NOT DESIGNATED FOR PUBLICATION

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 100,930

IN THE MATTER OF THE MARRIAGE OF:

MELODY GEROW,
Appellant,

and

GEORGE GEROW,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson district court; SARA WELCH, judge. Opinion filed April 7, 2009. Affirmed.

Jeffrey M. King, of Kansas City, Missouri, was on the brief for the appellant.

Mark A. Rohrbaugh, of Fletcher & Rohrbaugh, LLP, of Olathe, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

ROSEN, J.: This appeal is the unfortunate result of parents who are unable to reach agreement on the best course of medical treatment for their child. It compels the courts to join in a role that is normally and preferably the domain of parents.

Melody Gerow and George Gerow were married in 1987. Two daughters were born into the marriage: D.G., born January 12, 1989, and S.G., born December 19, 1992. S.G. was born with a large mole on her forehead that disfigured her face. She underwent surgeries to remove it because of danger that it could become cancerous. As a consequence of the surgery to remove the mole, S.G. has scarring and one eye socket lower than the other. She has undergone subsequent corrective plastic surgeries.

On July 25, 1996, Melody filed a petition seeking a divorce. Although the record on appeal does not contain the divorce decree, it appears that the district court granted the divorce on February 13, 1997, and ordered joint custody of the children, with Melody having primary residential custody. The district court later transferred primary residential custody to George. In 2006, the district court ordered a child custody investigation through Family and Youth Services, and, in February 2008, the court appointed a case manager relating to S.G.

In July 2007, the surgeon who had performed the previous cosmetic surgeries met

with Melody and George to discuss carrying out additional major surgery to reduce scarring and to level S.G.'s eyes. At that meeting the surgery was tentatively planned for the summer of 2008.

Some 9 months later, on April 21, 2008, Melody took part in a meeting with the case manager at which the upcoming surgery was discussed. The next day, Melody filed a motion for an emergency restraining order asking that the court restrain George from arranging for plastic surgery on S.G. Melody apparently cancelled a May 5, 2008, scheduled hearing on the motion; she did not seek to reset it until July 7, 2008.

Melody, George, S.G., and the surgeon discussed the surgery again in a meeting on May 8, 2008, at the end of the school year. At that meeting, Melody requested medical records for the purpose of obtaining a second medical opinion, but she did not inform the other participants that was the reason why she was seeking the records. At a final meeting on June 2, 2008, Melody requested second and third medical opinions about the desirability and safety of the surgery and picked up the medical records that she had requested on May 8, 2008.

In a June 3, 2008, status report, the case manager reported that, in the opinion of the surgical staff, S.G. had become physically mature enough for the corrective surgery

and that S.G. "eagerly anticipated" the surgery. The case manager recommended that the surgery proceed promptly, and, on June 6, 2008, the district court adopted the recommendation.

The surgery was scheduled for June 11, 2008, but it appears that legal proceedings, including a motion by Melody asking that the court reconsider its June 6 order, blocked further medical procedures.

A hearing was conducted on July 7, 2008, at which George, the case manager, and Melody testified. The court heard testimony in support of the surgery and heard Melody articulate the importance that she attached to obtaining additional medical opinions and the reasons for the delays in obtaining medical records and formally requesting additional opinions.

On July 9, 2008, the district court entered an order granting George's emergency motion for sole decision-making authority for medical care. The court denied Melody's motion for an emergency restraining order, and Melody filed a timely notice of appeal. This court on its own motion transferred the case from the Court of Appeals.

Melody contends on appeal that the district court abused its discretion by failing to

make statutorily mandated findings relating to S.G.'s best interests that supported a change to sole custody.

Custody embraces the sum of parental rights with respect to raising a child, including the right to make decisions regarding the child's health. *Trompeter v. Trompeter*, 218 Kan. 535, Syl. ¶ 1, 545 P.2d 297 (1975). When only the two parents are in disagreement about custody issues, the paramount judicial consideration is the child's welfare and best interests. This court recognizes that the district court is best situated to inquire into and determine what best serves the child's welfare and interests, and we will not disturb that determination unless we find that the district court abused its discretion. *In re Marriage of Rayman*, 273 Kan. 996, Syl. ¶ 1, 47 P.3d 413 (2002).

Under circumstances such as those in this case, 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).

K.S.A. 2008 Supp. 60-1610(a)(2) provides that the district court "may change or modify any prior order of custody . . . when a material change of circumstances is

shown." K.S.A. 2008 Supp. 60-1610(a)(4)(B) provides:

> "The court may order the sole legal custody of a child with one of the parties when the court finds that it is not *in the best interests of the child* that both of the parties have equal rights to make decisions pertaining to the child. If the court does not order joint legal custody, the court *shall include on the record specific findings of fact* upon which the order for sole legal custody is based." (Emphasis added.)

Melody does not argue on appeal that it would not be in S.G.'s best interests if George has sole decision-making authority. She instead argues that the district court failed to make the statutorily mandated specific findings on the record that sole custody would be in S.G.'s best interests. As a consequence, she contends, the district court abused its discretion.

The statutes enacted by our legislature do not require that the district court make explicit written findings or that the findings contain particular language.

In *Dickison v. Dickison*, 19 Kan. App. 2d 633, 874 P.2d 695 (1994), our Court of Appeals considered a district court order that changed custody without containing a specific recitation of the facts supporting a change of circumstances. The Court of Appeals elected to read the entire decision and the statements by the district court on a

motion to alter or amend as a whole. After considering the record as a whole, the Court of Appeals found that the district court had made sufficiently specific findings to support its custody decision. 19 Kan. App. 2d at 639; see also *Jones v. Walker*, 29 Kan. App. 2d 932, 935, 33 P.3d 872 (2001) (written findings and conclusions unnecessary when district judge's comments on hearing record adequately set out reasons for decision).

Because pronouncements from the bench may satisfy the statutory mandate for specific factual findings, this court's attention turns to the record of the July 7, 2008, hearing. Although the district court made limited written findings, it referred back to the record of the evidentiary hearing on the parties' motions. The record suffices to comply with the statutory requirements.

The district court took judicial notice of the case history through an electronic table of contents. The court noted S.G.'s history of surgeries and the desirability of alleviating the facial abnormalities with which she was born. The court further noted the hardships that S.G. faced because of her facial abnormalities and the desirability of a prompt surgical response during the summer. The court found that both parents were aware of the possibility of further cosmetic surgery and both parents attended a meeting with the surgeon in July 2007, where the surgery was discussed. The court noted that Melody waited until shortly before the surgery was scheduled to initiate a search for

additional medical opinions and that she had been dilatory in pursuing additional medical opinions. The court made specific reference to the case manager's testimony that it would be in S.G.'s best interests that George have sole medical decision-making authority, based on the planning for the surgery, S.G.'s positive anticipation of the surgery, and S.G.'s emotional well-being. The court also found that Melody's attempt to obtain additional medical opinions was made at the "11th hour" and was not made in good faith, but instead she sought to disrupt a surgical procedure that had been planned over a substantial period of time.

These findings on the record are specific, are grounded in the sworn testimony given to the court, and address S.G.'s best interests. The findings therefore comport with the statutory requirement for awarding sole custody—in this case, the sole authority to make medical decisions—to George. The decision was based on competent evidence and was not unreasonable.

This court does not express an opinion about the best course of treatment for S.G., and it does not reach the question of Melody's motive for delaying S.G.'s surgery. Those questions are not before this court and do not lie within the scope of this court's long-established standards of review. Although reasonable minds might differ on the desirability of obtaining additional medical opinions and the urgency of carrying out the

corrective surgery, the district court did not abuse its discretion in finding that it serves S.G.'s best interests that George have sole medical decision-making authority.

The decision of the district court is affirmed. George Gerow has sole authority to make decisions relating to the health and medical care of his daughter, S.G.; all medical care providers may conclusively rely on that authority; and Melody Gerow lacks legal standing to challenge such decisions.

A true copy ATTEST
Carol G. Green
Clerk Supreme Court