

NOT DESIGNATED FOR PUBLICATION

No. 112,561

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of
KIMBERLY LYNN HINES,
Appellee,

v.

TRAVIS RYAN HINES,
Appellant.

MEMORANDUM OPINION

Appeal from Ford District Court; E. LEIGH HOOD, judge. Opinion filed July 24, 2015. Affirmed.

Derek W. Miller and Tessa French, of Miller Law Firm, LLC, of Liberal, for appellant.

Glenn I. Kerbs, of Kerbs Law Office, of Dodge City, for appellee.

Before PIERRON, P.J., BUSER and POWELL, JJ.

Per Curiam: Kimberly Lynn Hines filed for divorce from Travis Ryan Hines. As part of the divorce process, the trial court held a hearing on custody and residency of their two minor children, Kaydence and Gunner. The trial court granted Kim and Travis joint custody and designated Kim as the primary residential parent. Travis appeals the court's designation of Kim as the primary residential parent. Travis failed to object to the court's findings or request more specific findings. Therefore, we will presume the trial court made all proper findings and affirm.

Kim and Travis were married in Spearville, Kansas on June 18, 2005. Kim had a daughter, Rileigh, from a previous relationship. Kim and Travis had Kaydence and

Gunner together. By all accounts, the marriage was fraught with conflict, stress, and debt. There were allegations of constant fighting, drinking problems, and that both Travis and Kim had threatened suicide. After a few brief separations beginning in February 2013, Kim finally filed for divorce on August 5, 2013. She moved multiple times but ended up in an apartment in Dodge City. Travis remained in the family home in Spearville.

Both parents provided proposed parenting plans. Prior to the trial, the children were going back and forth between the parents' houses every week. Everyone agreed this was not a long-term solution. Both sought primary residential custody of Kaydence and Gunner. Neither parent cited to K.S.A. 2014 Supp. 23-3201 *et seq.*, the statutory basis for determining residential custody, or discussed the factors that favored him or her in their proposed parenting plan.

On August 13-14, 2014, the trial court held a hearing to make determinations regarding custody. This was the same week school started. The court's residential determination was important because the children were enrolled in both Dodge City and Spearville schools. They had attended Spearville until Kim moved them to Sacred Heart in Dodge City the previous semester. Kim indicated it was easier for her to pick them up from Sacred Heart and Kaydence wanted to participate in Sacred Heart's dance program. As of the trial, Kim had enrolled the children in a third school, Ross Elementary, and Travis had enrolled them at Spearville. The court's award of residential custody would determine where they would attend school.

The hearing lasted a day and a half, and the testimony is highly summarized. The testimony presented indicates both parents loved their children. Travis spent much of his free time playing outside with the children and coaching their sports teams. Kim constantly advocated for her son's needs. However, both parents, like all parents, had negative aspects as well.

Kim and Travis had lots of debt and little to show for it. They had a severely upside down vehicle, a large amount of credit card debt to retailers, and student loans. The testimony indicated much of the family's debt was tied to Kim's shopping habits, such as the purchase of a \$1,500 dog and an \$800 vacuum cleaner.

The separation and divorce proceedings were as acrimonious as the marriage. There was a breakdown in communication between Kim and Travis to the point they could not compromise at all. Kim moved around with the children without telling Travis. Kim withheld Gunner's medication from Travis. Once, she threw his medicine out the window of her car, forcing Travis to retrieve it from the side of the road. Travis told Rileigh he hoped Kim would get in a car wreck. Travis' mother was also a source of tension between Kim and Travis throughout the marriage and separation.

At the time of the hearing, Travis had worked for United Telephone for 13 years. He generally worked from 8 a.m. until 5 p.m., but was on call once a month and could be called in if an emergency occurred. His mother lived nearby and was available to help with Kaydence and Gunner after school, for meals, and when Travis had to work.

Kim, a cosmetologist, had no steady work history. At the time of the trial, she had been renting a booth from a local salon for less than a month. In the 18 months since Travis and Kim first separated, Kim had worked for no fewer than four different hair salons. At least one salon ended its relationship with Kim based on her personal problems. However, due to the nature of her employment, she had flexibility to work around her children's schedules.

At times, Travis had drunk too much alcohol. He said the stress of his marriage led him to drink. On one instance, he drove while intoxicated, did not see Kaydence behind his car, and nearly hit her. He indicated he had drunk far less since the separation. Kim

was diagnosed with bipolar disorder and depression at age 14. She was supposed to take medicine every day, but she acknowledged she does not always take it.

Travis' father Dale also testified to seeing Kim physically abuse Gunner. Dale testified he was sitting in his truck waiting for his wife who was shopping in a store. He did not know Kim and Gunner were there. He saw Gunner running through the parking lot and jumping up and down on top of Kim's car. Dale got out of the car and walked towards Gunner and Kim. Dale said when Kim got to the car she grabbed Gunner by the legs causing him to fall onto his back. After Kim got Gunner off the car, she got on top of him and held his arms down with her knee to his chest. Once Gunner was in the car, Kim hit him in the head. After seeing Dale, Kim immediately called Travis and said, "It's not what it looks like." Kim acknowledged the events and claimed she was just protecting Gunner's safety.

The record indicates that Gunner, who is 6 years old, has behavioral problems. Gunner was aggressive and had "rages." The parties disputed the severity of his problems, but he had been diagnosed with A.D.H.D. and oppositional defiant disorder. Based on the testimony of those who had experienced Gunner's rage, his behavior was the most extreme around Kim. He did not handle change well and was also very far behind other children his age academically. At 5-years-old, Gunner could not identify his body parts, say the ABCs, or count to 10.

Gunner's case manager, Richard Falcon, testified at the hearing. Falcon felt both parents had participated and supported Gunner. Gunner also saw a therapist at Compass Behavioral Health, Alicia Brown. He had been treated by doctors at the K.U. School of Medicine in Wichita, a neurologist in Wichita, and a chiropractor. Gunner attended psycho-social therapy through ABC Hope to help him catch up academically. His group leader Jeanie Zortman testified she had found both parents to be equally cooperative.

Gunner also attended Bright Beginnings through the school district. Bright Beginnings was a program that provided structure and was supposed to help get Gunner ready for kindergarten. His teacher, Barbara Crosser testified she had never had any contact with Travis. Travis also failed to attend one I.E.P meeting for Gunner, despite having knowledge of it.

Kim said Travis was opposed to Bright Beginnings and ABC Hope. Travis indicated Kim never consulted him on any decisions regarding Gunner's health or education, such as enrolling him in Bright Beginnings or ABC Hope. Therefore, his initial hesitation was due to a lack of knowledge about the programs. Kim acknowledged she did not consult with Travis before switching doctors but provided no reason and testified she believed she was "the boss" but Travis could make decisions too. Travis acknowledged his son's diagnosis but believed a firm "no" would do more good than additional doctors and more medicine. Kim seemed more supportive of medical intervention as opposed to altering her parenting style.

The testimonies of Kim, Travis, and Gunner's teacher and therapists indicated Gunner's behavior had improved based on the combination of medicine, stability, and the assistance he received at Bright Start and ABC Hope.

Travis testified Kaydence was excelling at school in Spearville and wanted her to remain there. Kim testified Kaydence wanted to participate in a dance program available in Dodge City and be near Raleigh.

After hearing a day and a half of testimony, the trial court issued its rulings. It determined it needed to make a primary residency ruling that day because the children were set to start school that week and where they would go would be based upon who had primary residential custody. The judge acknowledged this was likely the toughest custody determination he had to make in the 14 years he had been a judge. The court

discussed the chaos and "incredible animosity" surrounding this marriage, even questioning what the two ever saw in each other.

The trial court acknowledged the parents' differing opinions as to the best path for Gunner's treatment. The court admonished them for creating an environment in which Gunner was able to act out so much and in which both Gunner and Kaydence had a large vocabulary of inappropriate words. The court addressed Kim's mental health issues and Travis' drinking. It addressed Kim cutting Travis out of decisions, but it felt that Travis "did not step[] up to the pump all the time." The court also felt Travis' mother—Kaydence and Gunner's grandmother—helped Travis out too much. Ultimately, the court acknowledged that both parents, "in each of your own unique ways, you're good parents."

The trial court determined it was in Kaydence and Gunner's best interests to award primary residential custody with Kim. The court focused on Kim's flexibility, which allowed her to get the kids where they needed to go. The court also considered Travis' failure to attend one I.E.P. meeting at Bright Beginnings for Gunner and his lack of effort to communicate with the Bright Beginnings teachers. The court did not specifically address the controlling statute, K.S.A. 2014 Supp. 23-3203, or expressly name the factors from the bench. However, Travis made no objections to the court's findings or ruling.

The trial court later provided a written ruling. The court cited K.S.A. 2014 Supp. 23-3201 *et seq* as the statutory basis for legal and residential custody.

Travis did not file a motion requesting the court to make additional findings.

Travis brings this appeal.

K.S.A. 2014 Supp. 23-3203 reads as follows:

"In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including, but not limited to:

- (a) Each parent's role and involvement with the minor child before and after separation;
- (b) the desires of the child's parents as to custody or residency;
- (c) the desires of a child of sufficient age and maturity as to the child's custody or residency;
- (d) the age of the child;
- (e) the emotional and physical needs of the child;
- (f) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
- (g) the child's adjustment to the child's home, school and community;
- (h) 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;
- (i) evidence of spousal abuse, either emotional or physical;
- (j) the ability of the parties to communicate, cooperate and manage parental duties;
- (k) the school activity schedule of the child;
- (l) the work schedule of the parties;
- (m) the location of the parties' residences and places of employment;
- (n) the location of the child's school;
- (o) whether a parent is subject to the registration requirements of the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, or any similar act in any other state, or under military or federal law;
- (p) whether a parent has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto;
- (q) whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, or any similar act in any other state, or under military or federal law; and
- (r) whether a parent is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 2014 Supp. 21-5602, and amendments thereto."

These provisions of K.S.A. 2014 Supp. 23-3201 *et seq.* guide a trial court's discretionary determination of a child's custody, residency, visitation, or parenting time. The paramount consideration in making such decisions is the child's welfare and best interests. In light of the trial court's unique vantage point of what is often an emotionally-charged situation, an appellate court generally will not overturn such decisions unless the court abused its discretion. See *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013) (civil). Challenges to specific factual findings in support of such determinations are reviewed to assure that they are supported by substantial competent evidence and that they support the court's legal conclusions. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 420, 119 P.3d 684 (2005).

Supreme Court Rule 165 (2014 Kan. Ct. R. Annot. 272) places on the trial court the primary duty to provide adequate findings and conclusions on the record of the court's decision on contested matters. A party, however, must object to inadequate findings of fact and conclusions of law to preserve an issue for appeal. Such objections necessarily give the trial court an opportunity to correct any alleged inadequacies. See *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013). When no such objection is made, an appellate court can presume the trial court found all facts necessary to support its judgment. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012). K.S.A. 2014 Supp. 60-252(b) also provides a party the opportunity to file a motion requesting a trial court make additional findings after it issued its ruling.

Here, Travis contends the trial court failed to consider any of the factors set out in K.S.A. 2014 Supp. 23-3203. Travis claims the court focused solely on two nonstatutory factors when it awarded residential custody to Kim. However, Travis did not object to the journal entry or file a motion requesting the court make more specific findings. See *In re Marriage of Bradley*, 258 Kan. 39, 46-50, 899 P.2d 471 (1995). Kim suggests this precludes appellate review of the issue. Travis alleges this failure of his counsel is not fatal to his appeal. Travis argues ordinarily there is a presumption the trial court found the facts necessary to support the judgment. See *In re Marriage of Whipp*, 265 Kan. 500, 509, 962 P.2d 1058 (1998). But, before that presumption is applied, this court should review the record to determine if it contains evidence to support the application of the presumption. *Whipp*, 265 Kan. at 509.

A brief review of the record suggests the trial court was familiar with the statutes governing child custody as it cited the proper provision in its written order. Therefore, Travis failed to establish the record affirmatively shows the trial court was unaware of the relevant factors.

There is a legal maxim that states if you sit on your rights, you can lose them, often with unfortunate results. *Ingraham v. Fischer*, No. 109,584, 2013 WL 5975967 (Kan. App. 2013) (unpublished opinion), *rev. denied* 300 Kan. 1 (2014); *Hagen v. Perry*, No. 92,256, 2005 WL 3433998 (Kan. App. 2005) (unpublished opinion). Travis had multiple opportunities to present the statutory framework for determining child custody to the court to ensure it followed the law. But he did not. He did not cite the statute in his proposed parenting plan, his attorney did not make closing arguments regarding how the factors favored Travis, he did not object to the court's findings at the close of the trial, and he did not file a motion requesting the court make additional findings pursuant to K.S.A. 60-252(b) after the court issued its written ruling. Therefore, Travis failed to preserve this issue for appeal.

However, a brief review of the record indicates the trial court did not abuse its discretion in awarding Kim primary residential custody. First, the court referenced the statutory framework governing child custody decisions in its writing order indicating it did consider the statutory factors. Additionally, the two factors the court did cite fall within the statutory factors. For example, when making custody determinations, the court is required to consider: each parent's role and involvement with the minor child before and after separation, see K.S.A. 2014 Supp. 23-3203(a); the school activity schedule of the child, see K.S.A. 2014 Supp. 23-3203(k); and the work schedule of the parties, see K.S.A. 2014 Supp. 23-3203(l).

Clearly the trial court was following the statutory framework when it considered how Kim's flexible work schedule better allowed her to get the children where they needed to go for school and activities and when it considered Travis' failure to be involved with Gunner's IEP. Though reasonable minds could differ, it was not an abuse of discretion to award primary residential custody of the children to Kim.

Affirmed.

* * *

BUSER, J., concurring: I concur in the decision.