejudiced by those comments and rulings. Voboril has the burden of proving that her substantial rights were prejudiced. See *State v. Kirkpatrick*, 286 Kan. 329, 348, 184 P.3d 247 (2008). If a reasonable construction renders the remarks

unobjectionable, there can be no prejudice. The mere possibility of prejudice from a judge's remark is not sufficient to overturn a judgment. See *State v. Miller*, 274 Kan. 113, 118, 49 P.3d 458 (2002). Our review of a claim of judicial misconduct is unlimited. We have carefully reviewed the district court's evidentiary rulings and comments which Voboril challenges.

The record from a May 20, 2010, hearing reflects some impatience by the judge; the impatience was directed at Voboril's attorney, not Voboril. Taylor had filed a motion in April requesting that Vorobil not be allowed to move E.R.T. from Manhattan, and this was the subject of the May hearing. By the time of this hearing, Vorobil had neither provided Taylor the K.S.A. 60-1620 required written notice of her intent to move nor had she filed a motion to modify parenting time. Voboril's attorney appeared at the hearing with a proposed parenting plan, but the attorney had not completed any of the preliminary legal pleadings and requirements to modify a parenting plan; the court admonished him, telling him he should get the necessary papers filed. At the next hearing, the judge apologized for causing anyone to perceive that he had been angry. At the May hearing, the judge commented on the parties' "ideal" shared custody agreement entered into 9 months prior, and he commented on the mother's move and its connection to her new relationship; he failed to mention her new, less stressful and more lucrative job. Finally, he stated there was nothing to suggest that the parties' agreed parenting plan did not continue to be in their child's best interest, a statement which focused on the needs of the child. The court's statements are not inconsistent with the facts; Voboril started the new relationship in September 2009 and learned of the potential job in December 2009. Vorobil complains of another comment made by the judge at the same hearing involving her pretrial parenting plan. The judge inquired of her whether she thought the plan was fair, just, and equitable and whether she would find it to be acceptable if the parenting time were reversed. This question on its face is not improper. The judge's remarks at the motion hearing do not indicate bias or prejudice against the mother; a reasonable construction of these remarks makes them unobjectionable.

The record on appeal is inadequate for our review as to several of Voboril's complaints. She claims the family evaluator reported to her that the judge told the evaluator that he was angry with her and her attorney. In the record on appeal the only citation to this is in counsel's closing argument; counsel elicited no testimony from Voboril or the evaluator on this point. With no evidence of such a statement, we cannot review it. Voboril next claims the judge exploded in anger at her attorney in chambers at an off-the-record pretrial meeting. There is no record of this meeting and Voboril's attorney made no effort to reconstruct the statements made as permitted by Supreme Court Rule 3.04 (2011 Kan. Ct. R. Annot. 26.) An appellate court will not review claims of error when an appellant has failed to reconstruct the unrecorded proceedings. *First Nat'l Bank & Trust Co. v. Lygrisse*, 231 Kan. 595, 603, 647 P.2d 1268 (1982). Next Voboril asserts the court showed prejudice or bias by not admitting tape recordings of E.R.T. crying at exchanges and when her father telephoned her. Counsel informed the court that the tapes were of E.R.T. crying and the court accepted her description of the contents instead of admitting the tapes. These tapes are not part of the record on appeal. We cannot determine if they contain relevant and admissible evidence. Finally, Voboril claims that the court demonstrated prejudice at the trial at by not ordering the custody evaluator to give her his working papers to confirm whether he interpreted the standardized testing he gave the parents; the evaluator testified that the interpretation was in his report in the section dealing with diagnostic impressions. Counsel continued her questioning about the conclusions the evaluator drew from the testing and evaluation process. Voboril claims the work papers were relevant and admissible to assist her in cross-examination of the evaluator. However, she did not ask the court to make copies of these notes for the record on appeal, so we cannot review them to determine their relevance and admissibility. For each of the above claims, it was Voboril's responsibility to make a record on appeal and to designate facts and exhibits to support her claims of error. Without such a record, the claims fail. *Kelly v. VinZant*, 287 Kan. 509, 526, 197 P.3d 803 (2008).

Voboril complains that the district court *sua sponte* excused a physician witness and then disallowed Voboril's testimony recounting the physician's comments to her on the grounds of hearsay. Voboril called this witness and questioned him; Taylor had no questions and the judge excused him without objection by either party. Voboril did not ask the witness to stay and she did not put an objection on the record. This was not improper behavior by the judge. The statements were hearsay and inadmissible.

Voboril claims that the district court's journal entry shows bias and prejudice. In the journal entry the judge mentions that shortly after her divorce Vorobil, unmarried, became pregnant by a man she had not known for long. Voboril does not dispute the factual basis for this statement, but she claims it shows bias because she was a mature adult and a trained physician. During the trial, Voboril focused much attention on Taylor's morality and choices, specifically his predivorce weekend with a young stripper, his gambling trips, and his viewing of pornography. The judge's mention in the journal entry of Voboril's decision to add a new baby and a new man to E.R.T's life so quickly after the divorce was part of his focus on choices both parties had made and a reasonable construction of these comments does not demonstrate bias or prejudice.

Next, Voboril argues that in its decision the court applied a double standard of morality, holding her to a higher standard than Taylor. We cannot determine this from the court's brief journal entry. As explained below, we remand the case for further findings of fact and conclusions of law to allow for a meaningful appellate review of the court's decision.

In her final issue on appeal, Voboril contends that the district court did not properly consider evidence pertaining to the parents' predivorce conduct in determining which parent should be the primary residential parent of E.R.T. and that the district court failed to make adequate findings of fact and conclusions of law to support its decision to

assign Taylor to be the primary residential parent. Voboril admitted at oral argument that the district court allowed her to present evidence pertaining to Taylor's alleged misconduct prior to and after the divorce and the record does not reflect the court excluded any proffered evidence on that subject. Therefore, Voboril's arguments are limited to whether the court adequately considered and weighed the evidence presented.

In reviewing any child custody determination, the appellate court's function does not involve delving into the record and independently considering the statutory factors from a cold record. *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995). Instead, our courts have repeatedly held:

> "'[w]hen the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the child. The trial court is in the best position to make the inquiry and determination, and in the absence of abuse of sound judicial discretion, its judgment will not be disturbed on appeal.'" [Citations omitted.] *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002).

As a general rule, when a parent seeks to modify a preexisting custody determination or parenting plan, the parent seeking the modification must show a material change in circumstances. K.S.A. 2010 Supp. 60-1610(a)(2)(A). However, Kansas courts have previously held that the district court does not need to find a material change in circumstances before modifying orders or decrees that are the product of default or the parties' stipulations. See *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 (1980) (original custody order entered in a default proceeding where facts were not substantially developed); *In re Marriage of Jennings*, 30 Kan. App. 2d 860, 863, 50 P.3d 506, *rev. denied* 274 Kan. 1112 (2002) (two prior custody agreements between parents without evidentiary hearings).

In her motions, Voboril asserted both that a material change of circumstances had been shown and also the authorities indicating such proof was not necessary. The district

court's three-page opinion briefly discussed some of the evidence presented and several statutory factors in finally awarding custody to Taylor. We fail to find that the district court's plan is in E.R.T.'s best interest. The court failed to clearly indicate whether it was applying the material change of circumstances standard. It failed to state the factual basis for the decision with specificity. Voboril complied with our appellate requirement that a litigant object to inadequate findings of fact and conclusions of law before the district court and gave the lower court the opportunity to correct its findings and conclusions. See *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006); see K.S.A. 60-252. Notwithstanding Voboril's request, the district court declined to provide a more detailed journal entry or elaborate on its decision. We are unable to presume the court made the findings necessary to support its decision.

Under K.S.A. 60-252, the district court's findings and conclusions should be sufficient to resolve the issues and should be adequate to advise the parties, as well as the appellate court, of the standards applied by the court that governed its determination and the facts which persuaded it to arrive at the decision. *Mies v. Mies*, 217 Kan. 269, 275, 535 P.2d 432 (1975). If the district court's findings and conclusions of law are inadequate in this regard, meaningful appellate review is precluded and the appellate court should remand. *In re Marriage of Bradley*, 258 Kan. 39, 49, 899 P.2d 471 (1995).

Voboril has failed to establish the district court improperly excluded any evidence or that she was the focus of judicial bias or prejudice. This case does not meet the criteria for divided custody under K.S.A. 60-1610(a)(5)(A). There was ample evidence presented regarding both parents to enable the district court to make a decision in this case. However, we are unable to determine from the journal entry the basis of the district court's ultimate conclusion without inferring a number of findings and conclusions not expressly made. Although the district court noted there is evidence that both parents love E.R.T. and could provide her a good home as the primary residential parent, we are

unable to review the district court's decision based on the scant journal entry before us. We require additional findings of fact and conclusions of law from the district court.

Affirmed in part and remanded in part for adequate findings of fact and conclusions of law.

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MARQUARDT, J., concurring and dissenting: I concur with the majority's conclusion that the Kansas Legislature did not intend the divided residency rule to include half-siblings and step-siblings as family members in determining custody under K.S.A. 2010 Supp. 60-1610(a)(5)(A). However, I dissent from the majority's conclusion and analysis on the issue of bias and prejudice. I believe the facts in this case clearly show that the district court abused its discretion in granting primary custody to Taylor.

I am mindful of the fact that appellate courts are not to reweigh the facts; however, when the facts overwhelmingly show there has been an abuse of discretion, we are obligated to note the error. In order to understand what has transpired in this case, a recitation of the facts is necessary.

Reggie Voboril and Harold Taylor were married March 20, 2004. When they married, Voboril was a practicing physician living and working in Manhattan making $100,000 a year; Taylor was finishing his residency requirement in Wichita. Voboril relocated to Wichita.

Their only child, E.R.T., a female, was born in 2006. The couple moved back to Manhattan in 2007 where Mother got a job with Medical Associates, which allowed her to be the primary caregiver for E.R.T. She earned approximately $100,000 her first year back in Manhattan; however, her pay was dramatically reduced soon thereafter.

Complicating the situation was the fact that her contract with Medical Associates contained a non-compete clause. At the time of the divorce, Taylor was earning approximately $180,000 a year as a hospitalist, and Voboril was earning $70,000.

Voboril filed for divorce on February 27, 2009. Because of her non-compete agreement, she investigated a hospitalist job in Wichita but decided against the job because it would not promote her ability to parent E.R.T. In June 2009, Voboril was informed that by September, she would have to buy into the Medical Associates practice if she were to stay there.

In the summer of 2009, Taylor told Voboril there was a hospitalist position available at Mercy Hospital where he worked. She inquired and interviewed for the position because it would allow her to stay in Manhattan and would not violate her non-compete agreement with Medical Associates. Taylor decided he didn't want Voboril working at the same place where he worked, so he talked with a co-worker and then wrote a derogatory letter about Voboril to Mercy Hospital's CEO and the co-worker saying he did not want Voboril considered for the job. The co-worker said she would "take care of it." Voboril was not hired. Taylor and his co-worker conveniently testified at the hearing that no one was hired for the position.

Voboril claimed that she had not agreed to the settlement. Various discovery requests were filed by the parties and on September 30, 2009, a marriage settlement agreement was signed by both parties and filed with the court. The court adopted the agreement in a decree of divorce that same day. The provision for child custody stated:

> "The child for whom this Agreement pertains is the parties' minor child . . . born in 2006. . . . The parties agree that joint legal custody of [E.R.T.] should be awarded to the parties. The parties further agree that shared residential custody of [E.R.T.] is ideal, but recognize their existing schedules do not currently permit the same so they agree

> [E.R.T.] will maximize the amount of her time (up to 50%) with [Father] as his schedule permits."

It was after the divorce that Reggie Taylor changed her name back to her birth name of Voboril.

In October 2009, a friend in Kansas City contacted Voboril about a hospitalist job at St. Luke's. She interviewed in January 2010 and signed a contract in February. Voboril did not tell Taylor about the job until March, because she feared that he would undermine her application there, just as he had done in Manhattan. Her starting salary was $170,000 per year.

The parties were in the process of negotiating a custody solution when on April 22, 2010, Taylor filed a motion for an order to prohibit Voboril from moving E.R.T. to Kansas City. At the end of the motion hearing on May 20, 2010, the judge claimed that the only circumstance that had a bearing on the custody of E.R.T. was that "Dr. Voboril has fallen in love and the person she's in love with lives in Kansas City and she wants to join him there." That simplistic statement is not supported by the facts. When the court filed its custody order on January 27, 2011, it found "that the parties are practically equal in all respects, and in fact the Court can feel comfortable that either parent will provide a sufficient and nurturing home for their daughter." Dr. Fajen, the custody evaluator appointed by the judge, testified that the custody decision was a "toss up" but determined that Taylor "is more stable due to" his "lifestyle, his sense of who he is" because "he grew up that way." When asked to explain, Dr. Fajen said "I can only assume that's why."

It is a travesty to make a custody recommendation on an *assumption*. There was no explanation in the record on appeal of how Taylor grew up other than his father committed suicide and he was raised by a single mother. As an adult, he regularly and consistently viewed pornography on the internet, and he made many trips to Las Vegas each year to gamble. Does this equate to a more stable lifestyle than Voboril's?

Both parties testified that throughout their marriage and continuing to the date of the hearing, Taylor viewed pornography on his computer. Voboril testified that Taylor told her

> "that he felt that the porn is something that is very addicting and then you feel like you need to have more or the excitement of something more and he felt it was a slippery slope that led to going to the strip clubs, meeting girls at the strip clubs."

Sean Combs, someone who has worked with computers for over 20 years and spent 10 years as a systems administrator, investigated Taylor's laptop computer and prepared a report. Combs testified that his initial scan recovered almost 11,000 pornographic images and files on Taylor's laptop computer that included nudity and all types of sexual acts.

When questioned about the pornographic images, Dr. Fajen minimized Taylor's behavior stating under oath that "viewing of pornography is so rampant that it is - - it has been shown simply by day-to-day life that it doesn't impact people to that great extent particularly when someone is bright enough to carve out one behavior from another."

First of all, there was no evidence in the record on appeal that Taylor was "bright enough to carve out" his pornography mind-set from the rest of his life. I do not know how the court could discount this behavior, in addition to the fact that Taylor had a liaison with a 19-year-old stripper who he took to Las Vegas on one of his five to six yearly gambling trips while he was married. These facts might be discounted by the court in deciding a divorce; however, they are relevant when deciding custody of a 4-year-old child.

Ultimately, the court in deciding custody of E.R.T., focused on only one subsection of K.S.A. 2010 Supp. 60-1610—(a)(3)(B)(vi)—to the exclusion of all other factors listed in the statute. Because Voboril told Dr. Fajen that if she were out of the picture, she would not be comfortable having her daughter raised by the child's father and she "would not be satisfied with a parenting plan that she proposed as appropriate for respondent [Taylor]," the court awarded Taylor custody of E.R.T. Subsection (vi) of the statute states: "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." Voboril was very willing to respect and foster a continuing relationship between E.R.T. and Taylor. She was not trying to keep Taylor from his daughter; she tried to foster their relationship in regular phone calls when E.R.T. was with her and proposed a schedule when E.R.T. could see Taylor.

The other persons "who may significantly affect the child's best interests" were apparently overlooked. Voboril has many relatives who live within a short distance from Kansas City—her mother, brother, sister, sister's husband, nephews with two small children, niece and husband, and another sister and husband with twin boys. These relatives are in addition to Voboril's new baby, her husband, and his three children. On the other hand, Taylor has a mother in Paola who he sees every couple of months, a half-sister who lives near Denver that he sees once a year, and a 24-year-old girlfriend. The court noted that in Manhattan, E.R.T. has "the opportunity to grow up and take advantage of the offerings of a vibrant college town;" however, "[i]t is clear that she will adjust to the primary home, wherever it is."

Voboril asserts in her appellate brief that some of the judge's findings were contrary to the evidence and improperly subjected her to a double standard of morality that was not applied to Taylor.

Voboril filed a motion for a rehearing or to alter and amend and asked for specific findings of fact and conclusions of law. The district court denied the motion, claiming the "reasons for such Order are clear and that no further findings of fact or conclusions of law are necessary."

K.S.A. 2010 Supp. 60-1610(a)(3)(B) requires that the court "consider all relevant factors" when making a child custody, residency and parenting time determination. At the time of the divorce on June 8, 2009, the parties agreed to a joint custody order because of the facts that existed at that time, The facts were substantially different when the issue was again raised. When the original custody order was entered, both parties were living in Manhattan, E.R.T. was 4 years old, E.R.T. was not in school, Voboril had a non-compete agreement with her employer and was earning about one-third of what Taylor was earning, and Voboril was available to observe Taylor's interaction with E.R.T.

When a custody decision is entered on an agreed order and the facts are never developed and presented to the court, the court may consider evidence at a modification hearing as to the facts that existed at the time the earlier order was entered. *Johnson v. Stephenson*, 28 Kan. App. 2d 275, Syl. ¶ 6, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001).

The majority fault Voboril for not pursuing "her bias claim properly at the trial court level." Slip op. at *5. They overlook the facts and reasoning set forth in Voboril's 22-page motion for rehearing or to alter and amend the decision and for specific findings of fact. Voboril stated that the court's order should be reversed "because of abuse of discretion by the court and circumstances wherein the Petitioner was not afforded a reasonable opportunity to present her evidence and *be heard on the merits of the case*." (Emphasis added.) Voboril was allowed to present evidence but apparently it was not heard or considered.

I agree that this case must be sent back to the district court, but I believe under all the facts of this case that it should be remanded to a different judge for a new hearing.