NOT DESIGNATED FOR PUBLICATION

No. 97,852

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

KIMBERLY A. BROWN n/k/a KIMBERLY KROUPA,
Appellee,

v.

CHRISTOPHER K. BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER, JR., judge. Opinion filed January 11, 2008. Affirmed.

Terry L. Malone, and *Adam T. Pankratz*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellant.

Christopher M. McHugh, of Joseph & Hollander, P.A., of Wichita, for appellee.

Before MARQUARDT, P.J., and LEBEN, J., and KNUDSON, S.J.

Per Curiam: In this divorce proceeding, Christopher K. Brown (Father) appeals from the district court's order designating Kimberly A. Brown, now known as Kimberly Kroupa, (Mother) primary residential parent of their three children. The following issues are presented: (1) Did the district court error in permitting the case manager to testify at trial and present recommendations that were inconsistent with his written report; (2) did the district court err in refusing to grant Father's request for a trial continuance to consider rebuttal of the case manager's change in recommendations; and (3) did the district court abuse its discretion in designating Mother primary residential parent of the children?

The Case Manager Issues

The case manager appointed by the district court, Wally Underhill, filed his recommendations in writing on April 13, 2006. Those written recommendations included a recommendation that Father be the primary residential parent of the children. Father acknowledges the procedure was consistent with K.S.A. 2006 Supp. 23-1003(d)(2).

However, on June 1, 2006, Underhill submitted a temporary recommendation, proposing a shared residency arrangement for the summer that was adopted by the parties. Subsequently, the district court extended the summer parenting schedule until further hearing.

During a meeting on September 21, 2006, Underhill informed the parties his testimony at the upcoming trial would be that the parties continue shared residency. Obviously, this recommendation is at odds with Underhill's previous written recommendations. On September 25, 2006, Father filed a motion to disqualify Underhill as case manager. This motion did not mention Underhill's change of position or request that the court delay the trial that was to begin the next day. The thrust of Father's motion was that Underhill had made intentional misrepresentations to him regarding the case manager's communications with Mother.

On September 26, 2006, over 2 years after the divorce petition had been filed, a 3-day trial was held. Before evidence was taken, the district court denied Father's motion to have Underhill disqualified as case manager. Father then orally moved for a continuance, contending more time would be needed to prepare for trial and counter Underhill's change in recommendations. The district court denied Father's motion. At trial, Underhill did testify the parties should continue with shared residency of the children.

After hearing all of the evidence presented at trial, the district court did not adopt Underhill's recommendations. Instead, the district court designated Mother as primary residential parent.

On appeal, Father challenges the district court's decision to permit Underhill to testify at trial contrary to his prior written recommendations. He claims the decision was contrary to K.S.A. 2006 Supp. 23-1003(d)(2), caused surprise, and resulted in undue prejudice.

Father correctly asserts that K.S.A. 2006 Supp. 23-1003(d)(2) requires the case manager to submit his final recommendations *in writing* within 10 working days. Nevertheless, the court must be mindful that the purpose of a case manager is to investigate and make recommendations regarding the best interests of the children so that the court can make a well-informed and intelligent decision. See K.S.A. 2006 Supp. 23-1003(1)-(7). As a general rule, courts should construe statutes to avoid unreasonable results and presume the legislature does not intend to enact useless or meaningless legislation. *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006). We believe it illogical that the case manager's failure to memorialize his recommendations in writing would render those recommendations worthless, particularly where the case manager has been heavily involved in the case for an extended period of time. As a result, the question is whether Father was prejudiced when the district court permitted Underhill to make recommendations not contained in his written report.

K.S.A. 2006 Supp. 23-1003(d)(6) provides a safeguard for parties that employ a

case manager in resolving domestic relations disputes. Where a parent opposes the recommendations rendered by a case manager, he or she may file a motion with the court for a review and the case manager must explain to the court either by report or testimony the reasons for his recommendations. K.S.A. 2006 Supp. 23-1003(d)(6); *In re Marriage of Gordon-Hanks*, 27 Kan. App. 2d 987, 988, 10 P.3d 42, *rev. denied* 270 Kan. 898 (2000).

In the present case, although Father did not file a motion for review, he did strenuously object to Underhill's altered recommendations. This court has recognized that a formal motion for review is not necessary where a party has clearly challenged the case manager's recommendations. *Gordon-Hanks*, 27 Kan. App. 2d at 988-89. At trial, the district court gave Underhill an opportunity to explain the reasons for his updated recommendations and his decision to deviate from his written recommendations. Underhill indicated that he had completed the permanent recommendations almost 6 months before trial and that the circumstances had changed substantially since then. Underhill believed results of the temporary recommendations were more successful than he had expected and that the temporary recommendations were better for the children. Because Underhill offered an explanation for his opinions upon Father's motion, Underhill's failure to memorialize his ultimate recommendations in writing was not prejudicial in and of itself.

Father, however, further contends that as a result of Underhill's change in recommendations, the district court erred in not granting his request for a continuance of trial. Father argues prejudice because he was unable to sufficiently address Underhill's new recommendations or hire and present experts at trial.

On appeal, the trial court's ruling on a motion for a continuance will not be disturbed absent an abuse of discretion. *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 382, 22 P.3d 124 (2001). "In ruling on a motion for continuance under such conditions a court must consider all circumstances, particularly such matters as the applicant's good faith, his showing of diligence, and the timetable of the lawsuit." *Fouts v. Armstrong Commercial Laundry Distributing Co.*, 209 Kan. 59, 65, 495 P.2d 1390 (1972). The court will take particular care when denial of a continuance effectively deprives a party of the party's day in court. 209 Kan. at 65.

In the present case, Father did not seek to have the case delayed until the morning of the trial. The record indicates that Father became aware of Underhill's intent to change his recommendations the previous week. Although this is not a substantial amount of time, Father nevertheless filed a motion to remove Underhill as case manager the day before trial. In that motion, Father did not request a delay or continuance in the proceedings, object to Underhill's last-minute recommendations, or claim that he would

be unfairly prejudiced. He only made accusations that Underhill intentionally misrepresented certain facts to Father's counsel. Thus, Father did not exercise due diligence in waiting until the morning of trial to seek a delay.

Moreover, even if Father had filed a more timely motion for continuance, there is little evidence he could have offered to bolster his case. Any additional expert testimony he could have presented would have been cumulative. Moreover, the experts would not have had exposure to the case like Underhill, Falldine, Bowman, and Woods, who had interacted with and evaluated the parties for at least a year prior to trial. Undoubtedly, additional experts would have to some degree based their opinions on the reports of Underhill, Falldine, Bowman, and Woods, and other documents in the record and accessible by the district court.

In addition, Father knew, regardless of the case manager's recommendations, the parties needed to be fully prepared for trial to address the issue as to what custody arrangement would be in the best interests of the children. Father in preparing for trial was also aware of Underhill's temporary recommendations awarding shared residential custody of the children and Underhill's caveat in the permanent recommendation advising the court to further investigate before rendering its final custody order.

We conclude the district court's denial of Father's request for a continuance did not constitute an abuse of discretion.

Sufficiency of the Evidence

Father contends the evidence presented at trial does not support the district court's decision to award primary residential custody to Mother.

When resolving custody issues between the parents, the paramount consideration is the welfare and best interests of the children. The trial court is in the best position to make findings on the best interests of the children, and its judgment will not be disturbed in the absence of an abuse of judicial discretion. *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. 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. *In re Marriage of Bradley*, 282 Kan. 1, 7, 137 P.3d 1030 (2006).

While the primary concern is the best interests of the children, K.S.A. 60-1610(a)(3)(B) provides a nonexclusive list of factors that a court must consider in determining child custody, residency, and parenting time. Those relevant to the present

case are:

"(i) the length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

"(ii) the desires of the child's parents as to custody or residency;

"(iii) the desires of the child as to the child's custody or residency;

"(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

"(v) the child's adjustment to the child's home, school and community;

"(vi) 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;

"(vii) evidence of spousal abuse." K.S.A. 60-1610(a)(3)(B).

Here, the court explicitly considered each relevant factor listed under K.S.A. 60-1610(a)(3)(B). Nevertheless, we acknowledge the court relied primarily on the "friendly parent" provision in K.S.A. 60-1610(a)(3)(B)(vi). Because Mother appeared more willing to coparent than Father, the court believed that the children would be more likely

to develop continuing relationships with both parents if it designated Mother the primary residential parent.

On appeal, Father contends the district court erred in awarding Mother primary residency of the children based on K.S.A. 60-1610(a)(3)(B)(vi). He insists that this provision is a catch-22 for spouses and parents of abused children. Father claims he was faced with the decision of either reporting Mother's abuse and seeking primary residential custody of the children or ignoring Mother's abuse and pretending to be a friendly parent. Because Father chose to be honest and present evidence of Mother's abuse, he believes he was inappropriately penalized by the district court.

Relying on *Ford v. Ford*, 700 So. 2d 191 (Fla. Dist. App. 1997), as persuasive authority, Father argues that in a domestic violence case where joint residency is detrimental to the children's best interests, K.S.A. 60-1610(a)(3)(B)(vi) no longer serves the best interests of the child. In *Ford*, the ex-wife challenged the judgment awarding her ex-husband custody of their children. The ex-wife had filed for divorce after the ex-husband committed numerous instances of domestic violence. The appellate court

found that the trial court had abused its discretion in dismissing and not taking into consideration the ex-husband's history of domestic abuse, had made no determinations regarding the parties' credibility, and failed to offset what it perceived to be the mother's violation of the friendly parent provisions in light of the trial court's own finding that ex-wife had "'justifiable reason to fear the Husband.'" 700 So. 2d at 196. The court went on to caution: "We cannot emphasize enough the exceptional nature of the facts of this case." 700 So. 2d at 197.

While solely relying on K.S.A. 60-1610(a)(3)(B)(vi) to determine the issue of custody in total disregard of other factors would perhaps be contrary to the best interests of the children in some circumstances, the facts before us do not show that is what the district court did in this case. Despite accusations by both Mother and Father, abusive behavior toward the children remained unsubstantiated contrary to *Ford*. Several witnesses indicated their doubt as to the accusations of abuse and the children's accounts of the alleged abuse. Mother provided explanations for the incidents in which she had been accused of abusing her children. The court itself recognized that Mother may have inappropriately disciplined the children but did not make any findings that abuse had

occurred.

Under K.S.A. 60-1610(a)(3)(B), the best interests of the children take precedence over any and all of the factors listed in statute. Kansas courts have consistently recognized that parental contact remains a strong factor to be considered in determining the best interests of the children. See *In re Marriage of Cobb*, 26 Kan. App. 2d 388, 391-93, 988 P.2d 272 (1999) (indicating the court should consider a parent's willful prevention of access to the child or other attempts to undermine the relationship in determining custody).

In formulating its conclusion, the district court relied primarily on Father's unwillingness to work with Mother to coparent. Evaluation of the record and journal entry reveals that neither parent's home was an ideal living situation for the children. There were accusations that both parents were verbally and physically abusive. Moreover, both Mother and Father consistently used the children as tools in which to wage the war against each other. Although the two older children wished to stay with

Father, the district omitted this factor in its determination due to the significant influence Father had over the children and their young ages.

The district court believed that it would be in the best interests of the children to develop relationships with both parents. As such, the court indicated that awarding primary residency to Mother was more likely to facilitate these relationships and explained in detail why it believed that was the case. The record supports the district court's findings and conclusion that Mother demonstrated a willingness to cooperate with Father in raising and parenting the children.

In summary, this was obviously not an easy decision for the district court. Mother and Father were each convinced he or she would best serve the interests of the children as primary residential parent and a contrary decision would be detrimental to the children's well-being. There was conflicting testimony by various witnesses to support each parent's position. The court was required to decide the residential custody issue on conflicting testimony and enter a decision that would be in the best interests of the minor children after considering all of the evidence and the nonexclusive list of factors under K.S.A.

60-1610(a)(3)(B). We conclude the district court exercised sound judicial discretion in awarding primary residential custody to Mother.

Affirmed.