

IINOT DESIGNATED FOR PUBLICATION

No. 125,231

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

S.D. II,
Appellee,

and

L.D.,
Appellant.

MEMORANDUM OPINION

Appeal from Geary District Court; COURTNEY D. BOEHM, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed in part and dismissed in part.

Peter Charles Rombold, of Hoover, Schermerhorn, Edwards, Pinaire & Rombold, of Junction City, for appellant.

Autumn L. Fox, of Jacobson & Fox, L.L.C., of Manhattan, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PICKERING, J.: L.D. (Mother) appeals the district court's temporary residential custody and custody modification orders favoring S.D. II (Father). Mother raises three claims: (1) The district court violated the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3901 et seq., when it granted Father temporary residential custody while she attended Army training; (2) the district court abused its discretion when it granted Father's motion modifying residential custody; and (3) the district court made an

improper evidentiary ruling at trial by excluding evidence from her military file despite its relevance to one of Father's allegations against her. After the appeal was docketed, Father moved for attorney fees.

Mother's first argument is dismissed due to lack of jurisdiction; for her second argument, we affirm the district court's ruling granting Father's change of residential custody; and for Mother's third argument regarding the evidentiary ruling, we affirm the district court's rejection of Mother's evidence. Therefore, we affirm in part and dismiss in part. Additionally, we deny Father's motion for attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Introduction to the Parties and Previous Divorce and Custody Proceedings

Father and Mother were married in 2008. Father is active-duty military and an Army helicopter pilot. He and Mother met when he was on deployment. Their first child, S.D., was born in 2011 and their second child, E.D., was born in 2018. Since 2008, their relationship was on again, off again, marrying and divorcing three times. Father and Mother's most recent divorce was finalized in December 2019.

Following contested proceedings regarding custody, child support, and spousal maintenance, the district court initially granted Mother primary residential custody of the children. Father received parenting time over summers and holiday breaks. Father unsuccessfully moved to alter or amend this judgment and later appealed the decision to this court. In January 2021, another panel of this court affirmed the district court's parenting time decision and order denying Father's motion to amend. *In re Marriage of Dickson*, No. 122,595, 2021 WL 69784, at *10, 11 (Kan. App. 2021) (unpublished opinion).

Initiation of Temporary Custody Proceedings

The month prior to the panel's decision, Mother messaged Father via Talking Parents to advise him of her plan to attend "school" from January 9 to June 5, 2021. Unbeknownst to Father, Mother had decided to join the Army Reserves and was scheduled to report for basic training at Fort Leonard Wood, Missouri, during that five-month time frame. At the time, she did not alert Father or the court of this significant decision to join the Army Reserves.

Due to Father's deployment to Volos, Greece, he was unable to care for their children at that time, and, thus, Mother began coordinating childcare plans. One of Mother's primary concerns was that S.D., the parties' only school-aged child, complete his school year at his current school rather than transfer mid-year. Based on this, Mother initially stated that the children would be watched by an aunt, T.M. Mother later stated that a neighbor and friend of hers, J.D., agreed to stay in Mother's home to watch the children while she was at "school."

Still operating on the misrepresentation that Mother would be away for her education, Father acknowledged Mother's concerns regarding S.D.'s schooling but objected to J.D. watching the children. Father remembered Mother's disparaging remarks about J.D.'s parenting—that Mother denied making. Father wanted his parents, who lived in Chicago, Illinois, to watch the children until he returned in March. This would, however, require that S.D. transfer schools. Mother did not object to Father taking the children in March but asked if Father's parents could stay in her house to watch the children. Father did not respond to this option over the Talking Parents messages but later revealed that his parents did not take up Mother's suggestion that they move to Kansas for a period of several weeks.

Up until January 9, 2021, the date that Mother supposedly went to "school," the couple continued to discuss childcare but never reached an agreement. Without any agreement, Mother proceeded with her plan and left the children with J.D. After Mother left and J.D. took over care of the children, J.D. received a message from her commander to call Father's attorney because she was accused of having the children illegally.

J.D. spoke with Father's counsel, her commander, and with police officers who later showed up to Mother's apartment. She notified everyone that she had power of attorney for the children and was therefore not breaking any laws. Father's counsel provided J.D. with documents—including a copy of Mother and Father's Talking Parents transcript—and suggest that J.D. hand over the care of the children to Father's parents. J.D. agreed.

On January 13, 2021, Father filed an emergency motion for ex parte orders, asking the district court to grant him temporary primary residential custody because Mother had "abandoned" the children. Father explained that if granted temporary custody, he could file a "Family Care Plan" with the Army and be allowed to return to the United States. He also explained that he told his commander about the situation and planned to return home soon. Father also stated that Mother initially provided vague details about her schooling and suggested that it was related to her job as a dental assistant in Fort Riley. It was sometime later that Father called the dental headquarters at Fort Riley and discovered that Mother recently "joined the United States Army."

The next day, Father filed a supplement to emergency motion for ex parte orders, notifying the district court that S.D. was approved to attend a new school and asking that his child support obligations be temporarily suspended. And in a separate motion filed the following day, Father requested a change of judge. The same judge who had initially ruled on their domestic case continued to preside over the case.

The next month, Father withdrew his motion for ex parte orders. He explained that in the interim he had been allowed to return "home from his deployment through a Red Cross message" on January 21, 2021, and five days later he was able to take custody of the children. Father also noted that Mother did not file a response to his previous claims and thus suggested that the hearing scheduled on his motion was no longer needed.

On April 20, 2021, Father filed a new motion for ex parte orders, requesting temporary primary residential custody of the children. In this motion, Father stated that the children still lived with him, but Mother refused to tell him her new address. Father explained that Mother had not provided him with her Fort Leonard Wood, Missouri address, where she was stationed, and that the last address he had was her home in Junction City. The following day, the district court granted Father's request for temporary custody.

Mother's previous attorney had withdrawn in March 2021, and Mother's new counsel filed an entry of appearance on April 27, 2021. On May 10, 2021, Mother filed a motion for status conference, trial setting and motion to vacate ex parte interlocutory orders. Mother claimed that despite knowing that she was participating in active military service, Father did not comply with 50 U.S.C. § 3931(b)(1)(A)-(B). Mother argued that the district court erred as a matter of law in entering its decision on Father's motion without complying with the SCRA. And in a supplement to her motion to vacate ex parte interlocutory orders, Mother submitted a copy of a "Proof of Enlistment" form to support her claim.

Initiation of Custody Modification Proceedings

On June 28, 2021, Father filed a motion to change residential custody. In this motion, Father asserted that Mother demonstrated that she was no longer willing or able to coparent the children or foster Father's relationship with them. As support, Father

stated that the children continued to live with him and were doing well in his care. Father said that Mother had failed to notify him that she joined the Army Reserves or provide an updated address since she went to out-of-state training. Father also noted that Mother previously "moved to several different states [without] telling Father" and "left the children with a neighbor . . . against [Father's] wishes." And according to Father, Mother "could have . . . moved her 'schooling' dates" until after he returned from deployment so that he could care for the children. Finally, Father maintained that based on Mother's actions and the children's continued placement with him, a material change in circumstances justified modification of the district court's previous custody order.

The following day, the district court held a status hearing and denied Mother's request for a hearing on her motion to vacate its temporary custody order. The court also entered a written order denying Mother's request for a hearing. In its order, the court explained that since Mother's summer parenting time with the children would start one week from the date of the status hearing, another hearing would "further delay" Mother's parenting time.

Also at the status hearing, the district court scheduled a one-day trial on "[t]his matter" for September 17, 2021. The court ordered the parties to submit proposed factual findings and legal conclusions regarding parenting time two weeks before the trial date. In August, Mother filed a response to Father's motion to modify residential custody. She argued that the court's previous order should not be modified because there had not been a significant material change in circumstances. For proposed findings and conclusions, Mother argued that it was in the children's best interests to continue enforcing the district court's original custody order. She also maintained that the ex parte order granting Father temporary custody violated the SCRA.

First Day of Trial, August 30, 2021

Notwithstanding the district court's previous order scheduling trial for September 17, the district court held the first of what would be two days of trial on the parties' motions on August 30, 2021. During an opening discussion at this hearing, the parties expressed confusion regarding the pleadings that the district court intended to hear that day. The parties and district court, however, eventually agreed that Mother's motion to vacate and Father's motion to change residential custody both needed to be addressed.

Before calling his first witness, Father unsuccessfully moved to strike Mother's response to his motion to change custody as untimely under Supreme Court Rule 133 (2023 Kan. S. Ct. R. at 217). Father also argued that the SCRA did not apply because Mother never filed a motion to stay the proceedings or a statement explaining how her military duties affected her ability to appear at the previous proceedings. The district court declined to decide this issue before hearing the evidence and ordered the parties to proceed with their cases.

As the first witness, Father described how the children were doing generally, discussed S.D.'s schooling, and what the children were participating in since under his care. He also testified that he met a new partner, and the couple were married in March 2021.

Regarding who would care for the children during Mother's absence, Father confirmed that he never agreed to allow J.D. to watch his children. He testified how he returned early from his deployment because Mother had left the children with J.D. Father explained that he knew J.D. and lived next to her when he lived with Mother. Also, Father knew that J.D. previously babysat the children and had them overnight at least a couple times. Still, Father testified that he was concerned because J.D. was active

military and she could have received orders to deploy at any time while caring for the children.

Father also testified that he sought release from his deployment in Greece because he believed that no one with legal custody was able to care for his children. Although Mother provided J.D. with power of attorney over the children, Father was not aware of that. In addition to his testimony, Father also presented testimony from his brother, a neighbor, and a family priest.

In support of her filed response, Mother testified that from early January to June 2021, she was in the Army Reserves and had been attending basic training. She joined the Reserves for tuition benefits and hoped that she would eventually get a better job. Mother also testified that when she enlisted, she thought that she could not delay her enlistment because the Army was concerned with her age. Mother also testified that she never changed her or the children's address, which remained in Junction City. She did admit that after she went to Fort Leonard Wood, she refused to give Father her address, which was contrary to the court's earlier order. She, however, maintained that she feared Father would interfere if he knew of her basic training.

Mother testified that she believed Father agreed to allow J.D. to watch the children because he stated in his messages that he would pick them up in March. She also testified that she wanted the district court to enforce its original custody orders and believed that Father's change of custody motion was not in the children's best interests. After joining the Army, Mother completed a "family care plan." The parties did not have a copy of Mother's family care plan on this date, but Mother testified regarding her memory about what was included in it. She testified that she listed J.D. as the person to care for her children in her absence. She did this knowing J.D. was active military at that time. On cross-examination, counsel asked Mother whether she knew that military rules prohibited a person from designating an active military caretaker for children. Mother stated that she

was not aware of this rule. She also testified that she was not sure but believed that she listed Father in her family care plan as an emergency contact.

Due to time constraints, the district court scheduled a second day of testimony on February 17, 2022. At the close of the proceedings on August 30, the district court entered an order requiring the parties to submit proposals for parenting time pending resolution of the ongoing matters.

Contempt Allegations, Proceedings, and Decision Between Trial Dates

Following the August hearing, the parties filed several motions and responsive pleadings. In response to a parenting time proposal that Mother filed, Father argued that Mother improperly requested that her residential custody be restored instead of requesting that she be granted certain parenting time. According to Father, this conflicted with the district court's order.

On February 8, 2022, Father filed a motion for a finding of direct contempt and attorneys' fees. This motion alleged that on February 2, 2022, the district court ordered Mother to provide copies of her "DA Form 7666, her parental consent form; all waivers she obtained to enlist in the United States Army, specifically the Age Waiver and Single Parent Waiver; and any and all Applicant Statements which she signed which enabled her to enlist in the United States Army[.]" Father argued that Mother handed over "some but not all documents for her Family Care Plan." Mother also allegedly claimed that the documents she did not provide did not exist or she did not have access to them. In her filed response, Mother asserted that Father had not followed an appropriate discovery procedure when requesting her military documents. Mother also alleged that she tried to comply with the court's order and only failed after diligent efforts.

The district court addressed Father's motion for contempt at the beginning of the second day of trial on February 17, 2022. The district court scheduled this hearing to begin at 8:30 a.m., but neither Mother nor her attorney appeared on time. Although the bailiff told the district court that Mother's counsel was on his way to the courthouse, the district court noted "it's 8:35" a.m. and directed Father's counsel to proceed. After hearing Father's argument that Mother had access to the relevant documents, the district court found Mother in direct contempt of its discovery orders. The court also directed Father to submit a request for costs.

Shortly after the district court announced this decision, Mother's counsel appeared in the courtroom and asked to be heard on the matter. The district court notified counsel of its decision but denied the request and ordered him to proceed with Mother's first witness.

Second Day of Trial, February 17, 2022

During the second day of trial, Father's counsel revealed that Mother had listed her aunt, T.M., as the person to care for the children in her absence and never changed this to list J.D.

Mother called J.D. to testify. J.D. explained that she was a recently retired Army veteran and described herself as Mother and Father's friend and neighbor. J.D. also testified that S.D. had a close friendship with her daughter, and J.D. frequently babysat the children. J.D. explained that she volunteered to move into Mother's apartment and to care for the children from January to June 2021, while Mother attended Army training. She, however, later decided to let Father's parents take the children after her commander and police questioned the legality of her watching the children while Mother was gone.

J.D. testified that she was in the Army for around 25 years and, during that time, reviewed, drafted, and approved dependent parent packages. She explained that single, deployable parents submitted family care plans to designate care for their children when deployed. And after her years of experience, J.D. never saw a deployed parent receive permission to leave deployment early—like Father received—by telling their commanding officer that their parent or someone with a power of attorney to their children was watching their children. On cross-examination, J.D. admitted that she did not know whether she was listed on Mother's family care plan. She only knew that she was given power of attorney over the children.

Father provided rebuttal testimony, primarily reiterating his previous points about not knowing that Mother left for Army training or agreeing to J.D. watching the children. Father also testified that after reviewing Mother's family care plan, he learned that Mother had not listed him in any of the documents. According to Father, this meant the Army would not contact him if something happened with his children. Father, however, explained that he was going to have to fill out a family care plan soon and that he planned to include Mother's information in it and that he would be required to list her.

Mother took the stand again to present surrebuttal evidence. Mother tried to admit several documents, which she maintained accounted for every document in her military file. Father objected, however, arguing Mother had several months to comply with orders to submit these documents and that he did not have the time to review the hundreds of pages offered. Mother responded that she previously provided Father with a screenshot of the list of documents in her file and that she only offered the printouts to prove that she was not hiding or withholding documents and that she provided them to Father previously. The district court rejected Mother's request to admit the documents, stating it would not allow "trial by ambush."

In his closing argument, Father conceded that Mother qualified to take advantage of the SCRA but waived that option by failing to submit the following documents: (1) a motion to stay proceedings as provided under the SCRA; (2) a letter stating she was unavailable when she was not represented by counsel; (3) a letter stating to the district court she was not available based on her active military service; and (4) a letter from a commanding officer stating she joined the Army and was unavailable to attend court proceedings. The district court filed its journal entry of judgment on the contempt issue on February 28, 2022.

Final Decisions and Appeal

On March 8, 2022, the district court entered its final ruling on the following three remaining issues: (1) Father's motion to change residential custody; (2) Mother's motion and supplemental motion to vacate the temporary custody order, and (3) attorney fees and costs associated with the contempt order.

Regarding residential custody, the district court found that pursuant to K.S.A. 2021 Supp. 23-3218, "the facts as presented" constituted a material change in circumstances, allowing modification of the previous custody order. The district court specifically found: "[T]he residency of the children has changed because the children are now residing with Father due to Temporary Orders that were entered by this Court in early 2021. The Temporary Orders were necessary as Mother had left the children with a friend, over the objections of Father."

The district court's order continued and cited K.S.A. 2021 Supp. 23-3203(8) relating to its concerns with the parents' ability "to respect and appreciate the bond between the children and the other parent." While the court determined that Father "heeded the Court's previous Orders and findings," the court found that Mother had not. She "demonstrate[d] an unwillingness to coparent with Father," did not "appreciate his

bond with the children," and acted against the children's best interests by leaving them with someone other than "the individual listed in her enlistment paperwork." The district court also stated that both parents still struggled with communication, citing K.S.A. 2021 Supp. 23-3203(10). And finally, the court found Mother's actions surrounding the children's placement with J.D. established that she was incapable of coparenting:

"Mother's actions . . . demonstrated a serious inability to communicate, cooperate and manage parental duties . . . [by] not provid[ing] Father her physical address and [leaving] the children with a friend instead of cooperating with Father to find a custodian both parents agreed to. Mother unilaterally made decisions regarding the care and custody of the children and cut Father out as a parent."

The district court thus granted Father primary residential custody and Mother parenting time and ordered Mother to reimburse Father for his overpayment of child support.

The district court denied Mother's motion to vacate the order temporarily granting Father residential custody. The district court found that it did not violate the SCRA by entering the temporary orders, and the orders "were emergency in nature and necessary to ensure the safety and wellbeing of the minor children." The district court also explained that Mother failed to provide Father her address and left the children with someone other than the person listed in her "paperwork." Finally, the district court granted Father's request for attorney fees and costs.

Mother filed a notice of appeal, specifically appealing the district court's decision "entered on March 8, 2022."

ANALYSIS

Mother raises three primary contentions on appeal, claiming the district court: (1) violated the SCRA; (2) erroneously found a material change of circumstance to modify

the custody order; and (3) improperly denied her request to admit her military file as evidence at trial. In response, Father contends that the panel lacks jurisdiction to consider some of these claims and asks that Mother's remaining claims be dismissed as unpreserved or inadequately briefed.

I. DUE TO LACK OF JURISDICTION, WE WILL NOT DECIDE WHETHER THE DISTRICT COURT ERRED BY GRANTING TEMPORARY RESIDENTIAL CUSTODY TO FATHER

Mother's first argument challenges the district court's order granting Father temporary residential custody. Before considering the merits of this argument, we must address jurisdiction. See *Baker v. Hayden*, 313 Kan. 667, 673, 490 P.3d 1164 (2021) (appellate court has duty to question jurisdiction). Jurisdiction is a question of law, and we have unlimited review of jurisdictional issues. *City of Wichita v. Trotter*, 316 Kan. 310, 312, 514 P.3d 1050 (2022).

Father asserts that Mother needed to file a posttrial motion challenging the district court's findings as provided in K.S.A. 2022 Supp. 60-252(b) and Supreme Court Rule 165 (2023 Kan. S. Ct. R. at 234) to allow appellate review of her SCRA claims. He cites our Supreme Court's decision in *In re Marriage of Bradley*, 258 Kan. 39, 44, 899 P.2d 471 (1995), as support. In fact, in an earlier appeal, Father had filed a posttrial motion under K.S.A. 2019 Supp. 60-252(b), and the panel had jurisdiction to consider his appeal. *Dickson*, 2021 WL 69784, at *3. Father alternatively claims that Mother failed to sufficiently brief her arguments about the SCRA.

Mother did not directly appeal the district court's order granting Father temporary custody in April 2021. So, to the extent that Mother tries to appeal that decision, her claim must be dismissed. See K.S.A. 2022 Supp. 60-2103(a) (party must appeal within 30 days of district court entering judgment); *Wiechman v. Huddleston*, 304 Kan. 80, Syl. ¶ 1, 370 P.3d 1194 (2016) (appellate courts lack jurisdiction to entertain civil appeal not taken

within time limitations prescribed by applicable statutes); see also *In re N.E.*, 316 Kan. 391, 409, 516 P.3d 586 (2022) (applying these rules in Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq., case and dismissing appeal of temporary custody order for lack of jurisdiction based on failure to appeal within 30 days of judgment). As such, we lack jurisdiction to consider this claim.

Mother thus fails to raise a reviewable argument in her first issue on appeal. As such, her challenges to the district court's temporary orders of custody are dismissed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING FATHER'S MOTION TO MODIFY RESIDENTIAL CUSTODY DUE TO A MATERIAL CHANGE IN CIRCUMSTANCES

Next, Mother challenges the district court's decision to modify custody, claiming the court abused its discretion when finding a material change in circumstances. Mother contends that Father failed to present evidence showing a material change in circumstances because, outside of Mother joining the Army, there had not been a material change in circumstances. She also claims that the district court's ruling violated the SCRA.

Father again asks the panel to simply dismiss Mother's claim, arguing Mother failed to properly brief her claim. And recognizing no difference between Mother's claims regarding the SCRA in the first issue and this issue, Father discounts Mother's SCRA argument as redundant. Although lacking, we find Mother sufficiently briefs her argument that the district court abused its discretion in granting Father's motion to modify residential custody.

Standard of Review and Basic Legal Principles

An appellate court generally reviews a trial court's order granting or denying a request to modify custody for an abuse of discretion. *State, ex rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 861-62, 491 P.3d 652 (2021); *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1031, 186 P.3d 852 (2008). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). The party asserting the district court abused its discretion bears the burden of proving that error occurred. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

In deciding whether the district court abused its discretion, we review the evidence in the light most favorable to the prevailing party to determine if the district court's factual findings are supported by substantial competent evidence and whether they support the court's legal conclusions. We do not reweigh the evidence, pass on witness credibility, or redetermine questions of fact. *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 704-05, 229 P.3d 1187 (2010). "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." *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 (1998).

Overall, the "paramount consideration" of the district court in deciding child custody or residency is the best interests of the children. *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011); see K.S.A. 2022 Supp. 23-3201. Under K.S.A. 2022 Supp. 23-3218(a), a district court is authorized to "change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown." Thus, when a proper motion and notice is filed, the court may modify and change any order involving custody, residency, visitation, and parenting time previously made upon a showing of a material change in circumstances which makes

modification in the best interests of the child. See K.S.A. 2022 Supp. 23-3218(a); K.S.A. 2022 Supp. 23-3221(a).

"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.' [Citations omitted.]" *In re Marriage of Bahlmann*, 56 Kan. App. 2d 901, 908, 440 P.3d 597 (2019).

Support for Material Change Finding

The district court based its finding regarding a material change and ultimately its final decision to modify custody on the following facts:

- Mother's "actions at the end of 2020 and beginning of 2021," which demonstrated "an unwillingness to coparent" and conflicted with the children's best interests;
- Mother's act of leaving the children with a person not listed in her "enlistment paperwork" and without Father's approval;
- Mother's "inability to communicate, cooperate and manage parental duties with Father," as demonstrated by her refusal to provide Father an updated address, unilateral decision-making "regarding the care and custody of the children," and failure to "cooperat[e] with Father to find a custodian both parents agreed to";
- The residency of the children changed to living with Father after the district court granted Father temporary custody, as was "necessary" to address Mother's decision to leave the children with a friend against Father's objection.

Mother argues that the district court abused its discretion by relying too heavily on her temporary deployment to support its decision to modify residential custody. Mother asserts that this alone constitutes reversible error, citing *In re Marriage of Rayman*, 273 Kan. 996, 47 P.3d 414 (2002). There, our Supreme Court directed that "[t]he temporary transfer of the parent with residential custody must not automatically trigger a custody change." 273 Kan. at 1001.

The material change in circumstances, however, was due to Mother's "actions at the end of 2020 and beginning of 2021," which caused the change in the children's residency. Mother's actions included leaving the two children with a friend, not listing this friend as a caregiver in her enlistment paperwork, choosing to ignore Father's objections and having her friend care for the children, hiding her Army Reserves enlistment from Father, and not providing her address for her Missouri basic training to Father. In its written ruling, the district court referred to Mother's actions during the period "at the end of 2020 and the beginning of 2021," which led to the children's residency move. The court's order explained that temporary orders were necessary "as Mother had left the children with a friend, over the objections of Father." It was Mother's behavior during that period—not her enlistment—which cause the material change in circumstances.

The district court explained that there had been earlier concerns about the parents' willingness and ability to "respect and appreciate the bond between the children and the other parent." Mother had not followed the court's orders. Rather, the court found her behavior demonstrated an unwillingness to coparent:

"Mother's actions at the end of 2020 and beginning of 2021 were not done in the best interests of the children. Mother left the children with a friend, who was not the individual listed in her enlistment paperwork, and over the objections of Father. She did

not demonstrate any willingness to coparent with Father or appreciate his bond with the children."

Unlike Mother, the district court noted, Father "heeded the court's previous order and findings" and demonstrated "a willingness to work with Mother and respect for her role as a parent." In support, the court cited to Father's testimonial evidence and the admitted exhibits of the parents' Talking Parents conversations.

Additionally, the district court explained how Mother's actions "at the end of 2020 and beginning of 2021" caused further disruption:

"Mother's actions at the end of 2020 and beginning of 2021 demonstrated a serious inability to communicate, cooperate and manage parental duties with Father. Mother would not provide Father her physical address and left the children with a friend instead of cooperating with Father to find a custodian both parents agreed to. Mother unilaterally made decisions regarding the care and custody of the children and cut Father out as a parent."

Mother also fails to acknowledge how she did not follow the district court's initial order of parenting between the two parents. The court never entered an order allowing either parent's friend to have custody of the children on a temporary basis. Mother also suggests that the district court relied too heavily on the children's placement with Father because the district court caused that change when it erroneously granted Father temporary custody. This argument fails as Father convincingly shows that the record contained sufficient support for the district court's finding regarding a material change in circumstances and that modification of residential custody was in the children's best interests.

Mother's argument that the district court abused its discretion in finding there was a material change of circumstances that warranted a change in the best interests of the

children fails. The district court resolved the disputed evidence and made factual findings supported by substantial competent evidence. The district judge—who had presided over the initial child custody proceedings in 2019—heard the evidence and saw each witness who testified. Particularly in child custody cases, "[i]ssues of credibility are the providence of the trial courts." *In re Marriage of Rayman*, 273 Kan.at 1001.

In this case, we cannot say that no reasonable person would have come to the same conclusion. Because we conclude that Father's motion and the supporting testimonial evidence does allege a material change in circumstances, the district court did not abuse its discretion in granting Father's motion to change residential custody. We see no reason to modify the district court's holding on this point, as we find no abuse of discretion. See *In re Marriage of Grippin*, 39 Kan. App. 2d at 1031.

The district court's order modifying custody is affirmed.

III. THE DISTRICT COURT DID NOT ERR IN DENYING MOTHER'S REQUEST TO ADMIT HER MILITARY FILE AT THE HEARING

In her final appellate claim, Mother challenges the district court's evidentiary ruling excluding her military file as evidence at the evidentiary hearing. Mother does not appeal the district court's contempt ruling or order for attorney fees and costs. She, instead, specifically limits her arguments to the district court's evidentiary ruling entered at the end of the second day of trial.

Given Mother's decision not to include a claim regarding the district court's contempt decision or proceedings in her appellate brief, Mother waives or abandons any such claims. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

Jurisdiction

Father again argues that we lack jurisdiction to consider Mother's argument. In this regard, Father correctly notes that Mother's notice of appeal specifically identified the district court's order entered on March 8, 2022. Also, Mother did not include any catch-all language in her notice of appeal. So, any issues that Mother raises in her appellate brief that are unlike the issues decided in the district court's March 8 order should be dismissed. See K.S.A. 2022 Supp. 60-2103(b) (notice of appeal "shall designate the judgment or part thereof appealed from"); *Gates v. Goodyear*, 37 Kan. App. 2d 623, 628-29, 155 P.3d 1196 (2007) (notice of appeal should be given liberal construction but where it does not address same issues as argued on appeal and does not contain "catch-all" language, appellate court's jurisdiction is limited to rulings identified in notice of appeal).

Although Mother did not reference the district court's ruling excluding her evidence in her notice of appeal, we have found we had jurisdiction in a somewhat similar context. In *Walker v. Regehr*, 41 Kan. App. 2d 352, 202 P.3d 712 (2009), the appellant referenced a specific journal entry without using catch-all language. However, another panel of this court found that the journal entry set forth the specific trial dates, during which the district court made the contested rulings on the appellant's trial objection. The panel also noted that the opposing party never claimed surprise or disadvantage in opposing the appellant's request for review. 41 Kan. App. 2d at 356.

The same is true here. Mother appeals the district court's order entered on March 8, 2022. That order states that trial was held on "August 30, 2021 and February 17, 2022." The district court denied Mother's request to admit her evidence on February 17, 2022. Father does not claim that he was surprised or disadvantaged by Mother raising this claim. Thus, in broadly construing Mother's notice of appeal and under these specific circumstances, we find the notice of appeal was adequate to provide us with jurisdiction to review Mother's claim. See 41 Kan. App. 2d at 356.

Mother briefly references basic rules of evidence as the only legal basis for her challenge to the district court's ruling. In this regard, Mother argues that the district court erred by denying her request to admit the evidence because it was "material to her response to Petitioner's motion to modify custody." Mother does not provide us with any additional authority in support of her overall claim that she should have been allowed to admit the documents in her military file to show she complied with Father's requests for this information.

Mother then claims that Father relied on her alleged failure to produce the documents in her military file as a basis for his request to change custody. She thus argues that she should have been allowed to present evidence refuting that position. Even if we assume this is correct, the erroneous admission or exclusion of evidence is subject to review for harmless error. K.S.A. 2022 Supp. 60-261; *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016).

The record shows that regardless of Father's argument, the district court did not rely on this information in making its decision. True, the district court found Mother's failure to give Father an address when she was away at training was relevant in deciding Father's motion to change custody. The court did not, however, rely on the evidence showing Mother failed to abide by discovery requests to support its conclusion. As such, even if an error can be established here, the panel would likely find such error harmless. But cf. *In re Marriage of Ziebart*, No. 117,293, 2018 WL 1545786, at *13 (Kan. App. 2018) (unpublished opinion) (finding error in district court's reliance on findings that "Mother was not forthcoming at the evidentiary hearing and that she brought her initial motion to modify for financial reasons" to decide critical question of residential placement of her child).

IV. FATHER IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

On March 22, 2023, Father filed a request in this court for attorney fees and costs, arguing this appeal is frivolous. As support, Father argues that Mother cannot succeed on appeal because she consistently missed filing deadlines and failed to preserve her right to appeal by not filing a motion to reconsider in the district court. Father also notes that Mother further limited the issues she could raise on appeal by drafting her notice of appeal with particularity. Somewhat unrelated, Father also claims that Mother made false statements of fact in her appellate brief. He also includes an affidavit in support of his motion.

Mother filed a motion to file a late objection to Father's motion for attorney fees. We granted that request, and Mother filed an objection. Mother responded to some of the allegations that Father made in his motion and argued that these statements were evidence of Father's attorney's disdain for Mother's attorney. Mother thus argued that Father's statements had no bearing on the merits of her appeal and asked that his motion be denied.

We may award attorney fees if we find "that an appeal has been taken frivolously, or only for the purpose of harassment or delay." Supreme Court Rule 7.07(c) (2023 Kan. S. Ct. R. at 52). A frivolous appeal is one where "no justiciable question has been presented" and is without merit. *Blank v. Chawla*, 234 Kan. 975, 982, 678 P.2d 162 (1984). After reviewing this case, we find Mother's appeal does not meet this standard.

Even though we cannot review Mother's first or third issues on appeal—based on jurisdiction, preservation, or other legal principles—we find Mother's second appellate claim raises a justiciable question. This is true even if we do not agree with the merits of Mother's claim.

A residential parent's relocation or deployment may, but does not necessarily, constitute a material change in circumstances. See *In re Marriage of Rayman*, 273 Kan, at 1001 (declining appellant's request to adopt a bright line rule finding long term deployments necessarily constitute material change); see also *In re Marriage of McNutt and Gates*, No. 123,507, 2021 WL 4224660, at *6 (Kan. App. 2021) (unpublished opinion) (listing statute and cases similarly addressing whether relocation constitutes material change). As our Supreme Court explained, a material change requires a case by case analysis, and "[e]ach situation involving military families has distinct differences, as do the facts of temporary changes which relate to nonmilitary custodial relationships." *In re Marriage of Rayman*, 273 Kan. at 1001.

Here, by raising her argument that her deployment and temporary residency in another state did not justify modification of the custody order, Mother raised a justiciable question. We conclude that Mother's appeal was not frivolous and deny Father's request for attorney fees.

Affirmed in part and dismissed in part.