NOT DESIGNATED FOR PUBLICATION

No. 92,390
No. 92,391

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

CHARLES MICHAEL YOCH,
Appellant,

and

LISA DAWN YOCH (NOW CONKLING),
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; JANICE D. RUSSELL , judge. Opinion filed March 10, 2006. Affirmed in part, reversed in part, and remanded.

Scott E. Wasserman, of Scott Wasserman & Associates, LLC, of Lenexa, for appellant.

No appearance by appellee.

Before BUSER, P.J., MALONE, and CAPLINGER, JJ.

Per Curiam: In this consolidated case, Charles Michael Yoch, natural father of minor children N.Y. and D.Y., appeals from the district court's rulings in a post-divorce child custody action (Case No. 98CV1708) and a protection from abuse action (Case No. 03CV8316). We affirm in part, reverse in part, and remand.

Factual and Procedural Background

Charles Michael Yoch and Lisa Yoch were married on June 26, 1988. Two children were born of the marriage--N.Y. was born in 1989, and D.Y. was born in 1994.

In July 1998, Charles and Lisa were divorced and the court granted them joint custody of the children with Lisa as the primary residential parent, subject to rights of liberal and frequent visitation with Charles. Lisa married Doug Conkling in September 2003, and the children lived with them.

The incident which triggered these legal actions occurred on November 5, 2003. The evidence was considerable and controverted, but for purposes of this appeal it is sufficient to summarize the incident.

In the evening hours of November 5, 2003, a dispute arose between N.Y. and Doug at their residence. This dispute arose following a confrontation between N.Y. and his, mother, Lisa. N.Y. alleged that during this disturbance Doug grabbed him by the neck and shoulders, threw him on the couch, across a table in the living room, and pushed him into a wall. Doug denied ever pushing N.Y. against the wall, or putting his hands anywhere on or near his throat. Doug admitted grabbing N.Y. by his arms and forcing him into his bedroom. Lisa denied ever seeing Doug throw N.Y. on the couch or across the table.

Later in the evening, N.Y. and Lisa had another altercation which culminated in her slapping N.Y. in the mouth. Following this last encounter, Doug drove N.Y. to Charles' home. Charles testified that N.Y. was visibly shaken and upset. According to Charles, N.Y. had told him that Doug threatened to kill N.Y. if N.Y. ever touched his mother again.

Warren Gardner, a Roeland Park police officer, testified regarding a battery report he obtained from N.Y. on November 5, 2003, at the police station. Gardner took pictures of N.Y., showing a scratch on his nose allegedly caused by his mother's slap, abrasions on his left chest allegedly inflicted from being thrown by Doug, and scratches on his left arm that N.Y. said were from being dragged by Doug. Garner filed the report with the police

department, and it was forwarded to the district attorney's office and the Kansas Social and Rehabilitation Services (SRS).

On November 20, 2003, N.Y. through Charles filed a petition for protection from abuse (PFA) against Doug, alleging Doug had "pushed, shoved, beaten, and thrown" N.Y. and Doug had thrown N.Y. into a "coffee table drawing blood on his torso." Charles amended the petition, adding that N.Y. suffered "scrapes, scratches, bruises and markings to his back, abdomen, and extremities."

On December 10, 2003, an evidentiary hearing was held in both the post-divorce child custody action (Case No. 98CV1708) and PFA action (Case No. 03CV8316). On December 31, 2003, the district court found the PFA petition frivolous and dismissed it, holding the petition "was filed to gain an advantage in the pending child custody matter." The court ordered Charles to pay $300 as reasonable attorney fees to Doug.

On January 16, 2004, the district court ruled on Charles' motion to modify custody and ordered N.Y. to reside with Charles. D.Y.'s custody remained with Lisa and Doug. The district court also determined the parental visitation schedules for Charles and Lisa with D.Y. and N.Y. respectively.

On January 22, 2004, Charles filed a motion for a new trial, relief from judgment, and protective order in the child custody case. He alleged the SRS substantiated the physical abuse by Lisa and Doug against N.Y., but this information was not available at the time of the December 10, 2003, hearing. Charles requested the court to change the residency of both children to him.

On April 30, 2004, the court denied Charles' motion for new trial, relief from judgment, and protective order. The court directed the appointment of a CASA representative for D.Y. and a meeting with the parents and N.Y. regarding the best interests of D.Y. On May 11, 2004, Charles filed a notice of appeal in Case No. 98CV1708 and Case No. 03CV8316.

The Definition of "Abuse"

Charles contends that in ruling on his PFA petition the district court erroneously applied the definition of "abuse" as found in K.S.A. 60-3102(a) and (b) "instead of following K.S.A. 38-1523 which applies the KAR 30-46-10 definition of abuse." "Interpretation of a statute is a question of law, and an appellate court's review is unlimited. An appellate court is not bound by the district court's interpretation of a

statute. [Citation omitted.]" *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003); see *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004).

K.S.A. 60-3102 provides:

> "As used in the protection from abuse act:
>
> (a) 'Abuse' means the occurrence of one or more of the following acts between intimate partners or household members:
>
> (1) Intentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury.
>
> (2) Intentionally placing, by physical threat, another in fear of imminent bodily injury."

Charles filed a PFA petition pursuant to this act, K.S.A. 60-3101 *et seq*. The definition of abuse as found in K.S.A. 60-3102 specifically relates to petitions filed pursuant to this act. See *Paida v. Leach*, 260 Kan 292, 296, 917 P.2d 1342 (1996).

Charles claims the definition of abuse found in K.S.A. 38-1523 and the regulation K.A.R. 30-46-10 should apply to his case. K.S.A. 38-1523 is a provision from the Kansas Code for Care of Children, K.S.A. 38-1501 *et seq*. It establishes the duty of SRS and law enforcement officers to investigate reports of child abuse.

Charles filed his petition under the PFA Act, not the Code for Care of Children. Although Charles indicates the SRS investigation was pending at the time of the hearing, that fact does not alter the nature of his PFA petition.

Charles mistakenly relies on *Sokol v. Kansas Dept. of SRS*, 267 Kan. 740, 981 P.2d 1172 (1999), in support of his contention. In *Sokol*, a father appealed an SRS ruling validating an act of physical abuse upon his son. The father argued on appeal that the definition of abuse in the PFA Act should apply to this administrative action but our Supreme Court rejected his argument, stating:

> "In conclusion, the allegations of abuse against Sokol were not brought under the PFA Act. Sokol's claim that the facts alleged in this case do not constitute abuse, as that term was interpreted in *Paida* and *Barnett v. Barnett*, 24 Kan. App. 2d 342, 945 P.2d 870 (1997), may be accurate, but this is not determinative of the outcome in this case, given that *Paida* and *Barnett* involve the PFA Act." 267 Kan. at 747.

Sokol instructs that allegations of abuse made pursuant to the PFA Act should be evaluated in accordance with the statutory definition of abuse as contained within that particular act.

The district court did not err in applying the definition of abuse as set forth in K.S.A. 60-3102 and contained within the provisions of the PFA act, K.S.A. 60-3101 *et seq.*

The Definition of "Bodily Injury"

Charles argues in the alternative that assuming K.S.A. 60-3102 is the applicable statute, the district court erred in failing to follow the standard enunciated in *Paida* by finding the bodily injury sustained by N.Y. was "slight." Charles submits in *Paida* our Supreme Court used the terms "minor" and "inconsequential," but not "slight" to describe injuries not actionable under the PFA Act.

The *Paida* court acknowledged the PFA Act did not contain a definition of bodily injury and explained the purpose of the Act further:

> "[T]he trial court can and should determine in light of all the circumstances in each individual case whether the plaintiff has shown abuse by a preponderance of the evidence. Those circumstances will include the age of the alleged victim and his or her relationship to the alleged abuser. Neither reason nor the limits clearly expressed by the legislature in the Act permits a trial court judge to overlook the infliction of bodily injury. However, the Act is not intended to dictate acceptable parental discipline or

unnecessarily interfere in the parent/child relationship absent a clear need to protect the child. *The State's intrusion should be limited to injunctive relief where parental conduct causes more than minor or inconsequential injury to the child.* Such a construction of the term 'bodily injury' will prevent misuse or misapplication of the Act." (Emphasis added.) 260 Kan. at 300-01.

Here, the district court found N.Y. was "slapped and shoved" while behaving defiantly and in a hostile manner toward his mother and his step-father. The trial judge further found:

"[N.Y.] had been aggressive and hostile toward his younger brother. He had been verbally and physically hostile and defiant toward both of [Lisa and Doug]. And although it is hard for me to ever approve of slapping or shoving or pushing a child, even a child that is this big and this out of control, I do not believe that under [*Paida*] anything that they did would constitute abuse as the [Kansas Supreme Court] has defined it.

"I note further that the physical injuries that [N.Y.] received were apparently extremely slight. The photos that were taken by the police officer that night show a few light scratches. They do not show any kind of serious bruising. The physical evidence does not show that there were any serious injuries. Mr. Yoch testified that he didn't believe that the injures were serious enough to take–to take [N.Y.] to the doctor, no medical treatment was necessary.

"Again, under [*Paida*], I think that the plaintiff has simply [failed] to meet its burden of proof."

A plain reading of the district court's thorough findings of fact and specific references to the *Paida* case convince us the district court employed the appropriate standard to evaluate N.Y.'s injuries. Whether the injuries are characterized as "minor," "inconsequential," or "slight," the district court's conclusion of law that Charles had failed to meet his burden of proof, was in full accord with *Paida's* holding that "bodily injury under the Act requires a finding of substantial physical pain or an impairment of physical condition. " *Paida*, 260 Kan. at 301.

The district court did not err in using the term "slight" to characterize the type of injuries which, according to *Paida,* are insufficient to merit injunctive relief under the PFA Act.

Award of Attorney Fees As Sanction

Charles argues the trial court erroneously awarded attorney fees to Doug upon its holding that Charles' filing of the PFA petition was frivolous.

Pursuant to K.S.A. 60-211, the trial court shall impose appropriate sanctions, which may include attorney fees, against a party or an attorney for signing pleadings, motions, and other papers filed with the court stating claims, defenses, and other legal contentions not warranted by existing law or a frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

The standard of review in these matters was only recently clarified by our Supreme Court in *Evenson Trucking Co., v. Fred Aranda,* (No. 91,311, filed February 3, 2006): "[W]hen an appellate court reviews a district court's decision to impose sanctions under K.S.A. 60-211, 'the appellate court's function is to determine whether substantial competent evidence supports the trial court's findings of fact that the statutory requirements for sanctions are present.' [Citations omitted.]" *Evenson*, No. 91,311, slip op. at 12.

The factors to be considered in determining the sanction under K.S.A. 60-211 are enumerated as follows:

"(1) whether the improper conduct was willful or negligent;

"(2) whether it was part of a pattern of activity or an isolated event;

"(3) whether it infected the entire pleading or only one particular count or defense;

"(4) whether the person has engaged in similar conduct in other litigation;

"(5) whether it was intended to injure;

"(6) what effect it had on the litigation process in time or expense;

"(7) whether the responsible person is trained in the law;

"(8) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and

"(9) what amount is needed to deter similar activity by other litigants. [Citation omitted.]" *Wood v. Groh*, 269 Kan. 420, 431, 7 P.3d 1163 (2000).

The district court ordered Charles to pay attorney fees for Doug's counsel, holding Charles filed the petition "spuriously without reasonable cause and to manipulate the Court in a custody proceeding." Charles argues his claim was far from frivolous.

The district court made no findings of fact regarding this matter, and there is no indication that it even reviewed the nine factors listed in *Wood* that should be considered by a district court prior to the determination of whether sanctions are appropriate in a given case.

In *Vondracek v. Mid-State Co-op, Inc.*, 32 Kan. App. 2d 98, 79 P.3d 197 (2003), the Court of Appeals held the trial court abused its discretion in assessing sanctions

against the Vondraceks, where the trial court made no attempt to consider the factors in *Wood*. 32 Kan. App. 2d at 105. Moreover, the court noted the sanction under K.S.A. 60-211 "is generally utilized when a party files a claim based upon a legal theory that is clearly contrary to statute or case law." 32 Kan. App. 2d at 104.

We are unable to find substantial competent evidence in support of the district court's findings of fact because the district court made no findings of fact with regard to the nine factors set forth in *Wood*. As a result, the district court's award of attorney fees as a sanction against Charles is reversed.

Dividing Custody of the Two Children

Regarding Charles' motion to modify custody, he argues the trial court abused its discretion in modifying custody by ordering that N.Y. reside with him while D.Y.'s custody remained with Lisa. Charles contends that he should have been awarded custody of both children.

When the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the child. The trial court's rulings will not

be disturbed in the absence of abuse of sound judicial discretion. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002).

K.S.A. 60-1610(a)(5)(B) provides: "*Divided residency*. In an exceptional case, the court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other." The trial court does not have the discretion to divide the custody of children of the same parents under this provision unless substantial competent evidence supports a finding that the case presents exceptional circumstances. *In re Marriage of Williams*, 32 Kan. App. 2d 842, 848, 90 P.3d 365 (2004).

In making its custody ruling, the district court found Lisa "is dealing with a child [N.Y.] who is now physically and emotionally beyond her control. I think that it – that things have – whether she bears any fault in this or not, she cannot control this child at this point." With regard to D.Y.'s custody, the district court ruled: "I don't find that there has been any – that anything has occurred that would change the situation or indicate that [D.Y.'s] best interests are not served by remaining in his mother's home."

Although the district court's findings are brief, we find they address important and serious issues involving the parental control of N.Y. and are sufficient to support a legal conclusion that this is an exceptional case justifying divided custody.

In *Williams*, the court noted that perhaps it is best there was no statutory or case-law definition of the term, "exceptional case," stating: "The determination is too important to be subjected to a mechanical application of an artificial litmus test containing three factors or two prongs." 32 Kan. App. 2d at 849. The court acknowledged the importance of sibling relationships in a divorce situation:

> "Children should not be deprived of a sibling relationship simply to accommodate the wants and needs of their separated parents. However, when the children's own welfare is implicated, the nonseparation rule is subordinate to the best interests of the child rule. Otherwise, we might well be employing a rule developed for the benefit of the children of divorcing parents to actually defeat that which would be beneficial to the child." 32 Kan. App. 2d at 849.

Here, the district court's determination to divide custody was focused on the best interests of N.Y. – establishing a residence with Charles who could provide N.Y. with the essential physical and emotional care and control which Lisa was unable to provide him. We also observe that the district court further ordered an extensive visitation schedule for

both children, so they could be together at Charles' and Lisa's homes on alternating weekends. This visitation schedule was in keeping with the trial court's belief that "the bond between siblings is important and it is important to make orders that facilitate keeping that bond together and strong, and I think that the orders that I have made do give the boys a lot of time together."

We hold there was substantial competent evidence that this was an exceptional case, as set forth in K.S.A. 60-1610(a)(5)(B), to justify the separation of the children and that the district court did not abuse its discretion in making its ruling.

Exclusion of Evidence

At the hearing, Charles' attorney offered into evidence a letter purportedly written by N.Y. to the district court judge. Charles explained the letter described N.Y.'s concerns regarding living with Lisa and Doug. Lisa's counsel objected to the admission of the letter, stating there was no way of knowing if N.Y. actually wrote the letter and, in essence, that the letter was hearsay. ("[W]e really can't cross-examine or refute today.") The district court sustained the objection. In response, Charles' attorney noted, "Your Honor, and he is present and available." The district court responded, "I sustained the objection."

Charles argues the trial court erred by disallowing his letter into evidence and by excluding N.Y. from testifying.

"[T]he admission of evidence lies within the sound discretion of the trial court. An appellate court's standard of review regarding a trial court's admission of evidence is abuse of discretion. [Citation omitted.]" *Garrett v. Read*, 278 Kan. 662, 667, 102 P.3d 436 (2004).

The letter offered into evidence was inadmissible hearsay–"a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." K.S.A. 60-460. The statement made by counsel for Charles indicating that N.Y. was present at the courthouse and available to testify was an effort to cure this inadmissibility. The difficulty with Charles' argument is four-fold. First, his attorney did not comply with Johnson County District Court Local Rule No. 19 which prohibits the testimony of children in domestic relations actions and PFA Act cases without prior notice to the court and counsel. Second, Charles never formally called N.Y. as a witness at the consolidated hearing. As a result, the district court never had an opportunity to rule on the propriety of having N.Y. testify. Third, the district court permitted Officer Gardner and Charles to testify at the hearing regarding statements made by N.Y., explaining what had happened on November 5, 2003. As a result, Charles was not

prejudiced because the district court had evidence regarding N.Y.'s statements. Finally, the record reveals that Charles never raised the issue of Rule No. 19 before the trial court. Issues not raised before the trial court cannot be raise on appeal. *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003).

Under these circumstances, we hold the trial court did not abuse its discretion in disallowing N.Y.'s letter. Moreover, there was no error in N.Y. failing to testify, and assuming arguendo there was error, this issue was never raised below which precludes appellate review.

Denial of Motion for New Trial

Charles contends the trial court erred in failing to grant his motion for a new trial based on newly discovered evidence. He alleges on appeal that SRS substantiated the abuse of N.Y. and mailed this report on December 18, 2003, after the evidentiary hearing.

An abuse of discretion standard applies to the trial court's decision on a motion for a new trial based on newly discovered evidence. *State v. Harris*, 279 Kan. 163, 176, 105 P.3d 1258 (2005).

The district court held a hearing on the motion, and counsel for Charles argued that, based upon the SRS report, D.Y. should be placed with Charles rather than Lisa and Doug. Counsel pointed out the conflicting testimony by Doug, D.Y.'s statements in the SRS files, and the seriousness of N.Y.'s injury.

The evidence proffered was hardly newly discovered. Witnesses who gave statements to the SRS investigators also testified either in person or through the testimony of others at trial. The SRS files are not included in the record on appeal so we have no basis to conclude they contained anything new for the trial court to reconsider regarding the issue of D.Y.'s residential placement. The trial court did not abuse its discretion in denying the motion for new trial.

Affirmed in part, reversed in part, and remanded.