

NOT DESIGNATED FOR PUBLICATION

No. 106,900

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

ZAHIR ALSHEHRI,
Appellant,

and

FATMAH ALSHEHRI,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; KATHLEEN M. LYNCH, judge. Opinion filed September 14, 2012. Affirmed.

Joseph W. Booth, of Booth Family Law, of Lenexa, for appellant.

Douglas M. Greenwald, of McAnany, Van Cleave & Phillips, P.A., of Kansas City, for appellee.

Before GREEN, P.J., ATCHESON and BRUNS, JJ.

Per Curiam: This appeal arises out of a divorce action between two Saudi Arabian citizens in which a dispute arose over the custody of their two minor children. After a 3-day court trial, the district court awarded sole legal custody and residency of the children to the mother. The father was granted parenting time every other weekend and was granted limited access to information regarding the children's health, education, and welfare. On appeal, the father challenges the grant of sole legal custody to the mother as well as the parenting plan ordered by the district court. Because we find that the district court did not abuse its discretion, we affirm its decision.

FACTS

Zahir Hasan Alshehri and Fatmah Muhammad Alshehri were married in Saudi Arabia in 2001, and two children were born during the marriage. A daughter, R.A., was born on March 1, 2002, and a son, W.A., was born on September 21, 2004. The family lived together in Saudi Arabia with Zahir's family until he moved to Canada to attend school in late 2004 or early 2005. Several months later, Fatmah and the children joined Zahir in Canada.

In 2006, after a 2-month visit to Saudi Arabia, the Alshehri family relocated to Ohio so that Zahir could continue his studies, and Fatmah began taking an English language class. In August 2008, the family moved to Kansas City, Kansas, where Zahir entered the respiratory therapy program at the University of Kansas Medical Center. At the time the family moved to Kansas City, Fatmah had a sixth grade education.

Shortly after moving to Kansas City, Fatmah enrolled in another English language class and R.A. enrolled in school. The Alshehri family continued to live together until February 25, 2009, when Fatmah left the family home with the children and went to a domestic abuse center. The next day, Fatmah filed a protection from abuse action against Zahir, claiming that he had hit her and threatened her life.

On March 25, 2009, Zahir filed a petition for separate maintenance. In response, Fatmah filed a counter-petition for divorce. A few weeks later, the protection from abuse action was consolidated into the divorce proceedings. Although the parties initially agreed that Zahir should have unsupervised parenting time, Fatmah filed a motion to suspend Zahir's unsupervised parenting time on June 5, 2009. In her motion, Fatmah alleged that Zahir had sexually abused R.A.

On May 22, 2009, at the request of Zahir's counsel, the district court appointed Dr. John V. Spiridigliozzi to conduct a neutral custody evaluation. Specifically, Dr. Spiridigliozzi was "appointed to conduct a child custody investigation . . . and provide a written report to the Court . . . , which [was to] include recommendations for child custody in this case." Over the next year and a half, Dr. Spiridigliozzi conducted his evaluation, interviewing Zahir, Fatmah, R.A., and W.A.

On June 16, 2009, the district court held an evidentiary hearing on the motion to suspend Zahir's unsupervised parenting time. An investigating officer testified that R.A. claimed that Zahir had touched her vagina on several occasions and that he had also touched W.A.'s penis. According to the officer, R.A. also stated that Zahir had shown her pornographic videos on the computer. Zahir, on the other hand, asserted that the sexual abuse allegations were fabricated. After hearing the evidence, the district court ordered that Zahir have supervised parenting time with the children.

In his report to the court dated November 11, 2010, Dr. Spiridigliozzi stated that he believed the allegations of sexual abuse against Zahir were "dubious at best." Moreover, he suggested that if Fatmah had manipulated and coached R.A. into making false allegations against Zahir, it would be akin to emotional abuse. Dr. Spiridigliozzi also stated that he believed both Zahir and Fatmah had used corporal punishment on the children in the past. But he believed that Fatmah and Zahir were both capable of meeting the needs of their children.

Dr. Spiridigliozzi rendered the opinion that the best interests of the children would be served by them remaining in Kansas with Fatmah. He noted that Zahir had reported that his visa expired on December 31, 2010, and that he would have to return to Saudi Arabia to live. Although Dr. Spiridigliozzi felt that Fatmah needed encouragement to promote the children's relationship with their father, he recognized that she had always been the primary caregiver for the children. Moreover, he opined that a move to Saudi

Arabia would be traumatic for the children and might reverse the progress they had made over the past year.

Because Zahir believed that Dr. Spiridigliozzi's report cleared him of the allegations of child abuse, he requested that he be permitted to have unsupervised parenting time with the children. At a hearing held on December 22, 2010, Zahir voiced the concern that if he was required to return to Saudi Arabia following the divorce trial, it may be 2 years before he could return to the United States to see the children. Although the district court increased Zahir's supervised parenting time, it denied his request for unsupervised parenting time until it could hear the evidence to be presented at trial.

On January 27, 2011, a 3-day jury trial commenced. During the trial, the district court heard the testimony of Zahir, Fatmah, Dr. Spiridigliozzi, Cassandra DeForest, LMSW, Dr. Aileen Utley, and several other witnesses. In addition, numerous exhibits were admitted into evidence. Although we will not repeat the evidence presented at trial in this opinion, it is fair to say that the testimony offered by Zahir and Fatmah regarding their relationship and family life differed dramatically. At the conclusion of the trial, the district court took the case under advisement.

Although the reason for the delay is unclear, the district court did not announce its decision until August 11, 2011. At a hearing held on that date, the district court granted the divorce and awarded Fatmah sole legal custody of the children. In addition, Fatmah was granted residency and Zahir was granted unsupervised parenting time to be exercised in the Kansas City metropolitan area. Furthermore, the district court ordered that the children were not to be removed from Kansas or the Kansas City metropolitan area without the written consent of both parents. Evidently, Zahir had not returned to Saudi Arabia at that point and—based on statements made to this court at oral argument—it appears that he continues to reside in the United States.

In rendering the decision, the district court noted that it had heard the testimony presented at trial, observed the demeanor of the witness, and reviewed the voluminous trial exhibits. The district court stated that the primary basis for the decision to grant sole legal custody to Fatmah was the evidence that Zahir abused Fatmah in front of the children; Zahir's failure to respect Fatmah as a co-parent; and Zahir's testimony that he would be in Saudi Arabia and unable to return to the United States for several years. Thus, the district court concluded that "joint legal custody [would not be] workable"

The district court entered a decree of divorce on September 8, 2011, in which it made findings of fact and conclusions of law consistent with the earlier announcement of the decision on the bench. Thereafter, Zahir timely appealed the award of sole legal custody and the parenting time order to this court.

ANALYSIS

Issues Presented

There are two issues presented on appeal. First, whether the district court abused its discretion in granting sole legal custody to Fatmah. Second, whether the district court abused its discretion in adopting the parenting time schedule. It should be noted that residency is not an issue. Rather, Zahir's legal counsel has candidly recognized that the district court's decision to have the children reside with Fatmah in Kansas City was well-founded based on the evidence presented at trial.

Standard of Review

The parties agree that abuse of discretion is the appropriate standard of review. "[T]he 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).

Accordingly, it is Zahir's burden on appeal to show that the district court abused its discretion in granting Fatmah sole legal custody and in adopting the parenting plan. See *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 419, 119 P.3d 684 (2005). Judicial discretion is abused only when a decision is so arbitrary that no reasonable person would have taken the same position. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011).

We must review the record to determine whether substantial evidence supported the district court's factual findings and then determine whether a reasonable person could rely on such findings to reach the same conclusion as the district court. See *In re Marriage of Kimbrell*, 34 Kan. App. 2d at 420. Importantly, when conducting this review, we do not weigh conflicting evidence or evaluate the credibility of witnesses. See *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010).

Substantial Competent Evidence

When determining custody, a district court must look to the statutory factors in K.S.A. 2011 Supp. 23-3203 (previously K.S.A. 60-1610[a][3][B]). A review of the record in the present case reveals that the district court went through each of the statutory factors on the record. Moreover, Zahir does not argue that the district court failed to apply the appropriate law. It is also important to note that Zahir recognizes on appeal that there is sufficient evidence in the record to support the district court's finding that Zahir physically and emotionally abused Fatmah—sometimes in front of the children. But Zahir complains about a number of other factual findings made by the district court.

In rendering its decision, the district court made a variety of factual findings on the record and in the decree of divorce, including: (1) that Zahir has physically and emotionally abused Fatmah, sometimes in front of the children, (2) that according to Dr. Spiridigliozzi, it is likely that the children have formed a stronger emotional attachment with their mother than with their father, (3) that the children are functioning well in Kansas, (4) that the children have adjusted well to their school in Kansas City and have friends in the community, (5) that based on his demeanor in court and the history of abuse, Zahir does not regard Fatmah as an equal and does not respect her opinion regarding parenting, (6) that Fatmah is willing to allow Zahir to have access to the children so long as they remain in Kansas or in the Kansas City metropolitan area, (7) that R.A. had indicated a desire to live with Fatmah, (8) that the children have a strong sibling bond, (9) that Zahir had expressed to Dr. Spiridigliozzi that he would take the children to Saudi Arabia if granted residential custody, (10) that the primary caretakers of the children in Saudi Arabia would be relatives and not Zahir, (11) that the children do not have a close relationship with relatives in Saudi Arabia, (12) that according to Dr. Spiridigliozzi, there is no guarantee the children would continue to function well if moved to Saudi Arabia because of the stress of relocation, (13) that neither of the children reads or speaks Arabic fluently, (14) that Zahir never testified either he or the Saudi Arabian courts would follow the custody orders issued by a Kansas court, and (15) that according to Dr. Spiridigliozzi, the children's best psychological interests will be served if they remain in Kansas with their mother.

Although we may or may not have made the same factual findings as the district court, we find sufficient evidence in the record to support each of these findings. Likewise, we note that the district court did not find the opinions of Zahir's expert, Dr. Utley, to be persuasive. Because the district court's findings were supported by substantial competent evidence and because we do not reweigh the conflicting evidence presented at trial, it would not be appropriate for us to replace our judgment on such matters for that of the district court.

Although Zahir complains that the decree of divorce and the findings made on the record are inconsistent, we do not find this argument to have merit. In both the transcript of the hearing held on August 11, 2011, and in the decree of divorce filed on September 8, 2011, the district court expressed a number of factors that led to her decision to grant sole legal custody to Fatmah. It is true that the reasons for granting sole legal custody and for entering the parenting plan are not identical. But from reading the transcript and the decree of divorce together, we do not find them to be inconsistent.

The decision reached by the district court rests primarily on the opinions rendered by Dr. Spiridigliozzi—whom Zahir nominated to serve as the neutral custody evaluator—and on the district court's evaluation of the evidence presented at trial. In particular, the district court found Zahir's demeanor at trial—including shaking his head, laughing, and smirking while Fatmah testified—to be evidence to show that Zahir did not respect Fatmah or see her as an equal parent. Furthermore, the district court also found it significant that Zahir testified he would be returning to Saudi Arabia shortly after the trial and would not be able to return to the United States for 2 years, which would make it difficult to co-parent. Thus, considering this evidence and our review of the record as a whole, we conclude that the district court's decision to grant sole legal custody to Fatmah was not an abuse of discretion.

The district court also ordered that Zahir would have weekend parenting time twice a month and that both parents would have daily phone contact with the children when they are with the other parent. At the time the district court made this order, Zahir was still in the United States, and it appears based on the statements made at oral argument that he has still not returned to Saudi Arabia. As such, we find this parenting time schedule to be reasonable. If at some point the schedule is no longer workable, there are avenues by which the parties can seek its modification. See K.S.A. 2011 Supp. 23-3221(a), (c). Likewise, if Zahir is now planning on remaining in the United States, he can

ask the district court to consider granting joint legal custody to the parents. See K.S.A. 60-1628.

Finally, we note that Zahir appears to argue that the district court's decision was flawed as a result of ethnocentric reasoning. Despite the cultural evidence presented at trial, however, the custody and parenting time decisions made by the district court were ultimately about the best interests of the children. Certainly, when Zahir testified that he would be returning to Saudi Arabia in the near future, the geographical distance between the parents became a relevant factor—just as geographical distance would be a relevant factor if a parent desired to move to a different part of the United States. Thus, we conclude the district court's decision was not the result of ethnocentrism but was made based on legitimate factors regarding the best interests of the children.

Affirmed.