

NOT DESIGNATED FOR PUBLICATION

No. 107,774

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

JOHN SLATER,  
*Appellee,*

and

AMY SLATER,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Johnson District Court; ALLEN R. SLATER, judge. Opinion filed January 11, 2013. Affirmed.

*Ronald P. Wood*, of Clyde & Wood, L.L.C., of Overland Park, for appellant.

*Lori S.B. Justice*, of Justice Family Law, LLC, of Olathe, for appellee.

Before PIERRON, P.J., MALONE, C.J., and BUKATY, S.J.

*Per Curiam:* In this divorce action, Amy Slater appeals the district court's decision granting sole custody of the minor children to her ex-husband John Slater, denying her any visitation with the children, and failing to award spousal maintenance. We affirm.

John and Amy were married on April 22, 1998. The couple adopted two children during the marriage: M.S., born December 2004 and R.S., born July 2006. In May 2010,

John filed for divorce based on grounds of incompatibility. In an affidavit filed with the divorce petition, John described how he learned Amy had discussed a murder-for-hire plot to kill him for insurance proceeds and she was under investigation by authorities for the plot, Amy had been having an on-line relationship with a man in Egypt, and he had found passport applications for the children. Amy was removed from the couple's residence. John retained temporary residential custody of the children, and Amy was permitted 2 days per week of supervised visitation at Safe Passages.

Dr. Wesley Crenshaw was appointed by the trial court to perform a child-custody evaluation. Dr. Crenshaw testified at trial as to the allegations of the murder-for-hire conspiracy, how Amy told the authorities that it was all a joke, how M.S. and R.S. overheard Amy's conversations about shooting John, and also the allegations of physical—abuse including Amy hitting R.S. and putting hot sauce in his mouth for punishment. Dr. Crenshaw described how it appeared that Amy was actually bragging about the amount of discipline that she had to use on R.S.

Dr. Crenshaw testified Amy admitted she was involved in discussions about murdering John, but it was a joke and nothing serious. Dr. Crenshaw stated that even if it was a joke, Amy showed remarkably poor judgment to have those conversations where they could be heard by the children. Dr. Crenshaw also testified concerning Amy's on-line affair with a man from Egypt and whether she would actually flee with the children to Egypt.

In Dr. Crenshaw's written report, he set forth two options for custody and parental contact:

**"Option 1: Termination**

"If based on the evidence in this report, the court find the case to be unresolvable (e.g., having no reasonable potential for reintegration) I recommend it suspend Amy's parental

access in perpetuity, and ask her to relinquish her rights down the road if and when John remarries. The rationale for selecting this option would be His Honor's belief that Amy's conduct had been so egregious in the treatment of the children as to render unlikely any future remediation, and that Amy poses a clear threat to the children that could not reasonably be mitigated by further individual and family therapy as I have outline in option 2. In this, the court would see the risk of exposing the children to their mother as EXCEEDING the risk inherent to terminating that relationship in its present form.

**"Option 2: Reintegration**

"If the court does aspire toward reintegration—even if that is simply unsupervised parenting time every other weekend and one night during the week—then the plan for getting there is fairly clear, even if the outcome is not. I have outlined what needs to happen in aspirational terms, as the specifics really have to evolve within an ongoing family therapy process with Amy and the children. The rationale for selecting this option would be His Honor's belief that there is something left to be salvaged in Amy's relationship with her children, that she could reasonably be expected to benefit from individual and family therapy as I have described it below, and that taking this risk could foreseeably benefit the children by restoring or forging a critical relationship with their only maternal figure. Here the court would see the risk inherent to termination of rights as EXCEEDING the risk of reintegration under the guidelines recommended below."

Dr. Maria Leichtman was M.S.'s therapist. She testified that M.S. told her that her mom, Amy, had three Internet boyfriends, she spent a lot of time on the computer while they were with her, her mother had planned to kill her daddy, and her mother was preparing passports so that M.S. and R.S. could accompany her to Egypt to see her boyfriend. Dr. Maria Leichtman found the information to be credible and consistent in all conversations with M.S. M.S. told Dr. Maria Leichtman that she was scared that her mother would have her father killed. Dr. Maria Leichtman opined:

"My opinion is that it is in the best interest of [M.S.] to not have contact with her mother. She has done well in school. She doesn't seem to miss mother. When I bring up the idea of mother and time with her, she turns away from that subject. She has stopped being scared at nights. She now sleeps independently."

Dr. Martin Leichtman was R.S.'s therapist. R.S. told Dr. Martin Leichtman that Amy had hit him with spoons and he was frightened of her. R.S. appeared to lack any attachment to Amy. Dr. Martin Leichtman shared the same opinion as his wife, Dr. Maria Leichtman. He concluded that of the options set forth by Dr. Crenshaw, the best option was to discontinue any contact with Amy.

After hearing all the evidence, the trial court awarded sole legal custody of the children to John. The court found it was impractical to expect parents to coparent with one another when one parent has plotted the murder of the other and even it was a joke it was grossly inappropriate, evidence of a serious lack of judgment, and a serious disrespect for the other parent. The court also based its decision on the credible evidence of abuse and that Amy did not understand the developmental needs of the children. For these same reasons, the court did not allow any parenting time between Amy and the children. However, the court's decision to not allow Amy any parenting time was not permanent:

"The Court has continuing authority to change the decision pertaining to parenting time in the event [Amy] expresses a sincere and heartfelt apology to [John] for her actions. Upon her demonstration that she is attune to the developmental needs of the children, if she can prove that she is not going to abuse the children by striking the children, hitting the children, putting hot sauce in the children's mouths, or being otherwise physically or emotionally cruel to the children, the Court could reconsider, but at this time there is no parenting time for [Amy]."

The court divided the assets of the parties and then ordered John to make a final equalization payment to Amy in the amount of \$47,895. The court stated that with respect to child and spousal support, it was necessary to keep the parties as separate as possible; and to that end, the court ordered John to be responsible for all expenses of the children, but no child support orders would be entered against Amy. Additionally, the court held

that since John was paying all the expenses for the children, there would not be any maintenance awarded to Amy either. The court commented that it was also not awarding maintenance to Amy because of the credible evidence of the murder-for-hire plot. Amy appeals.

First, Amy argues the trial court abused its discretion by denying her any visitation with her children in violation of her fundamental rights to custody and control of her children. She does not make any arguments to support her statement that the court erred in granting sole custody to John. This issue is incidentally raised at best. See *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012) (a point raised incidentally in a brief and not argued therein is also deemed abandoned.)

Kansas law provides that when the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the children. 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. See *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002).

A trial court's decision regarding parenting time and visitation will not be disturbed on appeal absent an affirmative showing of abuse of discretion. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 419, 119 P.3d 684 (2005). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *In re Marriage of Rayman*, 273 Kan. at 999. Moreover, under Kansas law the district court has been entrusted with the responsibility to safeguard the children's best interests in parenting time and visitation matters.

K.S.A. 2011 Supp. 23-3208 recognizes that a parent is entitled to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the children's physical, mental, moral, or emotional health. See

*In re Marriage of Kiister*, 245 Kan. 199, 201, 777 P.2d 272 (1989) (K.S.A. 1988 Supp. 60-1616(a) [predecessor to 2011 Supp. K.S.A. 23-3208] creates a statutory presumption that the parent who is not granted custody or residence will receive reasonable visitation. However, that presumption may be overcome if, after a hearing, the trial judge finds "that visitation would endanger seriously the child's physical, mental, moral or emotional health.").

"Courts of most jurisdictions are ordinarily reluctant to deny all visitation rights but authorities are generally in agreement that such rights may be denied if the child's welfare would be jeopardized thereby. The right of visitation is not an absolute one and must yield to the good of the child." *Donaldson v. Donaldson*, 198 Kan. 111, 113, 422 P.2d 871 (1967).

Amy contends the trial court did not make the appropriate finding that granting her visitation would seriously endanger the children's physical, mental, moral, or emotional health. Amy argues the only evidence before the court was spanking and the use of hot sauce. She contends supervised visitation could have been used, along with a reintegration plan, to ensure the children's safety. Amy maintains the trial court essentially terminated her parental rights without the safeguards of the child in need of care proceedings.

We have affirmed several unpublished cases where no visitation was granted to the noncustodial parent. In *In re Paternity of A.L. v. Florez*, No. 104,684, 2011 WL 2801080 (Kan. App. 2011) (unpublished opinion), *rev. denied* 295 Kan. \_\_\_\_ (November 11, 2011) the district court considered the impact of second-hand smoke and expressly found that cigarette smoke in A.L.'s presence would seriously endanger her physical health. The court held this finding was supported by substantial competent evidence and the district court did not abuse its discretion in denying Florez parenting time. In *In re Marriage of Becker*, No. 95,113, 2006 WL 2043458 (Kan. App. 2006) (unpublished opinion), the noncustodial parent was in prison. The court stated that the parent clearly

had criminal activities and drug use that supported the district court's decision that it was not healthy for his daughter to be around him. Although not in the precise language of K.S.A. 60-1616(a) [predecessor to K.S.A. 23-3208], we found the district court's decision complied with a finding that reasonable parenting time would seriously endanger his daughter's physical, mental, moral, or emotional health. We found no abuse of discretion in the district court's limitation on parent's visitation. 2006 WL 2043458, at \*2.

In the case before us, the trial court set forth the appropriate statutes for considering custody and visitation of M.S. and R.S. In its journal entry, the court quoted K.S.A. 2011 Supp. 23-3201 for determining visitation in the best interests of the children and also K.S.A. 2011 Supp. 23-3203 granting visitation unless it would seriously endanger the children's physical, mental, or emotional health. Immediately after citing these standards, the court concluded the testimony of the Leichtmans and Dr. Crenshaw supported a finding that no parenting time for Amy was appropriate. The findings in this regard are supported by substantial competent evidence.

The trial court granted sole custody of the children to John and also no visitation for Amy because of the allegations of child abuse by Amy including evidence that she was "beating the crap out of [R.S.]," hitting [R.S.] with wooden spoons, pinching [R.S.] on the fat part of his arm, putting hot sauce in the children's mouths as discipline, and contriving a murder plot to kill John. The court found that Amy's behavior demonstrated a very serious lack of understanding and empathy for the children who now know their mother has attempted to kill their father and demonstrated a clear disrespect for the other parent.

We acknowledge the constitutional concerns raised by Amy relating to the fundamental rights of child custody. The court in *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1993), stated that "[i]f a constitutional or statutory right has been violated, the trial [court's] use of discretion is limited. Under these circumstances there is a greater

need for articulation by the trial [court] of the reasons for [its] 'discretionary' decision." See *In Re Marriage of Kimbrell*, 34 Kan. App. 2d at 419-20 (quoting *Saucedo*). The trial court below articulated the very facts by which it denied visitation to Amy. We are unable to say the trial court abused its discretion. The court set forth the proper standard for a situation of no visitation and then set forth the facts by which it decided Amy should not be allowed any visitation. We agree with John that Amy failed to raise the issue of the court not making the appropriate findings below. The general rule is that a litigant must object to inadequate findings of fact or explanations of a decision to preserve an issue for appeal. Without such an objection, we generally presume that the district court found all of the facts needed to support its judgment. See *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

Next, Amy argues the trial court abused its discretion in failing to award her any spousal maintenance.

Regarding spousal maintenance, the trial court found:

"29. With respect to child support and spousal support, the Court's intent is to keep the parties as separate as possible. To that end, the Court orders that Petitioner/Father be entirely responsible for the financial support of the children and enters no child support order as against the Respondent.

"30. The Court denies Respondent's request for spousal support or maintenance based on the following: the Petitioner is entirely and exclusively financially responsible for the minor children; credible evidence that the Respondent discussed with Matt Burr coming to Kansas to kill the Respondent; and Respondent's attempted explanation of the plot to murder Petitioner as a joke."

The district court has wide discretion regarding spousal maintenance, and an appellate court will only disturb a judgment regarding maintenance if there was a clear abuse of discretion. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003).

As stated above, judicial discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the district court, then it cannot be said that the district court abused its discretion. *In re Marriage of Rayman*, 273 Kan. at 999. The party asserting that the district court abused its discretion bears the burden of showing such abuse. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995). However, the district court is required to comply with the statutes authorizing payment of support and maintenance, and failure to do so is reversible error. *In re Marriage of Cline*, 17 Kan. App. 2d 230, 234, 840 P.2d 1198 (1992).

The purpose of spousal maintenance is to provide for the future support of the divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other party to pay. *Carlton v. Carlton*, 217 Kan. 681, 681, 538 P.2d 727 (1975). A maintenance award must be fair, just, and equitable under all the circumstances. However, spousal maintenance is a discretionary award. K.S.A. 2011 Supp. 23-2902 states: "(a) Any decree of divorce . . . may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances."

In *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976), the court set forth elements that a district court may consider in determining whether to award maintenance, including: (1) the age of the parties; (2) the parties' present and prospective earning capabilities; (3) the length of the marriage; (4) the property owned by the parties; (5) the parties' needs; (6) the time, source, and manner of acquisition of property; (7) family ties and obligations; and (8) the parties' overall financial situation. It is clear the trial court considered all these factors in terms of coming to a fair and equitable division of property resulting in a substantial equalization payment to Amy. By the same token, the court probably had these considerations in mind when it decided to deny spousal

maintenance because John would be covering all child support expenses and Amy had plotted to kill John.

Amy's concern with the lack of spousal maintenance is a bit convoluted. She is wondering if she is "off the hook" for child support until the children reach majority. She also complains as to the lack of specificity regarding the proper amounts of maintenance and child support since the trial court appears to be offsetting her maintenance award by the amount of child support subrogated by John. Amy is most concerned with future courts using the lack of any child support payments as evidence in a termination of parental rights proceeding that Amy failed to support the children.

When the district court's findings supporting a denial of spousal maintenance are supported by the evidence, this court will not second guess the district court's decision. Although the record contains evidence which may have supported a different disposition in this case, the record also contains substantial competent evidence supporting the trial court's decision to deny Amy's request for maintenance. The underlying premise of the trial court's decision is that it would be unusual to award maintenance in this case after the divorce is granted in part due to a murder-for-hire plot by the spouse requesting maintenance. Spousal maintenance is awarded when it is "fair, just and equitable under all of the circumstances." Examining *all of the circumstances* in this case, we are unwilling to conclude that no reasonable person would have adopted the position taken by the district court. Accordingly, we conclude the district court did not abuse its discretion in denying Amy's request for maintenance.

Affirmed.