NOT DESIGNATED FOR PUBLICATION

No. 126,195

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

C.A.,
Appellee,

and

M.A.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; QUENTIN PITTMAN, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

Jordan E. Kieffer, of Jordan Kieffer, P.A., of Bel Aire, for appellant.

No appearance for appellee.

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: This case arises from a divorce proceeding involving four minor children. M.A. (Mother) appeals the district court's child custody and support decisions and claims the district judge was biased against her and should have recused himself. After carefully reviewing the record, we find no error and no disqualifying bias which would warrant recusal. We affirm the district court's decisions, which are supported by substantial competent evidence.

FACTS

Mother and C.A. (Father) married in 2006, and Father filed for divorce on July 21, 2021. Two months later, the district court entered an order awarding the parents shared residential custody of their four minor children. This arrangement continued through trial.

The district court held a bench trial in October 2022 to resolve their remaining disputed issues. The parents were the only witnesses, and they each represented themselves. After hearing the parties' testimony and reviewing their exhibits, the district court issued a journal entry of judgment and decree of divorce. The only decisions Mother challenges on appeal involve child custody and the amount of Father's child support arrearage.

The district court ordered the parties to continue shared residency of the children. In reaching this determination, it weighed the applicable statutory factors, the domestic conciliator's recommendation, and the best interests of the children. And while the court found Father owed Mother roughly $1,300 in child support arrearage, it offset that balance against the $1,600 Mother owed Father for their shared domestic conciliation bill. The court did not order Mother to pay Father the difference between the arrears and the domestic conciliation bill.

Mother appealed, raising three issues: (1) whether the district court judge demonstrated bias and/or should have recused himself from the matter; (2) whether the district court misapplied the statutory factors involving child custody; and (3) whether the district court erred in calculating child support arrearage. We address each of these issues in turn.

ANALYSIS

Did the district court judge show disqualifying bias against Mother?

Mother argues the district court judge should have recused himself from the case because he demonstrated "a spirit of ill will against Mother from the outset of the hearing, while showing favoritism towards Father." In support, Mother cites two remarks by the judge which she characterizes as "condescending" and "intimidating." She contends these remarks evidenced a "hostility" towards Mother which "severely impaired Mother's ability to represent herself effectively."

Recusal for bias or prejudice in Kansas

Under the Kansas Code of Judicial Conduct, Rule 601B, Canon 2, Rule 2.11(A)(1): "A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned," including where the judge has a personal bias or prejudice against a party. (2023 Kan. S. Ct. R. at 499). The recusal standard is an objective one, looking at whether a reasonable person with knowledge of all the circumstances might have reasonable doubt concerning the judge's impartiality. *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 778 (1984).

Normally, a party seeking to disqualify a judge should follow the procedure delineated in K.S.A. 20-311d by filing a motion for change of judge and if necessary, a subsequent affidavit explaining the rationale for the desired disqualification. *State v. Walker,* 283 Kan. 587, 605-06, 153 P.3d 1257 (2007).

Kansas courts employ a two-part test to determine whether the party's due process rights were violated by a judge's failure to recuse. The test first asks whether the judge had a duty to recuse from the case because they were biased, prejudiced, or partial. *Logan*, 236 Kan. at 86. The test then considers whether the party demonstrated actual

bias or prejudice by the judge to warrant reversal. 236 Kan. at 86. This court has often rejected claims of error in denials of motions for change of judge due to a lack of demonstrated prejudice. See e.g., *Walker*, 283 Kan. at 609; *State v. Reed*, 282 Kan. 272, 279, 144 P.3d 677 (2006); *State v. Griffen*, 241 Kan. 68, 73, 734 P.2d 1089 (1987).

Preservation

Mother did not object to the judge, nor did she file an affidavit under K.S.A. 20-311d to change judges. "Generally, the failure to file an affidavit showing prejudice bars the party from arguing that the trial judge erred by failing to recuse himself." *In re Equalization Appeal of Andover Antique Mall*, 33 Kan. App. 2d 199, 205, 99 P.3d 1117 (2004) (citing *State v. Alderson*, 260 Kan. 445, 453-54, 922 P.2d 435 [1996]; *State v. Snedecor*, 9 Kan. App. 2d 454, 456, 680 P.2d 563 [1984]).

Mother acknowledges that she did not follow the procedure outlined in K.S.A. 20-311d to change judges. Yet she cites *Alderson*, 260 Kan. at 453, and contends a party's failure to follow this procedure does not bar their later challenge because a judge has an independent obligation to recuse under the judicial canons if "the judge's *impartiality* might reasonably be questioned." Canon 2, Rule 2.11(A) (2023 Kan. S. Ct. R. at 499).

We find the issue preserved under these circumstances since Mother is complaining about remarks made during the parties' bench trial as evidence of bias. Nevertheless, we find Mother cannot prevail on the merits of her claim. *Alderson*, 260 Kan. at 453-54. We do not view the remarks—especially when they are considered alongside the entire record—the same way Mother does. Nor has Mother demonstrated actual bias or prejudice sufficient to warrant setting aside the district court's judgment. *Logan*, 236 Kan. at 86.

To begin, Mother cites two isolated remarks made during the bench trial to support her claim of bias or prejudice. The first comment was an admonition before Mother began her cross-examination of Father. The judge advised the parties, "This is adult court. We behave as adults."

Admonishments such as this only establish disqualifying bias if they "'display[] deep-seated and unequivocal antagonism that would render fair judgment impossible.'" See *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1151 (10th Cir. 2006) (citing *Liteky v. United States*, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 127 L. Ed. 2d 474 [1994]). We do not find this comment to reveal bias or prejudice against Mother. Instead, it seems inspired by the circumstances: Namely, one unrepresented party in an acrimonious divorce proceeding was preparing to cross-examine the other unrepresented party. The comment was directed at both parties and appeared to be aimed at preserving the decorum of the proceedings rather than suggesting the court was "showing favoritism towards Father," as Mother claims.

The second isolated comment similarly fails to show actual bias or prejudice. This comment was an off-the-cuff remark by the judge during Mother's non-responsive answer to questioning by the judge about dividing the parties' assets. During a lengthy and emotional recitation, Mother mentioned she had pursued and later dropped larceny charges against Father relating to an incident where Father had allegedly sent their oldest child to Mother's home to retrieve a bicycle for another one of their children to use to ride to school. While Mother was explaining these events, the judge stated, "I'll just say this, I'm really concerned that anytime there's a problem, you always go to the police. That's not normal."

After his comment, the judge allowed Mother to explain her purpose in filing police reports. And at the end of the trial, he told her that he had "no doubt in [his] mind that you, ma'am, are an excellent mother, clearly care about your children." While the

comment Mother complains about was imprudent, when taken in context, we find, as the court did in *Bolden*, that it shows frustration, not bias or prejudice. 441 F.3d at 1151.

"'Ordinarily, when a judge's words or actions are motivated by events originating within the context of judicial proceedings, they are insulated from charges of bias.'" 441 F.3d at 1151. We find both comments at issue to be so insulated. And, further, when viewing these two isolated remarks against the totality of the record, we have no reason to believe the judge was influenced in his ruling by a personal animosity towards Mother.

Mother also cannot satisfy the second prong of the test, which requires her to establish the district court's judgment should be set aside based on these two comments. Mother contends the court's bias against her led it to award shared custody of the children when it should have awarded Mother primary residential custody. But the fact that the judge ruled against Mother may not establish a finding of bias. K.S.A. 20-311d(d) ("the recital of previous rulings or decisions by the judge on legal issues . . . shall not be deemed legally sufficient for any belief that bias or prejudice exists"); *Smith v. Printup*, 262 Kan. 587, 608, 938 P.2d 1261 (1997).

We do not find Mother has shown disqualifying bias or prejudice by the district judge nor has she shown its custody ruling should be set aside on this basis.

Did the district court abuse its discretion in considering the statutory child custody factors when it awarded Mother and Father shared residential custody?

As noted above, Mother appeals the district court's ruling granting Mother and Father shared residential custody, arguing the district court erred by misapplying the statutory factors. Mother argues the district court applied the statutory factors incorrectly, disregarding evidence and testimony at trial. She claims the court should have awarded her primary residential custody.

Standard of review

The district court is in the best position to make the custody determination. Without any abuse of sound judicial discretion, the judgment will stand. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). A judicial action constitutes an abuse of discretion if it is: (1) arbitrary, fanciful, or unreasonable; (2) based on a legal error; or (3) based on a factual error. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party alleging an abuse of discretion has the burden of proving its existence. See *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

The job of the appellate court "is not to delve into the record and engage in the emotional and analytical tug of war between two good parents over [their child]." *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995). Rather, the district court holds the "better position to evaluate the complexities of the situation and to determine the best interests of the children." 258 Kan. at 45.

Specific factual findings made in support of determinations on a child's welfare and best interests are reviewed in the light most favorable to the prevailing party to determine whether they are supported by substantial competent evidence and support the district court's legal conclusion. *State, ex rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 862, 491 P.3d 652 (2021).

The district court applied the statutory factors correctly.

Under K.S.A. 2022 Supp. 23-3203, the Legislature provides several factors, along with a consideration of the best interests of the child, for courts to consider when determining legal custody, residency, and parenting time of a child. The factors relevant to a district court's decision on custody are not exclusive; the district court may consider any other relevant fact in reaching a decision. K.S.A. 2022 Supp. 23-3203(a).

Following the bench trial, the district court issued a journal entry detailing its decision. After considering all the residential factors under K.S.A. 2022 Supp. 23-3203, as well as the best interests of the children, the evidence presented, and the domestic conciliator's recommendation, the district court ordered joint legal custody and shared residential custody of the children.

On appeal, Mother disputes the court's consideration of some of the statutory factors:

> "(1) [e]ach parent's role and involvement with the minor child before and after separation;
> . . . .
> "(8) 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;
> "(9) evidence of domestic abuse . . . ;
> "(10) the ability of the parties to communicate, cooperate and manage parental duties; [and]
> . . . .
> "(12) the work schedule of the parties." K.S.A. 23-3203(a).

Factor 1: Each parent's role and involvement with the minor child before and after separation

The district court stated: "The evidence presented to the Court is that both parties have been the children's primary caregiver since September 21, 2021." Mother disputes this factor, arguing that the district court ignored her testimony at trial that she was the primary caregiver before separation.

That the district court did not include all factual assertions made during the trial in the written journal entry does not mean the court overlooked facts. The court need not "recount all of the evidence in fashioning a written decision, and the omission of

particular situations or circumstances does not equate to a failure to consider the evidence about them." *B.R.M. v. M.B.W.*, No. 124,451, 2022 WL 1123666, at *3, (Kan. App. 2022) (unpublished opinion) (citing *Hildenbrand v. Avignon Villa Homes Community Assoc.*, No. 120,245, 2021 WL 137339, at *8 [Kan. App. 2021] [unpublished opinion]). Rather, the non-inclusion "commonly signals the district court found the evidence either unpersuasive or irrelevant." *B.R.M.*, 2022 WL 1123666, at *3; see also *State v. Cheatham*, No. 106,413, 2012 WL 4678522, at *2 (Kan. App. 2012) (unpublished opinion) (finding that even though district courts are encouraged to explicitly rule on credibility determinations, appellate courts can recognize a district court's implicit credibility findings).

The district court had the best position to evaluate the testimony of the parents at trial. Both parents testified they were significantly involved with their children before and after the separation. The district court weighed their testimony and considered the significance of the children's shared custody arrangement in the year prior to trial. We respect its decision and cannot reweigh the evidence on appeal.

Factor 8: The willingness and ability of each parent to respect and appreciate the bond between child and the other parent

The district court found that "[b]oth parties have issues with each other respecting and appreciating the other parent's bond between the children and parent." Mother argues that this was a misstatement of evidence and demonstrates bias against her, stating "[e]vidence at the trial indicated that Father does not encourage or appreciate the bond between the Children and Mother." Mother cites *In re Marriage of Flipse*, No. 103,375, 2010 WL 2670879 (Kan. App. 2010) (unpublished opinion), for the proposition that where this factor suggests a breakdown, "[c]ourts will typically award primary residential custody to one parent, rather than shared custody."

Mother overstates our holding in *In re Marriage of Flipse.* That case concerned a modification of a custody order where the district court found the mother failed to respect the bond between her child and the child's father. 2010 WL 2670879, at *1. The panel found ample evidence supported the district court's conclusion. In doing so, the panel noted that it is "irrelevant whether this court would have reached a different decision based upon the reading of the evidence; the only consideration is whether the district court abused its discretion in reaching its decision." 2010 WL 2670879, at *3.

Likewise, we do not consider whether we would have reached a different decision than the district court. The function of a reviewing court is not to "delve into the record and engage in the emotional and analytical tug of war between two good parents." *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995).

At trial, both parties testified that they could respect and appreciate the bond between their children and the other parent. The district court was in the best position to weigh the sincereness and credibility of both parents and concluded that there are issues with both parties on this factor. Ultimately, the district court found that shared custody was in the best interests of the children, considering all relevant statutory factors.

Factor 9: Evidence of spousal abuse, either emotional or physical

The district court noted that "Respondent filed a [protection from abuse order] against the Petitioner (22DM4292) and received a final order on August 11, 2022. The Respondent claims Petitioner abused her during the marriage by controlling the parties' finances." Mother argues this was a mischaracterization and minimization of her abuse claims and "is yet another example of a domestic abuse victim being ignored or not believed by the district court."

In re Marriage of Flipse presented a similar argument. In that case, the mother cited to the psychological evaluator's testimony at trial to support the assertion that the evaluator's recommendations were "'clear and direct'" that it was not in the child's best interests to give father primary residential custody. 2010 WL 2670879, at *2. The panel found the mother's argument unconvincing given the appellate court's duty to look "only to evidence that supports the district court's decision in order to determine if discretion has been abused." 2010 WL 2670879, at *3 (citing *In re Marriage of Whipp*, 265 Kan. 500, 502, 962 P.2d 1058 [1998]).

Here, Mother presented the district court with merely her own testimony and citation to a domestic case in which a protection from abuse order was final. After Mother testified that Father abused her, the court noted that no police reports were provided to the court nor were any identified as exhibits before trial. At the end of the trial, the court suggested to Mother that if she had problems with Father in the future, she should bring those problems to the court's attention. There was no other evidence of abuse nor support for her argument that the district court mischaracterized or minimized her abuse. We do not find the court abused its discretion in weighing this factor in making its custody decision.

Factor 10: Ability of the parties to communicate, cooperate and manage parental duties

The district court found that "[t]he parties' ability to communicate, cooperate, and manage parental duties is strained." Mother argues that the "evidence in the record demonstrates that Father does not communicate with Mother to cooperate and manage the parental duties." Mother further cites to *Frakes v. Frakes*, No. 114,954, 2016 WL 4414021 (Kan. App. 2016) (unpublished opinion), to assert that courts recommend awarding "primary residential custody to one parent, rather than shared custody" when there is a breakdown in the parents' ability to interact in the ways considered by this

factor. In her citation, Mother states that *Frakes* found that "one parent should have primary residential custody because the other parent did not support the bond and generally did not communicate with him about the children."

Contrary to Mother's reading of *Frakes*, the panel in *Frakes* held that the district court's finding should not be disturbed because it was supported by substantial competent evidence. 2016 WL 4414021, at *8. The panel noted the district court's finding—that the mother failed to provide the father with relevant information—had support in the record. 2016 WL 4414021, at *8. The panel concluded that although "the evidence was contested, the district court's findings are supported by evidence in the record. The two parents gave very different stories. The district court had to decide which parent was more credible." 2016 WL 4414021, at *8. Mother's reading of *Frakes* is contrary to the text of the opinion, and appellate courts do not reweigh evidence or assess credibility of witnesses on appeal.

The district court heard testimony from both parents about the other parent's inability to communicate, cooperate, and manage parental duties. Being in the best position to assess credibility, the district court concluded the ability was strained but still found shared custody to be in the best interests of the children.

Factor 12: The work schedule of the parties

The district court stated that "[b]oth parties claim their work schedule enables them to take care of the children." Mother argues that "evidence presented to the district court demonstrates that Mother's work schedule was consistent and predictable, whereas Father's schedule was erratic."

This court's job is not to reweigh evidence or assess credibility of witnesses. The testimony given at trial supports the district court's finding that both parties claim their work schedules enable them to take care of their children. Father testified that his work schedule would continue the way it was under the previous parenting plan in place. He testified that he worked nights and during the day on Friday, Saturday, and Sunday. Father testified that he is off Monday and Tuesday, and on Wednesday mornings, he takes the kids to school and works that night. The district court had testimony from both parties to consider and found each party claimed they could take care of their children under their respective work schedules.

Mother asks this court to reweigh evidence and substitute judgment for the district court's judgment.

"While an appellate court has only the printed page to consider, the trial court has the advantage of seeing the witnesses and parties, observing their demeanor, and assessing the character of the parties and quality of their affection and feeling for the children." *Simmons v. Simmons*, 223 Kan. 639, 643, 576 P.2d 589 (1978). The district court had that advantage and found that shared residential custody was best supported by the evidence.

Mother argues the district court misapplied the statutory factors, but the essence of her argument is that the district court came to the wrong conclusion on the evidence presented. On appeal, unless no reasonable judge would draw the same conclusion, the district court's decision will stand. Here, the court followed the recommendation of the independent domestic conciliator and reasonably weighed the statutory factors in K.S.A. 2022 Supp. 23-3203 in making its custody decision.

The district court did not err by ordering neither party owed child support.

While Mother's argument is brief on this point, she asserts the district court disregarded evidence she provided and sua sponte made its own findings on child support. She cites an exchange at trial where the district court disagreed with Mother's statement that Father was over $16,000 in arrears on child support. She claims the court disregarded her testimony on this point and that the court's attitude showed hostility towards her and favoritism towards Father.

Mother cites no evidence on appeal to support her claim that the district court erred. In a later portion of the trial, the district court referenced records which are not in the record on appeal which the court stated showed Father's arrearage was a little under $1,300. Mother did not object or comment in response to this observation.

The journal entry reflects that the district court relied on the previous order of child support issued when Father filed for divorce on July 21, 2021. The order set the balance at $1,297 but was later changed when the district court granted Father's motion to modify the child support order and ordered neither party pay child support on September 21, 2021. The district court's final order contained in the journal entry reaffirms the temporary order, that no party owed child support. Because Father still owed child support and Mother owed Father her share of the domestic conciliation bill, the district court offset the amounts so that neither party owed the other anything.

We cannot reweigh the evidence on appeal and see no error in the district court's child support findings.

CONCLUSION

We find Mother has not shown disqualifying bias or prejudice by the district judge nor has she shown its custody ruling should be set aside on this basis. We also find the district court did not abuse its discretion when considering the statutory factors in making the custody determination and when weighing the evidence in its ruling regarding child support. We therefore affirm the district court on all issues appealed by Mother.

Affirmed.