

NOT DESIGNATED FOR PUBLICATION

No. 101,845

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JASON CARRIKER, AS NEXT FRIEND FOR AND ON THE
BEHALF OF DEAN IRWIN RICHARDSON, A MINOR CHILD,
Appellee,

v.

AMANDA RICHARDSON,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFF GOERING, judge. Opinion filed
October 2, 2009. Affirmed.

Amanda Richardson, appellant pro se.

No appearance by appellee.

Before GREENE, P.J., GREEN and STANDRIDGE, JJ.

Per Curiam: Amanda Richardson appeals from a decision by the district court to modify a child custody order. For the reasons stated below, we affirm the court's decision.

Facts

A child was born to Amanda Richardson (Mother) and Jason Carriker (Father) in 2006. After birth, the child resided with Mother.

In February 2007, when the child was 5 months old, Father filed a petition to adjudicate paternity and to establish court orders for child support, custody, care, and maintenance. Father also filed a proposed parenting plan, which suggested that the parties share legal custody of the child, that Mother have primary residential custody of the child, and that Father have regularly scheduled visits with the child. Father then moved for a temporary order that would incorporate the custody arrangements set forth in his proposed parenting plan. The district court granted the motion.

In January 2008, the court held an evidentiary hearing to address the issues raised in Father's petition. After hearing the evidence, the district court made a legal finding that Father was the child's natural father and, accordingly, ordered Father to pay past and

future child support. The court also awarded the parties joint legal custody of the child, awarded Mother primary residential custody, and established a parenting plan.

On November 4, 2008, Father filed an *ex parte* motion requesting the court modify the existing custody order to grant Father primary residential custody of the child with supervised visits for Mother. In support of this motion, Father submitted an affidavit recounting a conversation between Father and Mother's father (Grandfather) during which Grandfather stated that Mother "was drugged out," that the child had been living with various family members over the last few months, that Mother had granted Grandfather power of attorney, and that Mother had assigned her parental rights to Grandfather. Father further averred that Grandfather offered Father residential custody of the child and that, in a subsequent conversation between Father and Mother, Mother agreed to this change in custody if Father would continue to pay her child support. Father's affidavit also expressed concerns over the child's current residence with Grandfather because Grandfather's roommate had been imprisoned for several years. Based on the allegations set forth in the affidavit, the district court granted Father's *ex parte* motion and scheduled a hearing to review the matter the following week.

At the review hearing, Father appeared in person and through his attorney. Mother appeared in person and sought to be represented by Grandfather as special power of

attorney. Before proceeding with the hearing, the district judge announced that he knew Grandfather on a semi-casual basis and told the parties that he would recuse himself from hearing the case if there was any objection. Father affirmatively stated on the record that he had no objection; Mother made no statement on the record. Immediately thereafter, the court informed Grandfather that, as a nonlawyer, he would not be permitted to represent Mother. Grandfather lodged an objection, stating that Mother could not "get a fair hearing in this thing, against this kind of representation, with being forced to speak for herself."

In light of Grandfather's concern, the court asked Mother whether she wanted a continuance in order to have additional time to hire an attorney. Mother responded affirmatively and noted that she would need a week to obtain counsel. The court continued the matter to November 18, 2008.

When the review hearing reconvened on November 18, 2008, Mother again appeared without an attorney. Mother started off by asking the judge to recuse himself because of his prior relationship with Grandfather. The judge declined to do so, noting that he had given both parties the opportunity to object during the prior hearing and that if anything, his relationship with Grandfather, who was Mother's father, would have caused him to be biased in her favor.

Mother then requested another continuance to obtain counsel. The court denied the request. The court then deemed as final the earlier ex parte order giving primary residential custody to Father. The court did, however, invite Mother to obtain counsel and file a subsequent motion for review of the custody order. There is no evidence that Mother ever did so.

Analysis

Mother raises six issues on appeal: (1) the court erred in failing to appoint a guardian ad litem; (2) the judge erred in failing to recuse himself; (3) the court erred in issuing an ex parte child custody modification order; (4) the court erred in denying Mother's request for a second continuance; (5) the court erred in refusing to permit Grandfather to legally represent Mother; and (6) the final journal entry granting Father primary residential custody is void due to procedural error.

1. Guardian Ad Litem

Mother argues the district court erred in failing to appoint a guardian ad litem to represent the child's interests in (a) the paternity determination; and (b) both the initial and subsequent custody determinations. We note at the outset that Mother never raised

this issue before the district court, nor did she request a guardian ad litem be appointed for her child at any time.

a. The Paternity Determination

The appointment of a guardian ad litem in paternity proceedings is governed by K.S.A. 38-1125(b), which requires the appointment of a guardian ad litem to represent the child if the court finds the interest of the petitioner and the interest of the child are different. If, however, the court finds the child's interests do not differ from the petitioning parent, the decision regarding whether to appoint a guardian ad litem is discretionary. See K.S.A. 38-1125(b).

To that end, Mother points out that the court specifically made a finding in the March 4, 2008, written judgment of paternity that, for purposes of K.S.A. 38-1125(b), the interests of the child and the mother are one and the same. Mother reasons that because, as opposing litigants, Father's interests were necessarily adverse to her interests, and because her interests are the same as the child's interests, it must follow that Father's interests are adverse to the child's interests. Mother then concludes that, because Father's interests (as the petitioner) were different from the child's interests, the court was required pursuant to K.S.A. 38-1125(b) to appoint a guardian ad litem.

We find Mother's reasoning to be fatally flawed. Significantly, the Agreed Paternity Pretrial Conference Order signed by the court and all parties noted that a paternity test was not conducted because Mother and Father stipulated that Father was the biological father of the child. Given this stipulation, the interests of Mother and Father regarding the issue of paternity were one and the same—there was no dispute regarding paternity. Because the interests of Mother and Father were the same, it necessarily follows that the child's interests were similarly aligned.

"When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. We need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent." *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).

The statutory language in K.S.A. 38-1125(b) is plain and unambiguous: appointment of a guardian ad litem is required only when the court determines the interests of the child and the petitioner differ. Here, Father filed the petition to determine paternity as next friend for, and on the behalf of, the child. The interests of Father and Mother were aligned on the issue of paternity. Simply put, there was no evidence presented at any point in the proceedings to demonstrate that, for purposes of a paternity

determination, Father's interests were different from the child's interests.

b. The Custody Determinations

Next, Mother argues the district court erred in failing to appoint a guardian ad litem to represent the child's interests in the initial and subsequent custody determinations.

Generally, there is no case law or statutory mandate which compels the appointment of a guardian ad litem for minor children in child custody proceedings. *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 885-86, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006). With that said, the Kansas Code of Civil Procedure requires the district court to "appoint a guardian *ad litem* for a minor or incapacitated person not otherwise represented in an action or [] make such other order as it deems proper for the protection of the minor or incapacitated person." K.S.A. 60-217(c). Here, Father filed the initial and subsequent requests for custody determinations as next friend for, and on behalf of, the child. Because the child's interests were "otherwise represented" by Father, K.S.A. 60-217(c) did not require the court to appoint a guardian ad litem. There was no error.

2. *Recusal*

Mother argues the judge should have recused himself because of his personal bias against Grandfather. Under Rule 601A, Canon 3E.(1) (2008 Kan. Ct. Annot. 656) of the Kansas Code of Judicial Conduct, a judge should disqualify himself or herself "in a proceeding in which the judge's impartiality might reasonably be questioned." An example of such a situation includes a case where the judge "has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 3E.(1)(a), Kansas Code of Judicial Conduct (2008 Kan. Ct. R. Annot. 657). A judge should recuse himself or herself if the circumstances and facts of the case "create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances." [Citation omitted.] *State v. Alderson*, 260 Kan. 445, 454, 922 P.2d 435 (1996).

Generally, a party seeking to disqualify a judge from hearing a matter should follow the procedure delineated in K.S.A. 20-311d by filing a motion for change of judge and if necessary, a subsequent affidavit explaining the rationale for the desired disqualification. *State v. Walker*, 283 Kan. 587, 605-06, 153 P.3d 1257 (2007). However, there is at least some authority to indicate that a party's failure to file such a

motion does not bar a party's challenge, as a judge has an obligation to recuse himself or herself from such matters regardless of whether a party files a motion for disqualification. *Alderson*, 260 Kan. at 453-54; Rule 601B, Canon 2, Rule 2.11, Comment 2, effective March 1, 2009 (Advance Sheets, Vol. 287 Kan, No. 3, p. XIX).

The standard of review over a claim of error relating to a party's desire to disqualify a judge is set forth in *Alderson*, 260 Kan. at 454. The *Alderson* framework attempts to determine whether a defendant received a fair trial or whether his or her due process rights were violated when a district court judge refuses to recuse himself or herself by utilizing the following inquiry:

"(1) Did the trial judge have a duty to recuse himself from this case because he was biased, prejudicial, or partial? (2) If the judge did have a duty to recuse and failed to do so, was there a showing of actual bias or prejudice to warrant setting aside the judgment of the trial court? [Citation omitted]" *Alderson*, 260 Kan. at 454.

See *Walker*, 283 Kan. at 605.

Within the context of a judge's disqualification, bias refers to the judge's mental attitude towards a party. A judge will be found to have bias or prejudice if the judge "harbors a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or

favoritism towards one.' [Citations omitted.]" *Walker*, 283 Kan. at 608-09.

Under the first prong of the *Alderson* test, Mother has failed to demonstrate that the judge's prior casual relationship with Grandfather caused the judge to act in a biased or impartial manner. During the first custody modification hearing, the judge—without prompting from any party or witness—informed the parties that he knew Grandfather. Father affirmatively stated on the record that he had no objection to the judge presiding over the case; Mother made no statement on the record. As a result, the judge continued to preside over the case.

At the beginning of the second custody modification hearing a week later, Mother asked the judge to recuse himself, arguing she had not been given the right to object to his presiding over the case during the previous hearing. The judge was not persuaded by Mother's argument and determined that although Mother was given a chance to object at the prior hearing, she failed to do so. The judge decided to remain on the case and went on to question Mother about her intention to appear pro se. In doing so, he advised her:

"I know that your father is advising you; quite frankly, with all due respect to your father, he doesn't know what the law is or how the legal process works. So if you're relying upon him to give you legal advice, that's a mistake, respectfully. But you have the right to represent yourself if you

wish, but, I can just tell you, I have to hold you to the same standard as I would any attorney. So I have to presume that you know the law, that you know the procedures, and that you know the rules of the Court."

Instead of construing the judge's statements regarding the dangers of pro se representation as an admonition to proceed carefully with an understanding of the consequences, Mother asserts the judge's statements are proof of his personal bias against her father. We find Mother's assertion to be without merit. We have thoroughly reviewed the record and find neither the judge's statements or any other actions on the part of the judge establish hostile feelings or a spirit of ill will against Mother or Grandfather. And, even if Mother could prove hostile feelings or ill will, there is no evidence of any actual bias or prejudice caused by the judge's decision not to recuse. See *State v. Sappington*, 285 Kan. 176, 193, 169 P.3d 1107 (2007). In fact, Mother does not allege any such bias or prejudice in her appellate brief. Finally, and as noted by the judge himself, if anything, his prior casual relationship with Grandfather would have caused him to be biased in *favor* of Mother, not against her. The district judge did not err in deciding not to recuse himself from the case.

3. *Ex Parte Order*

Mother argues the district court erred in issuing the November 4, 2008, *ex parte* order temporarily granting primary residential custody to Father. More specifically, Mother asserts the court failed to comply with K.S.A. 2008 Supp. 60-1610(a)(2)(A), which requires submission of sworn testimony to support a showing of extraordinary circumstances before the court can issue an *ex parte* order changing residency from a parent who has had the sole *de facto* residency of the child.

Upon review of the record, we find the court fully complied with the requirements of K.S.A. 2008 Supp. 60-1610(a)(2)(A) in issuing the *ex parte* order modifying custody. The record reflects that, in conjunction with his motion for an *ex parte* order, Father filed an affidavit demonstrating extraordinary circumstances to justify modification of the current custody order: Mother's drug use and her inability to care for her child. Although not required to do so unless a party requests it, the court also took it upon itself to immediately schedule a review hearing for 6 days after the *ex parte* order was issued in order to permit Mother to challenge the sworn allegations set forth in Father's affidavit. See K.S.A. 2008 Supp. 60-1610(a)(2)(A) ("If an interlocutory order is issued *ex parte*, the court shall hear a motion to vacate or modify the order within 15 days of the date *that a party requests a hearing* whether to vacate or modify the order." [Emphasis added.]).

4. *Second Request for Continuance*

Next, Mother argues the district court erred in failing to grant her request for a second continuance at the November 18, 2008, custody modification hearing so that she could have time to find counsel to represent her. As a preliminary matter, we note that Mother fails to provide any support for her argument; thus, she has waived the right to raise the issue on appeal. See *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008) (an argument only incidentally raised in appellate brief is waived). Nonetheless, we briefly will address the substance of her argument.

Under K.S.A. 60-240(b), a district court may "for good cause shown continue an action at any stage of the proceedings upon such terms as may be just." The decision of whether to grant a continuance is vested in the sound discretion of the district court and should not be disturbed on appeal absent a showing of clear abuse. *Walker v. Regehr*, 41 Kan. App. 2d 352, 365, 202 P.3d 712 (2009). An abuse of discretion for failure to grant a continuance exists only if no reasonable person would take the view adopted by the district court. *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 97, 998 P.2d 514 (2000). Alternatively, a district court may abuse its discretion if its decision "goes outside the framework of or fails to properly consider statutory limitations or legal standards. [Citations omitted.]" *State v. Green*, 283 Kan. 531, 545, 153 P.3d 1216 (2007). The party asserting the district court abused its discretion bears the burden of showing such

abuse of discretion. *State v. Brown*, 285 Kan. 261, 303, 173 P.3d 612 (2007).

Based on the facts here, we find the district court did not abuse its discretion in declining to grant Mother another continuance to obtain counsel. At the first review hearing, the court recognized the importance of the interests at stake and continued the matter for 1 week, the amount of time Mother stated she would need to obtain counsel. Appearing without counsel a week later, Mother failed to present any evidence that she attempted to obtain counsel or made other preparations for the custody modification hearing. Nor did Mother, as the court invited her to do, retain an attorney after the judgment was issued and file a motion to review the custody decision. Mother's failure to file such a motion suggests that, had the court granted her the second continuance, such continuance would have worked only to unduly delay the finality of the proceedings.

5. Grandfather as Mother's Legal Representative

Mother argues the district court erred in refusing to permit Grandfather, a nonlawyer, to represent her during the custody modification proceedings. Kansas law is clear in that a party to a civil action may only appear pro se or through counsel. *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1033, 686 P.2d 171 (1984); *Atchison Homeless Shelters, Inc. v. Atchison County*, 24 Kan. App. 2d 454, 454-55, 946 P.2d 113, *rev. denied* 263 Kan. 885 (1997); *Hickman v. Frerking*, 4 Kan. App. 2d 590, 592, 609 P.2d 682

(1980). Because Grandfather is not an attorney, the district court did not err in prohibiting him from representing Mother during the custody proceedings.

6. Void Judgment

Mother's last argument is that the district court's judgment was void because there was no court seal affixed to the November 4, 2008, ex parte order modifying custody of the child. Neither the Kansas Code of Civil Procedure nor Supreme Court Rules require affixation of a seal to orders or judgments. Under K.S.A. 60-258, a judgment is effective when a journal entry or other judgment form is signed by the trial judge and filed with the clerk of the court. Here, the ex parte order is file-stamped and signed by District Judge Anthony Powell. The subsequent journal entry finalizing the ex parte temporary order is sealed, file-stamped, and signed by a district court judge. Thus, neither the ex parte order nor its subsequent journal entry are void.

Affirmed.