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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1127**

In re the Marriage of:
Janelle Rozalind Spah, petitioner,
Appellant,

vs.

Steven Phillip Spah,
Respondent.

**Filed May 1, 2017
Affirmed; motion granted in part
Cleary, Chief Judge**

Anoka County District Court
File No. 02-FA-14-213

Janelle Rozalind Spah, Elk River, Minnesota (pro se appellant)

Paul P. Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for
respondent)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Chief Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

After a court trial, the district court awarded custody of the parties' minor children
to respondent-father. Appellant-mother argues that the district court denied her the right
to equal legal representation, erred in its custody determination, failed to serve process to

a corporation and a trust whose interests were affected by the dissolution, and violated the judicial code of conduct by failing to inform the parties of its potential bias. Because we conclude that appellant was not entitled to equal legal representation, the district court did not abuse its discretion in awarding custody to respondent, appellant did not properly preserve and raise the service of process issue, and there was no reason to doubt the district court's impartiality, we affirm.

FACTS

Appellant-mother Janelle Rozalind Spah married respondent-father Steven Phillip Spah in 1992. The parties have three children: a son born in 1996 (adult son), a son born in 1998 (minor son), and a daughter born in 2003 (minor daughter).

In September 2013, appellant filed a petition for an order for protection (OFP) against respondent, and the couple reached a settlement by which respondent consented to the entry of an OFP (OFP I) without a finding of domestic abuse. OFP I granted appellant temporary custody of the children and temporary use and possession of the couple's home. Appellant later moved to modify OFP I, and on January 28, 2014, respondent filed a petition for an OFP against appellant on behalf of the three children, alleging that appellant had physically assaulted minor son and the other children witnessed the assault. The same day, appellant commenced a dissolution action by serving a petition for divorce on respondent.

In March 2014, the district court held a consolidated hearing to address both OFP files and found that appellant had engaged in domestic abuse against minor son on two occasions. The district court awarded temporary custody of the children and possession of

the home to respondent and granted an OFP (OFP II) restricting appellant from having unsupervised contact with minor son. OFP I remained in place.

The district court later entered an order in the dissolution proceeding including the same temporary-custody and home-possession terms, explicitly providing for supervised parenting time between appellant and adult son and minor daughter, and requiring that the first two supervised visits be at a child safety center. Appellant claimed at an August 2014 review hearing that she could not afford to pay the fees at the child safety center, and the court accordingly ordered respondent to sell an older vehicle and deposit the proceeds of the sale with the child safety center to cover the costs, and ordered appellant to participate in supervised parenting time.

Both parties were unrepresented at the two-day court trial. In addition to their own testimony, respondent offered testimony of the guardian ad litem, and appellant offered testimony by her business associate. Trial testimony relevant to this appeal focused on two issues: the custody determination and the ownership of a small business.

On the custody issue, the guardian ad litem testified about factors relating to each parent. She testified that she was concerned with appellant's "inconsistency and instability," and that sometimes appellant sounds like "two different people that would switch back and forth rapidly." According to the guardian ad litem, the children reported that, before respondent moved out of the home, appellant's outbursts were directed at respondent, but after respondent moved out of the home pursuant to OFP I, the outbursts were directed toward the children. The guardian ad litem testified that when the children lived with appellant, both sons seemed "generally concerned about what was happening in

their home” and told the guardian ad litem that appellant hits, yells, kicks, and throws things. On one occasion, appellant refused to feed minor son. Respondent testified that the family had kept appellant’s “dirty little secrets” by not reporting her abuse earlier. According to the guardian ad litem, minor daughter was nonchalant about appellant’s outbursts, though she told the guardian ad litem that appellant yelled every day when they had lived together, and had not visited minor daughter for supervised parenting time. Appellant testified that she did not take advantage of supervised parenting time because she was concerned about bringing minor daughter into the environment of the child safety center. She also testified that all allegations of her abuse were false, and that the children lied to the guardian ad litem.

The guardian ad litem testified that the children want respondent to retain custody, but minor daughter wants to be able to visit with appellant. She testified that respondent encourages minor daughter to stay in contact with appellant. Appellant testified that respondent should not be given custody because he is an abusive alcoholic, but the guardian ad litem testified that she did not find any evidence supporting this claim. The guardian ad litem ultimately recommended that respondent be granted sole legal and sole physical custody.

The parties also litigated extensively over ownership and control of 33 shares of a business. The business, known as Bella Extensions, but incorporated in Wyoming as JR Gatsby LLC, is an online hair extension business. Appellant’s business associate, who is also a part-owner of JR Gatsby, testified that the JR Gatsby shares are valueless. He also testified that one of the district court’s pretrial orders, which directed that the contents of

the company's PayPal account be placed into an attorney trust account pending the outcome of the divorce proceeding, "cause[d] concerns to the other owners that their assets could [be determined to be] part of [respondent's]."

The district court entered a judgment dissolving the marriage. The judgment awarded custody of the minor children to respondent and awarded appellant supervised parenting time with minor daughter and with minor son¹ at his discretion. The district court also divided the parties' real and personal property, awarding appellant "all right, title, and interest in the 33 shares of JR Gatsby, LLC" and the funds in the business's PayPal account.

Appellant later made a motion for amended findings or a new trial, which was granted in part relating to issues not disputed in this appeal. The district court held a subsequent hearing to consider the division of personal property and issued another amended order.

This appeal follows.

D E C I S I O N

I. Respondent's Motion to Strike Appellant's Reply Brief

While this appeal was pending, respondent filed a motion to strike appellant's reply brief, arguing that it is "not confined to new matters raised in the brief of the respondent as required." We deferred a ruling on this motion until consideration of this case on the merits, and therefore address it now. "If an argument is raised in a reply brief but not raised

¹ We note that minor son is now an adult, and therefore the custody order as it relates to him is no longer in effect. We therefore address only custody of minor daughter, who is still a minor.

in an appellant's main brief, and it exceeds the scope of the respondent's brief, it is not properly before this court and may be stricken from the reply brief." *Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 707 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003); *see* Minn. R. Civ. App. P. 128.02, subd. 3 (stating that any reply brief "must be confined to new matter raised in the brief of the respondent"). However, we may address a newly raised issue "in the interest of justice." *Timeline, LLC v. Williams Holdings No. 3, LLC*, 698 N.W.2d 181, 186 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005); *see* Minn. R. Civ. App. P. 103.04 (addressing the scope of review on appeal).

While appellant's reply brief addresses and clarifies some issues raised in her principal brief, it also raises new issues and factual allegations, many of which were neither raised to the district court nor raised in appellant's principal brief. Accordingly, we grant respondent's motion to strike as to the new arguments raised by appellant, and we deny the motion as to the brief's clarification of issues raised in appellant's principal brief. In deciding this appeal, we consider appellant's reply brief only to the extent that it addresses previously raised issues and do not consider newly raised issues.

II. Equal Legal Representation

Appellant argues that the district court erred in denying her "the right to representation when it knew she was incapable of properly representing herself." Both parties were represented by counsel during a portion of the pretrial proceedings, but both were self-represented at trial because they could not afford representation. Appellant argues that one of her attorneys was ineffective, that respondent received more legal assistance than she did, and that despite the fact that she was not capable of representing

herself, her “numerous requests to the trial court for equal access to marital assets in order to obtain equal representation,” were “continually denied.”

Appellant’s argument is flawed for many reasons. Parties to a marital dissolution have no right to court-appointed counsel, much less “equal” representation. *Reed v. Albaaj*, 723 N.W.2d 50, 56 (Minn. App. 2006). Further, we note that respondent was also unrepresented at trial, and we are not convinced by appellant’s argument that the parties’ pretrial representation was unequal because respondent was represented for a longer period of time. This record does not support appellant’s argument that her former attorney was incompetent; it certainly does not support her allegation that her former attorney’s status as a victim in a case which the district court judge had previously presided over “drastically interfered with [the attorney’s] ability to properly represent her.”

Additionally, contrary to appellant’s claims that her requests for access to funds were all denied, the district court ordered respondent’s pension fund to allow a hardship withdrawal so that both parties could hire attorneys. However, the record reflects that the pension company refused to release the funds. The record does not suggest that appellant challenged the pension company’s decision, or requested money for an attorney again. Accordingly, appellant is not entitled to reversal on this ground.

III. Custody Determination

Appellant argues that the district court should not have awarded custody to respondent. “Appellate review of custody determinations is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.” *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We

defer to the district court's credibility determinations. *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 90 (Minn. App. 2012).

Custody determinations must be supported by “detailed findings” on the best interests of the child according to the enumerated statutory factors. Minn. Stat. § 518.17, subd. 1 (2014). These factors take into account the child's wishes, the wishes of each parent, the relationships between the children and with each parent, the child's cultural background and health, the mental and physical health of the parents, the child's interest in stability, the place of the home and community in the child's life, each parent's willingness to encourage contact with the other parent, the effect of any domestic abuse, and each parent's capacity to “give the child love, affection, and guidance.” *Id.*²

In this case, the district court made detailed findings on the statutory best-interests factors. Finding that both parents wanted sole custody of the children, the children have a strong relationship with each other, both minor children want respondent to have custody, appellant has had a violent relationship with minor son and failed to visit her daughter, respondent has a positive relationship with both minor children, the children's adjustment to their home and community has improved since respondent has had custody, the children have an interest in a stable environment, appellant's “unpredictable and volatile behavior is a significant risk to the children,” and respondent has complied with court orders and appellant has not, the district court concluded that it was in the best interests of the children that respondent receive sole custody.

² The statutory best-interests factors were amended after the trial. See Minn. Stat. § 518.17, subd. 1 (2016). However, we apply the factors in effect at the time of trial.

Appellant raises several concerns regarding the district court's findings leading to the custody determination, but mainly focuses on her argument that "[b]y placing minor children in the sole custody of [respondent] the trial court has put them in the care of an abuser who uses alcohol to treat a chronic head condition." We construe appellant's arguments as challenging the district court's findings that respondent is not addicted to alcohol or physically abusive and that the children are faring well in respondent's custody. In its analysis of the mental and chemical health of the parties, the district court acknowledged appellant's argument that respondent has an alcohol addiction, but concluded "there is little evidence to support that allegation," citing a chemical-dependency evaluation, the testimony of the guardian ad litem, and the guardian ad litem's testimony that the children had not perceived of respondent having an alcohol problem. The district court noted that the only evidence of a potential alcohol problem, aside from appellant's own testimony, was a police report suggesting respondent smelled of alcohol. The record supports the district court's finding. The district court also found that, though there was evidence that appellant had abused minor son, there was sufficient evidence to find that respondent abused neither the children nor appellant. In so finding, the district court explicitly found that appellant's testimony regarding respondent's abuse was not credible. Because appellant's testimony and out-of-court statements to her business associate and to the police were the only evidence of respondent's alleged abuse, and the

district court found appellant to be not credible, we conclude that the district court did not err in finding appellant's allegations of abuse are not supported by the record.³

Appellant also argues that the district court erred when it found that the children are faring well in father's custody. According to appellant, the children's grades are dropping, they are missing school, they complain about their lives on social media, and a tanning bed has been moved into the family home. To the extent that these concerns were raised, the district court addressed them, saying, "[Appellant] asserted that there have been significant behavioral issues concerning the children at school. However, there was no credible evidence introduced to support that assertion. [Appellant's] assertions in this regard are given little weight because she has had minimal contact with the children in the past year." The only evidence of the children's well-being that appellant presented at trial, aside from her own testimony, was an email exchange between appellant and a school administrator documenting a planned meeting between appellant and the administrator. Accordingly, the record supports the district court's finding relating to appellant's argument.

Appellant argues in the alternative that the district court's order that parenting time with minor daughter must occur in a supervised environment was improper. Appellant argues that because OFP II only concerns minor son, the district court had no reason to

³ Similarly, appellant argues on appeal that respondent lied to the district court and manipulated the children to lie about appellant's abuse. The district court found appellant's testimony that the children "were lying to the Guardian or coached by [respondent] to be not credible. [Appellant's] testimony indicates a lack of self-awareness and an unwillingness to accept responsibility for her actions." Appellant's allegations that various witnesses lied to the district court ask this court to question the district court's credibility determinations, which we will not do.

require that parenting time with minor daughter be supervised. However, “[a]ppellate courts recognize that a district court has broad discretion to decide parenting-time questions . . . and will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or by relying on findings of fact that are not supported by the record.” *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014) (citation omitted). The district court did not state that its decision was based on OFP II, and we conclude that the district court could have reached its conclusion based entirely on facts relating to appellant’s conduct, without relying on the existence of OFP II. The district court found that respondent credibly testified that appellant has “difficulty regulating her emotions and acts out violently when angered,” the children “mentioned multiple specific incidents of violence” involving appellant, the children are “fearful of her erratic and sometimes abusive behavior,” and her behavior is “a significant risk to the children.” Appellant does not point to anything in the record contradicting these factual findings except her own testimony, which the district court found to be not credible. Accordingly, we conclude that the district court’s factual findings adequately support its award of supervised parenting time.

IV. Failure to Serve Bella Extensions

Appellant next argues that the district court erred when it filed orders related to Bella Extensions without serving process on the corporation. The district court twice implicated the corporation in its orders. Prior to trial, when PayPal refused to release funds belonging to the corporation to either appellant or respondent, the district court, at the parties’ request, found “that any assets, revenues, profits, inventory or equipment owned by Bella

Extensions are potentially marital assets,” and ordered PayPal to release “any funds associated with Bella Extensions” to appellant’s then-attorney, pending the outcome of the dissolution. Second, the district court made findings at and after trial regarding the ownership of the family’s undisputedly valueless shares in JR Gatsby. While respondent argued that adult son owned the shares, appellant argued she owned the shares. The district court concluded that adult son, a nonparty, could not be awarded property in the marriage dissolution, and therefore awarded the shares to appellant because she was more involved in the business than respondent. The district court also awarded the contents of the PayPal account to appellant.

The corporation was never served process in this matter. Appellant raised the lack-of-service issue on the first day of trial, and the district court stated that the company need not be served because:

The only thing I’m determining is the interest of the business between the two of you.

. . . .

. . . My only determination that I’m making here today is to what extent, if any, is this business a marital asset and to what extent, if any, do either party have an interest in this marital asset and what’s its value.

Appellant cites no authority to support the proposition that a corporation must be notified that shares of ownership are being distributed in a divorce, nor are we aware of any such authority. Moreover, appellant, who claims to be the rightful owner of the shares, received them in the dissolution. We find no error in the district court’s awarding the shares without notifying the corporation prior to trial.

Appellant also argues that the district court should have served the corporation before it “rul[ed] to freeze the assets of JR Gatsby LLC in their entirety and place them in a trust account.” The record establishes that the district court, at appellant’s request, ordered that the contents of a PayPal account, apparently that of the corporation, be held pending the outcome of the litigation. Even if the district court erred by ordering a freeze of the corporation’s PayPal account, appellant may not raise this issue on behalf of the corporation. Appellant is a party to this proceeding in her individual capacity rather than as a representative of the corporation. Though appellant, as an officer of the corporation, can make statements or decisions on behalf of the corporation, she cannot make arguments on its behalf in a court of law without engaging in the unauthorized practice of law. *301 Clifton Place L.L.C. v. 301 Clifton Place Condo Ass’n*, 783 N.W.2d 551, 560-61 (Minn. App. 2010). Accordingly, we need not address this issue.⁴

V. Failure to Serve P.M.C.M. Trust

Appellant also contends that the district court erred when it failed to serve the trust that she alleges controls all of her assets. According to appellant, the P.M.C.M. trust was created in 2008 for the purpose of documenting the alleged abusive behavior of respondent and to “ensure that Appellant and her children would be able to have the necessities of life given an emergency as a result of the Respondent’s abusive and controlling behavior.”

⁴ We note that the corporation itself did not appeal from the order freezing the PayPal account though it likely had a right to do so. *See In re Marriage of Sammons*, 642 N.W.2d 450, 456 (Minn. App. 2002) (noting that a nonparty may appeal from a judgment adversely affecting his or her rights). The corporation attempted, through appellant’s business associate, to intervene on appeal, but the business associate is not an attorney and cannot represent the corporation.

Appellant claims that the trust became the owner of all of her property in 2013, and that the trust therefore had a right to notification regarding the claims on her property in this dissolution. Appellant claims that notice was never given and that the district court “brushed aside” appellant’s mentions of the trust, but she cites to nothing in the record to support these contentions. The only reference to a trust in the record was made during appellant’s testimony. Immediately after her reference to a trust, the district court requested documentation of the existence of the trust. Appellant refused to provide documentation, claiming the trust was private. Because the trust issue was not sufficiently raised to create a record on the issue, we do not address it on appeal.

VI. Judicial Disqualification

Appellant argues that the district court judge violated rule 2.11 of the Minnesota Judicial Code of Conduct when he failed to disqualify himself from the dissolution proceeding. Appellant argues that the judge was biased because he “presided over a hearing in which he sentenced an individual to 200 months in prison for stabbing [appellant’s former attorney] over 25 times.” Respondent argues that if anything, this “would have benefited the Appellant,” but appellant clarified in her reply brief that she believes that the judge was biased against her because he “believed [she] was trying to gain an advantage in the dissolution by choosing” that specific attorney.

Rule 2.11 states that “[a] judge shall disqualify himself . . . in any proceeding in which the judge’s impartiality might reasonably be questioned.” Minn. Code Jud. Conduct Rule 2.11(A). “A judge’s impartiality is reasonably questioned when a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s

impartiality.” *State v. Cleary*, 882 N.W.2d 899, 904 (Minn. App. 2016) (quotation omitted). “Whether a judge violated the code of judicial conduct is a question of law, which we review de novo.” *State v. Hicks*, 837 N.W.2d 51, 58 (Minn. App. 2013), *aff’d on other grounds*, 864 N.W.2d 153 (Minn. 2015).

Assuming without deciding that appellant’s allegations are true,⁵ we cannot understand why any reasonable person would question the impartiality of this district court judge. Accordingly, we find no error in the district court judge’s refusal to disqualify himself.

However, appellant argues that the judge erred not only in failing to recuse himself, but in failing to inform the parties of his involvement in the case in which appellant’s attorney had been a victim. Comment 5 to rule 2.11 states that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification.” However, the Minnesota Supreme Court has stated that “the use of the word ‘should’ indicates that the comment is not mandatory.” *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011).

⁵ On this record, it is difficult to determine the veracity of appellant’s assertions. It appears that appellant did not raise this concern at the district court until after the trial had occurred, and long after her former counsel had stopped working on the case, when she filed a motion to remove the judge, which the judge denied. There was apparently a hearing on this matter, but appellant did not provide a transcript of this hearing. Later, during the hearing on division of personal property, appellant again raised the issue, asking the judge if he should have disclosed any information to the parties pursuant to Minn. Code Jud. Conduct Rule 2.11 cmt. 5. The judge did not answer her question, and continued with the questioning about the personal property.

Accordingly, the district court judge did not have a duty to inform the parties that he had previously sentenced a defendant who had stabbed appellant's former attorney.

Affirmed; motion granted in part.