

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLYSON M. HOOVER,
Appellant,
vs.
CLINT W. DESPAIN,
Respondent.

No. 49800

FILED

FEB 22 2008

ORDER OF REVERSAL AND REMAND

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a district court order modifying a child custody arrangement. Eighth Judicial District Court, Family Court Division, Clark County; Stefany Miley, Judge.

On January 6, 2006, appellant Allyson M. Hoover filed a complaint in the district court, seeking, among other things, a child custody determination as to the parties' minor child and child support from the child's father, respondent Clint W. DeSpain. With regard to child custody, Hoover requested that the court award the parties joint legal custody and award her primary physical custody. DeSpain filed an answer and a counterclaim, asserting that parties had been sharing physical custody equally since November 2002, and that they had at some point agreed in writing to that custody arrangement, under which the child alternated daily between the parents' homes. DeSpain requested, among other things, joint legal and physical custody of the child. In her reply, Hoover denied ever agreeing in writing to the joint physical custody arrangement described in DeSpain's counterclaim.

In April 2006, after a hearing, the court entered an order that, among other things, temporarily awarded the parties joint physical custody, with the Family Mediation Center to "determine the details of the

temporary 50/50 time share.” The court also ordered that DeSpain continue to save \$300 per month for the child and continue to pay \$307 per month for her school tuition.

At a subsequent status check hearing, the court, noting that mediation had resulted in an impasse, set the custody matter for an evidentiary hearing, and in the interim ordered that the parties continue to share physical custody, with the child alternating weekly between the parents’ homes. The court also ordered an outside custody evaluation from Dr. Stephanie Holland and directed the parties to follow Dr. Holland’s physical custody recommendation, indicating that Dr. Holland’s report and evaluation would be considered at the evidentiary hearing.

Meanwhile, after a hearing on various motions, the court entered an order on February 23, 2007, finding that the matter was highly conflicted and that that Dr. Holland’s October 13, 2006 report (which apparently was filed with the court), as well as her future testimony during the evidentiary hearing, would be given considerable weight, as would the outcome of DeSpain’s pending domestic violence matter. Based on Dr. Holland’s custody recommendation, the court then awarded temporary primary physical custody to Hoover and visitation to DeSpain three weekends per month.¹ The court also ordered a reevaluation by Dr. Holland forty-five days before the evidentiary hearing, which was reset for May 25, 2007.

¹While acknowledging that the district court’s temporary custody order specified that Hoover was awarded primary physical custody, DeSpain points out that Dr. Holland’s report did not designate a primary custodial parent, but instead merely set forth a parenting time schedule.

At a motions hearing on May 7, 2007, the court denied DeSpain's request for a continuance, but indicated that it would reconsider the motion if Dr. Holland was not ready to testify by the scheduled date. Later, DeSpain filed motions regarding discovery, and another motion to continue the hearing. During a May 23, 2007 hearing on DeSpain's motions, the court found that, based on Dr. Holland's October 13, 2006 report, and her subsequent letter, neither party should have primary physical custody. Instead, the court found that it was in the child's best interest for the parties to "resume their previously agreed and previously ordered joint physical custodial time," with the child alternating weekly between the parents' homes. The court then vacated the evidentiary hearing that was set for May 25, 2007, finding that, based on the evidence presented thus far and consideration of the parties' allegations, there was no need for the hearing. The court then entered its final order for joint legal and physical custody. Hoover appeals.

On appeal, Hoover argues that the district court abridged her constitutional due process rights by rendering a final custody determination without first holding an evidentiary hearing and without making any findings concerning the child's best interests, as required under NRS 125.480(4).

Generally, child custody matters rest in the district court's sound discretion,² and this court will not disturb the district court's custody decision absent an abuse of that discretion.³ In evaluating a

²Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

³Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

district court's custody decision, this court must be satisfied that the decision was made for appropriate reasons and that the district court's factual determinations are supported by substantial evidence.⁴ This court has previously explained that "[l]itigants in a custody battle have the right to a full and fair hearing concerning the ultimate disposition of a child."⁵ With regard to divorce proceedings,⁶ NRS 125.480(1) mandates that when determining child custody, "the sole consideration of the court is the best interest of the child." In determining the child's best interest, the court must consider and set forth its specific findings concerning relevant factors, which include, among others, any conflict between the parents, the parents' abilities to cooperate to meet the child's needs, and whether either parent has engaged in an act of domestic violence against the child or the child's other parent.⁷

Here, the district court entered an order for joint custody without conducting a hearing to consider the parties' testimonial and documentary evidence. Although respondent asserts that the district

⁴Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

⁵Moser v. Moser, 108 Nev. 572, 576, 836 P.2d 63, 66 (1992); see also Norris v. Graville, 95 Nev. 71, 73, 589 P.2d 1024, 1025 (1979) (indicating that when a district court fails to render a custody decision that is supported by substantial evidence after a full hearing on the merits, its decision will not stand on appeal).

⁶Here, the parties were not married, but DeSpain conceded paternity. See NRS 126.031 (explaining that the parent and child relationship extends equally to every child and to every parent, regardless of the parents' marital status).

⁷See NRS 125.480(4).

court properly entered a final custody decision based on the proceedings that had occurred leading up to that decision, we disagree. In particular, the court's order noted that its decision was based upon the evidence presented at that point, but, other than Dr. Holland's report and follow-up letter, the parties were not allowed to present any evidence during any pre-evidentiary hearing proceedings, as the court reminded the parties that presentation of evidence would be reserved for the evidentiary hearing. Although the court also noted that it had considered the parties' allegations in concluding that an evidentiary hearing was not warranted and that joint custody was in the child's best interest, the parties' allegations do not amount to substantial evidence.⁸ Accordingly, since the district court failed to conduct a "full and fair hearing" to consider the evidence regarding the parties' allegations and failed to adequately state its reasons for the joint custody determination, we reverse the district court's order and remand this matter to the district court for further proceedings,⁹ including a new custody determination after an evidentiary


⁸See Richards v. Steele, 59 Nev. 121, 125, 86 P.2d 30, 31 (1938) (recognizing that pleadings establish issues but they "do not constitute evidence").


⁹Hoover asks this court to reassign this matter to a different district court judge on remand, arguing that the district court judge has demonstrated her bias in favor of joint custody, without making any relevant findings to support such a determination. Having considered Hoover's request, we deny it. See NRS 1.235(1) (providing that a party who seeks to disqualify a judge for actual or implied bias must file an affidavit specifying the basis for disqualification not less than twenty days before the date set for hearing the case, or not less than three days before the date set for the hearing of any pretrial matter); see also Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005) (recognizing that if


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hearing as well as resolution of the support and medical care issues that the parties raised below.

It is so ORDERED.¹⁰


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Stefany Miley, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Wells & Rawlings
Kunin & Jones
Eighth District Court Clerk

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new grounds for a judge's disqualification are discovered after the time limits have run under NRS 1.235(1), a party may file a motion to disqualify a judge under the Nevada Code of Judicial Conduct).

¹⁰Because Hoover believes that the district court, in making its child custody determination without first holding an evidentiary hearing, improperly relied on an unpublished decision entered by this court in violation of SCR 123, she asks this court to clarify that decision and generally admonish district court judges that they may not make final custody decisions before an evidentiary hearing. Because Hoover's belief is not supported by the record, we deny her request for clarification or any other request for relief related to any unpublished order.