NOT DESIGNATED FOR PUBLICATION

No. 124,967

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

K.U.,
Appellee,

and

C.U.,
Appellant.

MEMORANDUM OPINION

Appeal from Geary District Court; COURTNEY D. BOEHM, judge. Opinion filed April 7, 2023. Affirmed in part, reversed in part, dismissed in part, and remanded with directions.

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

Mark Edwards, of Hoover, Schermerhorn, Edwards, Pinaire & Rombold, of Junction City, for appellee.

Before GARDNER, P.J., MALONE and HILL, JJ.

PER CURIAM: This is an appeal of an order denying genetic testing of a child. We use initials to ensure the privacy of the child that is the focus of this case.

C.M.U. asked the district court to order genetic testing of C.W.U. to determine whether he was the boy's father. The court, after holding two hearings on the matter, decided that it was not in the best interests of the child to order testing. The court made

this order even though C.M.U. had obtained genetic testing that suggested he was not the biological father. Because C.M.U. is basically asking us to reweigh the evidence, which appellate courts cannot do, we affirm the district court's ruling that it is not in the best interests of C.W.U. to order genetic testing.

For his second issue, C.M.U. complains that the district court abusively denied his motion for relief from the judgment made under K.S.A. 60-260(b), because the court would not allow him to present evidence and witnesses to show that K.U., the mother of the child, either misrepresented or was fraudulent in her testimony about the biological father of the boy. A spirit of fundamental fairness leads us to hold that by not allowing any testimony or argument about this motion, the court was arbitrary and unreasonable. We therefore reverse and remand this issue for the court to entertain the motion.

In his final issue, C.M.U. argues that our Kansas Supreme Court has violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with its current interpretation of the Kansas Parentage Act. We decline to address this issue as it was not brought up in district court and is not preserved for appeal. C.M.U. has given no explanation on how any of the exceptions to the rule apply here and we dismiss this issue.

A brief history of the parties' relationship provides context for the ruling.

C.M.U. and K.U. met through an online dating application in March 2016. At that time, C.M.U. had just completed basic training in Georgia for the United States Army. The two went on their first date near the beginning of April 2016, had intimate relations, and about two weeks later, K.U. told C.M.U. that she was pregnant. In July 2016, K.U. and C.M.U. were married. K.U. then moved in with C.M.U. on post at Fort Benning in Georgia. In December 2016, C.W.U. was born. In 2019, while K.U. and C.M.U. were still married, another child, W.U., was born.

The marriage continued until March 2020, when K.U. filed for divorce. K.U. sought primary residential custody of both children. The next month, C.M.U. filed an answer and cross-petition.

In June 2020, K.U. moved for temporary orders requesting, among other things, that C.M.U. pay $1,776 in child support in accordance with the Kansas Child Support Guidelines. The motion stated that the children had resided exclusively with K.U. since she filed the petition for divorce. The motion also alleged that C.M.U. had not put forth consistent effort to see the children. K.U. also submitted a child support worksheet and a proposed parenting plan. The proposed parenting plan requested that C.M.U. and K.U. have joint custody of the children and they reside with her.

The next month, C.M.U. received a paternity test report from an over-the-counter paternity test he performed on C.W.U. The results of the test showed there was a zero percent probability that C.W.U. was C.M.U.'s biological child.

In September 2020, C.M.U. petitioned for annulment. The petition incorporated the paternity test results and alleged that K.U. had not told C.M.U. the truth about C.W.U.'s paternity. Similarly, the petition alleged that K.U. repeatedly assured C.M.U. he was C.W.U.'s father. C.M.U. eventually withdrew the petition for annulment.

In December 2020, the district court notified the parties of a scheduled hearing under *In re Marriage of Ross*, 245 Kan. 591, 783 P.2d 331 (1989). The purpose of a *Ross* hearing is to allow a district court the opportunity to consider the best interests of a child before ordering genetic testing to determine whether a presumed parent is a biological parent. 245 Kan. at 602-03.

In January 2021, the court-appointed guardian ad litem filed a pretrial report. The GAL had interviewed C.M.U., K.U., and several other possible witnesses. After outlining

the testimony from each person interviewed, the GAL considered several factors in determining what it believed C.W.U.'s best interests were. After doing so, the GAL stated:

> "For all these reasons, in weighing the factors, it does appear that it is in the child's best interest to know his paternity. At this time, everyone knows that [C.M.U.] is not the biological father. Whether or not [C.M.U.] should [have] done that is not the question right now. That cat is out of that bag and cannot be put back in."

Ultimately, the district court held two *Ross* hearings. We offer highly summarized accounts of the various witnesses' testimony.

At the first hearing, C.M.U. testified that he and K.U. met on an online dating application in March 2016. At that time, he had recently completed basic training in the United States Army and was stationed at Fort Benning in Georgia. K.U. and C.M.U. began communicating consistently after meeting online, and they met in person for the first time near the beginning of April 2016. The first weekend they spent together, C.M.U. and K.U. had intimate relations.

Roughly two weeks later, K.U. informed C.M.U. that she was pregnant. C.M.U. said he doubted whether the child was his, as did his mother and sister. C.M.U. also claimed he asked K.U. to submit to genetic testing, but she did not agree to it. That said, C.M.U.'s doubt diminished after K.U. convinced him the child was his using a conception calendar. C.M.U. claimed K.U. never told him there was a possibility the child was not his, and he would not have married K.U. had he not believed the child was his. C.M.U. said K.U. at some point admitted to having intimate relations with someone else two weeks before meeting him, though she never told C.M.U. the individual's name.

When C.W.U. was born in December 2016, C.M.U. was ecstatic. C.M.U. said he always wanted a son, and he routinely referred to C.W.U. as "my boy." C.M.U. also gave C.W.U. the same first name as him, a family name. C.M.U. said he and C.W.U. had a good relationship, though C.M.U. acknowledged there were times he could not be with C.W.U. due to his military obligations. But C.M.U. said the relationship changed once he obtained the results of the genetic testing.

When asked about the genetic testing, C.M.U. said he had it done because he wanted to ensure that C.W.U. was his biological child. Part of C.M.U.'s motivation was because his mother, V.U., had been in a similar predicament as C.M.U. C.M.U. said that V.U. was devastated to discover later in life that the person she knew as her father was not her biological father. By the time V.U. learned the truth, her biological father had died, and she never got to know him.

C.M.U. said he had a similar reaction when he learned C.W.U. was not his biological child. C.M.U. went to counseling to relieve some of the trauma, but he said he still had trouble dealing with it. C.M.U. said he could not look at C.W.U. the same, and often he would cry when he saw C.W.U. He did not believe he would ever overcome learning the truth about C.W.U.'s paternity.

C.M.U. felt it was important for C.W.U. to learn the truth about the paternity because C.M.U. wanted to afford C.W.U. the opportunity to develop a relationship with his biological father. C.M.U. also refuted the notion that he had paternity testing done to avoid paying child support for two children. C.M.U. said that no matter what the district court ruled, he would continue to look for C.W.U.'s biological father because he also wanted C.W.U.'s biological father to have the opportunity to meet and know C.W.U. He also testified that K.U. has never revealed the name of C.W.U.'s biological father to him, despite his asking her several times.

After learning of C.W.U.'s paternity, C.M.U. stopped having parent time with him because C.M.U. did not want to confuse him anymore than he already was. In C.M.U.'s opinion, C.W.U. still had the chance to recover easily if he learned C.M.U. was not his biological father because he was so young. C.M.U. also stopped having visitation with C.W.U. because of how it affected C.M.U. emotionally. C.M.U. said no matter how hard he tried, he could no longer view C.W.U. the same way. Because of this, C.M.U. did not wish to continue in the role of C.W.U.'s father.

As for the other child, C.M.U. said he tried to get visitation with only W.U., but K.U. did not allow him to see one child without the other. C.M.U. also knew K.U. planned to move to Georgia shortly after the *Ross* hearing, and he knew it would be difficult to see either child if he remained in the military. In short, C.M.U. believed K.U. would not allow him to have a relationship with W.U. after the divorce.

On cross-examination, C.M.U. said he knew R.W., K.U.'s best friend. C.M.U. said he never discussed genetic testing with R.W. because he felt it was none of R.W.'s business. C.M.U. also denied that R.W. ever encouraged him to do genetic testing.

This was a military family. C.M.U. described where he was stationed at various points during the marriage. C.M.U. said he was stationed at Fort Benning in Georgia from December 2016 until April 2018. Aside from the time C.M.U. spent at different military schooling and training, the family lived together at that point. From May 2018 to December 2018, C.M.U. was stationed at Fort Riley in Kansas and the family lived together. In January 2019, C.M.U. deployed to Poland, where he remained until September 2019. During at least some of that time, K.U. and C.W.U. lived in Oklahoma with C.M.U.'s sister and her then-husband. After C.M.U. returned from Poland, the family returned to Fort Riley in Kansas.

V.U. testified next and discussed her personal history with genetic testing. V.U. said that later in life, she discovered that the person she knew as her father was not her biological father. V.U. then tried to locate her biological father, but she discovered he had died. V.U. said it was frustrating she did not have an earlier opportunity to find her biological father.

When C.M.U. originally told V.U. that K.U. was pregnant, V.U. was shocked and upset. V.U. immediately asked C.M.U. whether the child belonged to him and suggested that he should have genetic testing done. V.U. suggested doing so because she knew he and K.U. had not been together long, and she wanted C.M.U. to be sure the child belonged to him. V.U. said she suggested genetic testing multiple times, but C.M.U. never did any. After obtaining the paternity results, C.M.U. called V.U., and she said he was devastated. Based on her own experience, V.U. felt it would be important that C.W.U. know his biological father.

On cross-examination, V.U. said she was present for C.W.U.'s birth. At that time, V.U. again suggested genetic testing be performed, but C.M.U. was convinced C.W.U. was his, so no tests were performed. When asked about the bond between C.M.U. and C.W.U., V.U. opined it had been broken since C.M.U. discovered he was not the biological father. V.U. said C.M.U. often struggled when he saw C.W.U. because of the grief the discovery caused him. V.U. also said she did not think the bond between the man and boy would ever return to what it was before.

C.M.U.'s sister testified next. She described the relationship between her and her brother as close. When she discovered K.U. was pregnant, she urged C.M.U. to have genetic testing done multiple times.

T.M., C.M.U.'s former brother-in-law, testified next. T.M. said he had been married to C.M.U.'s sister, but the two divorced around the beginning of 2020. T.M.

learned of K.U.'s pregnancy from C.M.U.'s sister. When he learned K.U. was pregnant, T.M. advised C.M.U. to do genetic testing. T.M. also suggested to C.M.U. that he should not get married. In response, T.M. said C.M.U. revealed that he wanted to settle down and start a family, even though he knew C.W.U. might not be his child.

J.M., C.M.U.'s close friend from the Army, testified after T.M. J.M. said he was present the day C.W.U. was born, but he did not remember speaking about genetic testing. Nor did he recall any conversation between C.M.U. and himself about the possibility of C.M.U. not being C.W.U.'s father. In October 2019, J.M. visited C.M.U., K.U., and the children at Fort Riley in Kansas. During that visit, J.M. said C.W.U. knew C.M.U. as his father, and everything else about the relationship between K.U. and C.M.U. seemed normal. Eventually, J.M. learned that K.U. and C.M.U. had separated and C.W.U. was not C.M.U.'s biological child. C.M.U. had stopped seeing C.W.U. and this spoiled J.M.'s relationship with C.M.U.

A.C., K.U.'s mother, testified next. A.C. said that she and K.U. have a good relationship and communicate daily. When K.U. told A.C. she was pregnant, K.U. said there was a possibility C.W.U. was not C.M.U.'s child. Even so, A.C. said she never suggested genetic testing to K.U. or C.M.U. Once C.M.U. performed genetic testing, A.C. said K.U. was shocked to learn C.M.U. was not C.W.U.'s father. A.C. also said K.U. was hurt when C.M.U. no longer considered himself C.W.U.'s father after learning the results.

Around Christmas 2019, K.U. and C.M.U. stayed with A.C. in Georgia. At that time, C.W.U. was three years old. A.C. said C.M.U. and C.W.U. still had a strong relationship at that point. A.C. also described C.M.U. as a good father who always spent time with the children.

On cross-examination, A.C. maintained that K.U. was shocked to learn C.M.U. was not C.W.U.'s biological father, even though she and K.U. had discussed that possibility. A.C. also said she did not know who the biological father was, but she knew K.U. reached out to him at one point. A.C. also said K.U. informed her that the biological father did not want to participate in C.W.U.'s life.

R.W. was the final witness during the first *Ross* hearing. R.W. testified that K.U. lived with her when K.U. and C.M.U. first met. On their first date, K.U. and C.M.U. came to R.W.'s house. C.M.U. spent the night at R.W.'s house that night, and R.W. said C.M.U. was at her house almost every weekend after that.

R.W. recalled learning about K.U. being pregnant about two weeks after she and C.M.U. first met in person. R.W. and K.U. then discussed whether C.M.U. was the father of the child, and K.U. told R.W. she was uncertain. R.W. also knew that K.U. had an intimate relationship with another individual before meeting C.M.U. online. At some point, R.W. said that she, K.U., and C.M.U. had a conversation at her house about the pregnancy. During that conversation, R.W. said K.U. told C.M.U. she did not think the child was his. R.W. said C.M.U. responded by saying the child belonged to him and mentioned getting married. Soon after, K.U. began to look at wedding rings.

When C.W.U. was born, R.W. knew that V.U. asked for genetic testing. Even so, R.W. said C.M.U. did not press K.U. about performing such testing. After C.W.U.'s birth, R.W. said she observed C.M.U. and C.W.U. interact several times. R.W. said C.M.U. and C.W.U. had a strong and loving relationship.

At the second *Ross* hearing, K.U. testified. She agreed that she and C.W.U. met online through a dating application in 2016 and messaged each other frequently. K.U. also agreed that she lived in Jackson, Georgia, at the time, while C.M.U. was stationed at Fort Benning in Georgia. K.U. lived with R.W. and said she and C.M.U. met for the first

time in person on April 1, 2016. C.M.U. spent the night the first night, and the two then spent the weekend together. During that weekend, the two had intimate relations. After that weekend, K.U. said C.M.U. would drive to Jackson often.

K.U. recalled learning of her pregnancy on April 18, 2016. The same day, K.U. told C.M.U. about the pregnancy, as well as the possibility that he was not the father. The next day, K.U. said that C.M.U. drove to Jackson and she, R.W., and C.M.U. discussed the pregnancy. During that conversation, R.W. told C.M.U. the timeframe between when he and K.U. met, and K.U.'s ensuing pregnancy, did not add up. But K.U. said C.M.U. did not care about being told he was possibly not the father. Instead, C.M.U. suggested that he loved K.U. regardless and wanted to get married and start a family.

Later, C.M.U. visited K.U. more often, and he proposed on July 15, 2016. Four days later, K.U. and C.M.U. got married, and K.U. moved to Fort Benning to live in a house on post with C.M.U. K.U. said C.M.U. did not give any indication that he had second thoughts during her pregnancy. After C.W.U. was born in December 2016, K.U. said C.M.U. and C.W.U. had a strong relationship immediately.

Shortly after C.W.U.'s birth, K.U. and C.M.U. moved off post at Fort Benning to living quarters in Phenix City, Alabama. Not long after, K.U. and C.M.U. moved to Fort Riley, Kansas and lived there from April 2018 until January 2019. After C.M.U. deployed to Poland, K.U. said she and C.M.U. communicated via text messages and video calls.

Despite the time C.M.U. was deployed out of the country or away from the home for other military matters, K.U. maintained that the strong relationship between C.M.U. and C.W.U. continued until C.M.U. took the over-the-counter genetic test in July 2020. After C.M.U. did so, he asked to only have visitation with W.U., but K.U. would not

allow him to do so. Her position was that he was the father of both children, and it would upset them if he took only one and not the other.

Just before taking the over-the-counter genetic test, K.U. and C.M.U. had discussions concerning child support, with C.M.U. suggesting he could not afford the amount of child support he would have to pay. K.U. argued that C.M.U. did the genetic test to avoid having to pay child support for two children.

During cross-examination, K.U. said she recalled speaking with the GAL in the case. In the GAL's report, it explained that K.U. had reached out to C.W.U.'s biological father, N.A. K.U. said she did not know N.A. well, but she remembered who he was. K.U. also did not know where N.A. lived, but she messaged him through social media. In those messages, K.U. said N.A. revealed he did not want to be part of C.W.U.'s life. She also said she no longer had access to those messages.

The district court's ruling

In the memorandum decision, the district court weighed various factors in deciding whether genetic testing to determine paternity was in C.W.U.'s best interests. After considering those factors, the evidence, the testimony, and the GAL's pretrial brief, the district court found genetic testing was not in C.W.U.'s best interests.

C.M.U. then moved to set aside the judgment under K.S.A. 60-260(b). The motion focused on K.U.'s testimony at the *Ross* hearing and alleged that K.U. lied to the district court when testifying about N.A. To support these claims, C.M.U. attached copies of messages exchanged between K.U. and N.A. as an exhibit.

At the hearing on the motion, the district court did not hear testimony from any involved party. Instead, the district court reiterated its prior findings in the memorandum

decision and denied the motion. When C.M.U. pointed out that the motion was based on fraud, the district court found that K.U.'s testimony was not fraudulent.

This appeal followed.

We will not reweigh the evidence and substitute our judgment for the district court's judgment.

In this appeal C.M.U. argues that the district court erred by concluding it was not in C.W.U.'s best interests to conduct genetic testing.

This is a matter of discretion. We review a district court's findings on a child's best interests for an abuse of discretion. *Ross*, 245 Kan. at 597-98. 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 showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

The law that controls this issue is well settled.

Caselaw has developed 10 factors that a district court must consider in making a decision like the one in this case. They are listed in *Greer v. Greer*, 50 Kan. App. 2d 180, 195, 324 P.3d 310 (2014), where this court stated:

> "Over the years, courts have distilled the best interests of the child consideration present in paternity cases to include approximately 10 factors. These factors have been

> summarized as including: (1) whether the child thinks the presumed father is his or her father and has a relationship with him; (2) the nature of the relationship between the presumed father and child and whether the presumed father wants to continue to provide a father-child relationship; (3) the nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs; (4) the possible emotional impact of establishing biological paternity; (5) whether a negative result regarding paternity in the presumed father would leave the child without a legal father; (6) the nature of the mother's relationships with the presumed and alleged fathers; (7) the motives of the party raising the paternity action; (8) the harm to the child, or medical need in identifying the biological father; (9) the relationship between the child and any siblings from either the presumed or alleged father; and (10) whether there have been previous opportunities to raise the issue of paternity."

Our review of this record reveals that the district court examined all 10 of these factors. The district court found the following under each factor:

1. C.M.U. and C.W.U. have a strong and established relationship, though C.M.U. began withholding affection from C.W.U. after learning the results of the paternity test.
2. C.M.U. no longer wishes to be C.W.U.'s father.
3. There was no relationship between C.W.U. and N.A.; N.A. had only recently been identified, and the district court did not definitively conclude N.A. was C.W.U.'s biological father.
4. C.W.U. would be devastated to learn that C.M.U. is not his biological father.
5. C.W.U. would have no legal father if it concluded that C.M.U. was not the father.
6. K.U. and C.M.U. no longer have a stable relationship. The district court did not issue any findings on K.U.'s relationship with N.A.
7. Although C.M.U. raised the paternity issue, the district court did not find his motives for doing so were sincere. If paternity was an issue for C.M.U., he would have raised the issue long before the hearing. C.M.U. completed the

over-the-counter paternity test after K.U. filed for divorce, and after C.M.U. requested joint custody of both C.M.U. and W.U.

8. There was no compelling medical need to determine C.W.U.'s biological father.
9. C.W.U. and W.U. have a strong relationship, which would be affected.
10. C.M.U. and K.U. have moved a few times because of C.M.U.'s military obligations, and C.W.U. would not benefit by a determination of his biological father.

C.M.U. admits that the district court weighed all the factors from *Greer*. In fact, C.M.U. does not challenge how the district court weighed those factors. Nor does he dispute the conclusions the district court reached under any specific factor. Instead, C.M.U. argues the district court erred by not considering other factors.

C.M.U. contends the district court did not consider C.W.U.'s physical, mental, and emotional needs when rendering its decision. Similarly, C.M.U. argues the district court should have considered what role he would play in C.W.U.'s future and the emotional effect on him of finding out C.W.U. was not his biological son.

His arguments are not persuasive. First, C.M.U. does not explain his first argument—that the district court did not consider C.W.U.'s physical, mental, and emotional needs. He makes this assertion and calls it error, but he fails to explain how the district court failed to consider these factors. The language used by the court is filled with references of the concern it has for the boy's well-being.

Next, that argument is not supported by the record. The 10 factors listed in *Greer* are all distinct considerations that make an impact on a child's physical, mental, and emotional needs. By examining the 10 factors, the district court considered C.W.U.'s physical, mental, and emotional needs.

We notice a shift in C.M.U.'s argument. He moves from C.W.U.'s best interests to his own. After asserting the district court did not consider C.W.U.'s physical, mental, and emotional needs, C.M.U. then claims the district court ignored what impact the ruling would have on him, stating the district court "did not consider what it means to be a father." C.M.U. chides the district court for defining a father "as a man who pays child support." This argument misses the point. The main concern is the best interests of the child. See *Greer*, 50 Kan. App. 2d at 194-95.

Realistically, it is up to C.M.U., not the district court, to choose how actively he participates in C.W.U.'s life or how he treats C.W.U. in the future. If he chooses to be a man who just pays child support or chooses to remain aloof and distant, then that will be the father-role he will play in this boy's life. The court remained properly focused on the central question—Is this in the best interests of the child?

We are not persuaded by the criticism of the court's treatment of the GAL report. C.M.U. asserts the district court effectively disregarded the GAL's pretrial brief. C.M.U. points to a section of the district court's memorandum decision, in which it stated: "While the Court appreciates the time and attention the Guardian ad Litem put into this matter, her recommendation is merely one factor for the Court to consider when determining the best interests of the child."

But the district court's analysis is correct. After all, the duty of the GAL is to make an independent investigation of the facts on which the paternity petition is based and then to appear and represent the best interests of the child at the hearing. *Ross*, 245 Kan. at 597. The district court's duty is to then consider the recommendation of the GAL, along with the other evidence and testimony in the case, to decide a child's best interests. See 245 Kan. at 597-98. A court is not bound to follow the recommendations of a GAL.

In a child custody dispute, our Supreme Court has said the court may weigh the report but is not forced to agree:

> "Without question, a GAL does have an important role in child custody disputes, but the panel's apparent presumption that the district court disregarded the GAL's recommendation is not supported in the record. Mother validly reminds us that the written order is *not* the only document in the appellate record and the GAL *was* a full and active participant throughout the proceedings from the time she was appointed, including during the evidentiary hearings. We can only presume the district court heard and considered the GAL's questions and her recommendations, all as set forth and included in the official record. The only conclusion we can make with assurance is that the district court did not agree with the GAL. But the court is not required to agree with the GAL." *State, ex rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 863, 491 P.3d 652 (2021).

The same rule is true here in this paternity case. The GAL interviewed several witnesses while preparing the pretrial brief. But the GAL also appeared and participated at both *Ross* hearings. Simply because the district court did not agree with the GAL does not mean the district court disregarded the GAL's recommendation.

A fair reading of C.M.U.'s argument on this issue leads us to conclude that he is asking us to reweigh the evidence. But that is not this court's function on appeal when reviewing for an abuse of discretion. See *State ex rel. Secretary of DCF v. Smith*, 306 Kan. 40, 60, 392 P.3d 68 (2017). In *Ross*, 245 Kan. at 598, the court held that the test is whether no reasonable person would agree with the district court. Because the record supports the district court's findings, we hold the district court did not abuse its discretion when it decided that it was not in C.W.U.'s best interests to order paternity testing.

We are concerned about the summary dismissal of C.M.U.'s motion.

For his second issue on appeal, C.M.U. argues the district court erred by refusing to hear testimony on his K.S.A. 60-260(b) motion.

This motion focused on K.U.'s testimony at the *Ross* hearing. C.M.U. alleged that K.U. lied to him when she said she did not know who N.A. was. To support this assertion, C.M.U. noted that K.U. revealed N.A.'s name to the GAL. C.M.U. also alleged K.U. lied to the district court during the hearing when she testified N.A. wanted nothing to do with C.W.U. Similarly, C.M.U. alleged K.U. lied by testifying she no longer had access to the messages she sent to N.A. To support these claims, C.M.U. attached copies of messages exchanged between K.U. and N.A. as an exhibit.

The messages showed that K.U. began communicating with N.A. around July 2020. In those messages, K.U. informed N.A. he had a three-year-old son. N.A. first denied that C.W.U. was his child, but K.U. maintained that C.W.U. belonged to N.A. In one message, K.U. told N.A. he was "the only other guy" that could be C.W.U.'s father, and that she "knew . . . the day [she] pushed [C.W.U.] out he looked just like [N.A.]."

About the same time, the GAL filed a motion urging the district court to grant C.M.U.'s motion. The GAL maintained its position that it would be in C.W.U.'s best interests to "know and have a relationship with his biological father." The GAL also stated essentially that K.U. always knew who N.A. was and she knew how to contact him. The GAL stated that N.A. has responded favorably that he does want to know C.W.U.

Finally, the GAL concluded by arguing that the court found K.U.'s testimony credible and relied on her testimony in its ruling. But "we now know that all of [her] testimony was a lie."

When the district court heard the motion, it relied on Supreme Court Rule 133(c) (2022 Kan. S. Ct. R. at 217). The district court held that oral argument and additional evidence would not aid it materially. As a result, the district court did not hear testimony from any involved party. Instead, the district court reiterated its previous findings in the memorandum decision and denied the motion. The district court held that nothing C.M.U. presented altered its opinion. When C.M.U. pointed out that the motion was based on fraud, the district court found that K.U.'s testimony was not fraudulent.

This is another matter within the discretion of the district court. A ruling on a motion for relief from judgment filed under K.S.A. 60-260(b) rests within the sound discretion of the district court. The district court's ruling will not be reversed in the absence of a showing of abuse of discretion. *In re Marriage of Johnston*, 54 Kan. App. 2d 516, 521, 402 P.3d 570 (2017).

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*, 308 Kan. at 893. C.M.U. asserts the district court's ruling on his motion was arbitrary, fanciful, or unreasonable because the district court did not allow him to present testimony to support his claim.

In essence, K.S.A. 2022 Supp. 60-260(b)(3) allows a district court to relieve a party from a final judgment based on "fraud, whether previously called intrinsic or extrinsic, misrepresentation or misconduct by an opposing party." Both C.M.U. and the GAL assert fraud by K.U.

The GAL's contention that the district court relied on K.U.'s testimony when making its decision is accurate. Additionally, factors three and six as stated in *Greer* directly involve an alleged biological father. Those factors concern:

> "(3) the nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs; (4) the possible emotional impact of establishing biological paternity; . . . [and] (6) the nature of the mother's relationships with the presumed and alleged fathers." 50 Kan. App. 2d at 195.

In its memorandum decision, the district court concluded there was no relationship between C.W.U. and N.A. And the district court indicated that N.A. had only recently been identified, and the district court did not definitively conclude N.A. was C.W.U.'s biological father. And under the sixth factor, the district court found that K.U. and C.M.U. no longer have a stable relationship but did not issue any findings about K.U.'s relationship with N.A.

Part of the district court's conclusion under the third factor is accurate—N.A. has never met C.W.U. But as C.M.U. points out, the district court did not issue any findings about whether N.A. wanted to establish a relationship with C.W.U. At the *Ross* hearings, both A.C. and K.U. testified that K.U. said N.A. wanted nothing to do with the child. The exhibits attached to C.M.U.'s K.S.A. 60-260(b) motion refute that testimony.

The major concern in these cases is the best interests of the child. See *Greer*, 50 Kan. App. 2d at 194-95. But in rendering its memorandum decision, the district court relied on K.U.'s testimony and credibility. While the exhibit does not refute all of K.U.'s testimony, it casts doubt on her credibility on certain issues.

In ruling on the motion, the district court provided no rationale for not allowing testimony, other than Rule 133(c). This did not allow C.M.U. the opportunity to support the allegations in his K.S.A. 60-260(b) motion. Considering the nature of these arguments and issues, a sense of fundamental fairness impels us to have the district court reconsider this motion.

The district court also said nothing about the GAL's motion in support of C.M.U.'s motion. Similarly, the district court never explained why it concluded that K.U.'s testimony was not fraudulent or misleading. In the absence of this explanation, we find the district court's ruling on this issue arbitrary or unreasonable. See *Biglow*, 308 Kan. at 893.

We remand the matter to the district court to reconsider and hear evidence on the motion.

We will not consider C.M.U.'s third issue.

For his final argument, C.M.U. claims our Supreme Court's interpretation of the KPA violates his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. C.M.U. admits that he failed to raise this issue in district court.

Issues not raised before the district court cannot be raised on appeal. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020). The same is true for constitutional grounds for reversal asserted for the first time on appeal. See *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014).

But our Supreme Court has recognized several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including:

(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case;

(2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and

(3) the district court was right for the wrong reason.

In re Estate of Broderick, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009).

Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

C.M.U. does not directly invoke any of the exceptions to the general rule prohibiting new legal theories from being asserted for the first time on appeal. See *In re Estate of Broderick*, 286 Kan. at 1082. Nor does he comply with Rule 6.02(a)(5) because he fails to explain why he did not raise his constitutional grounds for reversal before the district court, and why this court should consider it for the first time on appeal.

We will not address this issue and dismiss this claim for failing to preserve the issue for appellate review.

We affirm in part, reverse in part, dismiss in part, and remand with directions.