No. 95,133

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the MARRIAGE OF

Michelle R. BECKER (Previously Markus),

Appellee,

and

Dustin T. MARKUS,

Appellant.

No. 95,113.

Appeal from Franklin District Court; Thomas H. Sachse, judge.

Jody M. Meyer, of Lawrence, for the appellant.

No appearance for the appellee.

Before MARQUARDT, P.J., ELLIOTT and PIERRON, JJ.

MEMORANDUM OPINION

PER CURIAM.

Dustin T. Markus appeals the district court's order granting sole custody of Anna Markus to Michelle R. Becker, previously Markus. He argues the district court abused its discretion in ordering, *sua sponte,* that custody to the couple's daughter Anna be changed from joint custody between the parties to sole custody for Becker. He also argues the court abused its discretion by not making a finding of parental unfitness before ordering that he have no contact with Anna and that the district court had no jurisdiction

to order the paternal grandparents to have no contact with Anna as well. We affirm.

After a brief marriage, Markus and Becker were granted a divorce in 1995. At the time of the divorce, Anna was almost 1 year old. Markus received sole custody of Anna. The district court ordered no contact between Becker and Anna until such time as Becker completed a divorce workshop at the local mental health center.

Child in need of care (CINC) proceedings were filed for Anna in December 2003. Allegations in the petition described Anna being present during a physical altercation between Markus and his new wife. As a result of this altercation, Markus was being held without bond on charges of aggravated battery, aggravated kidnapping, and domestic battery. The petition also detailed a report by an SRS social worker where Anna witnessed Markus' drug use, drug paraphernalia, and his drug selling activities.

On August 19, 2004, the district court held Anna to be a child in need of care and ordered her to be fully integrated into the home of Becker and her new husband. The court's order permitted the paternal grandparents to have visitation with Anna not to exceed one visit per month. Markus was denied visitation until completion of in-patient drug treatment. At a subsequent review hearing in November 2004, Markus' visitation was similarly limited until a court determination that he was rehabilitated.

On April 13, 2005, Becker filed a motion to change residential custody requesting that residential custody of Anna be awarded to her. After a full hearing on the matter, the district court adopted all the findings from Anna's CINC proceedings and continued joint custody between the parties, but awarded Becker residential custody. The court ordered a separate hearing to determine what contact Markus would have with

Anna and also any motions filed by the paternal grandparents.

Markus appeals the order entered by the court concerning the hearing held on June 24, 2005. After considering the evidence and conducting an in-chambers hearing with Anna, the district court denied Markus' motion for contact. The court ordered that both Markus and the paternal grandparents were to have no contact with Anna until further notice by the court. Although not reflected in the journal entry, at the hearing, the court stated that it was in the best interests of Anna that Becker have sole custody. After the district court entered the order in the case, the CINC court terminated jurisdiction.

Markus' first argument on appeal is that the district court abused its discretion when it gave sole custody of Anna to Becker. Markus contends the court's decision was contrary to the agreed parenting plan and consequently, the court failed to make specific findings why the agreed parenting plan and also joint custody was not in the best interests of the child.

> " '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 is in the best position to make the inquiry and determination, and in the absence of abuse of sound judicial discretion, its judgment will not be disturbed on appeal.' [Citations omitted.]" In re Marriage of Rayman, 273 Kan. 996, 999, 47 P.3d 413 (2002).

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion. See *Simmons v. Simmons,* 223 Kan. 639, 643, 576 P.2d 589 (1978).

K.S.A. 60-1610(a)(3)(A) states that if the parties have entered into a parenting plan, it is presumed in the best interests of the child. The district court must make specific findings of fact to hold that the agreed parenting plan is not in the best interests of the child. Similarly, K.S.A. 60-1610(a)(4) provides that if the court does not award joint custody, the court must make specific findings on the record upon which the order for sole custody is based.

The district court made specific findings why it was awarding sole custody of Anna to Becker. The court stated that it was in the best interests of Anna that her sole custody be with Becker based on: (1) judicial notice of the findings and orders in Anna's child in need of care case and made them a full and complete part of its decision; (2) judicial notice of the six criminal cases that were pending against Markus; (3) the sworn testimony presented at the hearing; (4) the in-chambers testimony of Anna, and (5) that it was "just not healthy for this child to have any contact at the present time with her father." Markus testified that he still had a problem with drugs.

The district court complied with K.S.A. 60-1610(a)(3) and (a)(4). We find no reason to reverse the court's order concerning custody. The Kansas statutes involving child custody clearly give preference to agreed parenting plans and joint custody arrangements, but a preference is not an absolute. See e.g., *Skillett v. Sierra,* 30 Kan.App.2d 1041, 1048, 53 P.3d 1234 (2002). The district court did not abuse its discretion.

Next, Markus argues the district court abused its discretion in ordering that he have no contact with Anna.

The judgment of the trial court regarding visitation will not be disturbed absent an affirmative showing of abuse of discretion. See *In re Marriage of McNeely,* 15 Kan.App.2d 762, 764, 815 P.2d 1125, *rev. denied* 249 Kan. 776 (1991).

Markus cites several statutes concerning his rights to reasonable parenting time. See K.S.A. 60-1616(a) (reasonable parenting time unless it would seriously endanger the child's physical, mental, moral, or emotional health). He argues the district court's decision that it was not healthy for him to have visitation with Anna was not supported by the evidence and the court improperly based the custody and visitation decision solely on Anna's wishes. See *In re Marriage of Kimbrell,* 34 Kan.App.2d 413, Syl. ¶ 4, 119 P.3d 684 (2005) ("The child's wishes as to custody, residency, and parenting time and visitation cannot be the exclusive factor relied upon by the trial court in determining parenting time."). We disagree.

As previously demonstrated, the district court did not rely solely on the wishes of Anna in deciding sole custody in favor of Becker. Markus' arguments to the contrary are without merit.

Inherent in the district court's decision is the fact of Becker's criminal activity and pending revocation of probation resulting in his incarceration. Markus testified that if Anna wanted it, he would have his parents bring her to the prison for visitation. As cited in *In re Marriage of Brewer,* 13 Kan.App.2d 44, 45-46, 760 P.2d 1225 (1988), cases from other jurisdictions have addressed the issue of visitation when the noncustodial parent is incarcerated.

> "In M.L.B. v. W.R.B., 457 S.W.2d 465, 467 (Mo.App.1970), the Missouri Court of Appeals determined that the mere fact of incarceration is not enough to foreclose a father from any access to, or visitation with, his children.
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> "In Vaughan v. Merritt, 672 S.W.2d 187, 188 (Mo.App.1984), the same court, however, refused to reverse a lower court decision denying visitation even though no specific findings had been made. The appellate court presumed that the trial court made the necessary findings that visitation at the prison setting would not be in the best interests of the children.
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> "A similar holding was made in Garcia v. Garcia, 425 N.E.2d 220, 221 (Ind.1981), where the appellate court determined that the court had made a finding pursuant to an Indiana statute almost identical to K.S.A.1987 Supp. 60-1616 that visitation might endanger the children's physical health or significantly impair their emotional development.
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> "In other cases which have upheld the district court's denial of prison visitation, some evidence has been presented tending to demonstrate that the children have problems as a result of visitation. In Casper v. Casper, 198 Neb. 615, 619, 254 N.W.2d 407 (1977), there was evidence to show that the two eldest of the five children did not want to visit, that the attitudes of the children deteriorated after the visits, and that after visitations were terminated the attitudes of the children improved. The court went on to find no abuse of discretion in limiting the father's visitation to the mother's home even though that decision effectively cut off visits with the incarcerated father."

Markus clearly had criminal activities and drug use that supported the district court's decision that it was not healthy for Anna to be around him. Although not in the precise language of K.S.A. 60-1616(a), we find the court's decision complies with a finding that reasonable parenting time would seriously endanger Anna's physical, mental, moral, or emotional health. We find no abuse of discretion in the district court's limitation on Markus' visitation.

Last, Markus argues the district court had no jurisdiction to order the paternal grandparents, nonparties to the case, not to have any contact with Anna. We disagree.

The district court held:

> "[T]here is no motion for grandparent visitation rights before the court, but that order [no contact by Markus] would also extend to the paternal grandparents, that they have no contact, because in the past as reflected in

> the juvenile file that has been the way that Mr. Dustin Markus has contact with his child is through his parents, and because it is, that's derivative, and because it's not healthy for her to have contact with her father it would also not be healthy for the child to have contact with the paternal grandparents ."

There were no visitation motions filed by the paternal grandparents in this case. K.S.A. 60-1616(b) provides for stepparent and grandparent visitation. It does not mandate visitation for every stepparent or grandparent. Its intent is to give stepparents and grandparents visitation rights under the appropriate circumstances, including after a divorce has been granted. See *In re Marriage of Riggs and Hem,* 35 Kan.App.2d 61, Syl. ¶ 2, 129 P.3d 601 (2006).

The district court had jurisdiction concerning all visitation and contacts with Anna. See K.S.A. 60-1610(a)(3), (a)(4); K.S.A. 60-1616. The district court's decision to limit the paternal grandparent's contacts with Anna was a necessary restriction to enforce its decision preventing contact between Anna and Markus. We find no abuse of discretion with the district court's enforcement of Markus' visitation/contact limitations with Anna.

Affirmed.