

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICA CRAWFORD,  
Appellant,  
vs.  
TY CRAWFORD,  
Respondent.

No. 51014

**FILED**

MAY 06 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order awarding, on reconsideration, primary physical custody of the parties' child to respondent and allowing respondent to relocate the child to Utah.<sup>1</sup> Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

FACTS

The parties divorced in December 2002. As a part of the divorce decree, the parties agreed to and were awarded joint physical and legal custody of the minor child. Thereafter, in May 2006, respondent filed a motion for primary physical custody for the purposes of relocating with the child to Utah, explaining that his employer had moved to Utah. After an evidentiary hearing, the district court denied respondent's motion to modify custody. Meanwhile, in September 2006, respondent moved to Utah, and the child remained in Nevada with appellant.

Respondent moved for reconsideration, which the district court granted after a second evidentiary hearing, awarding respondent primary physical custody of the child and permitting him to relocate the

<sup>1</sup>Pursuant to NRAP 34(f), we have determined that oral argument is not necessary in this appeal.

child to Utah. In so doing, the district court examined each best-interest-of-the-child factor under NRS 125.480, concluding that several of the factors were inapplicable or did not weigh in either party's favor. See NRS 125.480(4)(a)-(e), (h), (k). The court's decision focused on the factor addressing the parents' physical and mental health. See NRS 125.480(4)(f). In that regard, the court found that respondent was in good physical and mental health, but that appellant had serious medical issues.

With respect to appellant's medical issues and their effect on appellant's ability to parent, the court made a series of contradictory findings. For example, the court found that appellant had been treating for Migraine Mimicking Meniere's Syndrome (MMMS) since 2001 and that, despite the fact that respondent initially had agreed to share custody with appellant, indicating that he thought appellant could care for the child, the condition left appellant "unable to function." At the same time, however, the court pointed out that appellant had temporary primary physical custody of the child since respondent had moved to Utah in 2006, that she had not had a severe attack of MMMS since before the divorce, in 2001, and that testimony from appellant's physician, whom respondent called as a witness over appellant's objection, indicated that appellant's condition should not preclude her from being a parent. Nevertheless, the court noted that appellant had failed to follow through on her doctor's MRI recommendation in light of financial difficulties and expressed concern that she could suffer a severe attack of MMMS. The court also found that appellant might take "more than her prescribed dosage of medications to deal with her stress," but also acknowledged the physician's testimony, explaining that appellant's prescription refills were appropriate, and that she had required less medication over time. Finally, recognizing that appellant had nothing negative on her driving record, the court expressed

concern that appellant's medications would prevent her from being able to pick up or drop off the child at school and that, while the parties' extended families resided nearby, appellant lived alone and was responsible for cleaning the house and taking care of the child.

As for respondent, the court found that he had remarried and had another child with his current wife, with whom his wife stayed home. The court found that respondent would be more capable of providing emergency assistance to the child because appellant might be simultaneously suffering from her own symptoms.

Addressing the child's physical, developmental, and emotional needs, the court noted that the child thrived in both parents' care and was attached to both parents. While noting that the child's academic performance had improved and that his academic problems were unrelated to the care provided by his parents, the court nonetheless expressed concern about his grades, finding that Utah appeared to have educational advantages over Nevada. The court also determined that both parents were meeting the child's needs, but gave weight to the sibling relationship that the child has with respondent's other child. Finally, the court found that neither party had "de facto" primary physical custody of the child during the time following respondent's move to Utah. Appellant has appealed.

On appeal, appellant argues that the district court abused its discretion by admitting documentary evidence and exhibits that were not timely produced and by allowing testimony from witnesses who were not disclosed before the hearing, as required under NRCP 16.1, NRCP 26(e), and EDCR 5.87. According to appellant, respondent had obtained many of the objectionable documents and exhibits admitted at the hearing after discovery closed. Appellant next argues that the district court improperly

considered and admitted evidence concerning her medical condition even though respondent knew about the condition before the divorce decree awarding the parties joint physical custody of the child was entered. Because respondent admitted that appellant, despite her medical condition, was a fit and proper parent when the decree was entered, appellant argues that res judicata principles bar consideration of such evidence on a motion to modify custody. Notwithstanding the alleged evidentiary problems, appellant asserts, the evidence supports that her health issues do not affect her parenting abilities.

Respondent asserts that the district court appropriately determined that he should be awarded primary physical custody and permission to relocate the child after considering the NRS 125.480(4) factors and relevant caselaw.<sup>2</sup> In response to appellant's argument that evidence was admitted and testimony was permitted despite failure to comply with court rules governing pretrial disclosures and discovery, respondent states that he could not make such disclosures because appellant failed to timely produce documents pursuant to his discovery requests. He also argues that the district court was correct in allowing the evidence after finding that appellant should not have been surprised that respondent would call her physicians to testify. According to respondent, evidence of appellant's medical condition, which supports the district court's decision, was properly admissible because the court was unaware of it when it entered the decree, which was entered on the parties' stipulation.

---

<sup>2</sup>Respondent's motion for permission to file an expanded fast track response is granted, and we direct the clerk of this court to file respondent's fast track statement and appendix, provisionally received in this court on September 10, 2008.

## DISCUSSION

Regarding evidentiary issues, the decision whether to permit witnesses to testify when there has been a failure to comply with the civil procedure disclosure requirements is reviewed for an abuse of the district court's discretion. Murphy v. F.D.I.C., 106 Nev. 26, 29, 787 P.2d 370, 372 (1990) (discussing district court's decision to limit expert testimony based on appellant's failure to adhere to applicable discovery rules). Under NRCP 16.1's mandatory pretrial discovery provisions, the parties were required to make certain disclosures, including exchanging lists of potential witnesses that include a general description of anticipated testimony and identifying documents and exhibits that the party expects to offer. See NRCP 16.1(b)(1) and (5) (family division version); see also EDCR 5.87 (providing that the parties must meet and exchange witness lists and exhibits before the scheduled calendar call). That disclosure duty is continual, and thus, such lists must be promptly supplemented. See NRCP 16.1(b)(5) (family division version).

With respect to the merits of the district court's decision, custody matters rest in the district court's sound discretion, Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), and this court will not disturb the district court's custody decisions absent abuse of that discretion. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). In that regard, however, this court must be satisfied that the district court's decision was made for appropriate reasons and that the court's factual determinations are supported by substantial evidence. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

When, as here, a joint physical custody arrangement exists, the parent seeking to relocate outside of Nevada with the child first must file a motion for primary physical custody of the children for the purposes

of relocating. Potter v. Potter, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). The district court must consider the motion under the best interest of the child standard established for joint custody situations set forth under NRS 125.510(2) and in Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994) (explaining that, when resolving custody issues in cases where the parents share joint physical custody, the district court's sole consideration is the children's best interests). Potter, 121 Nev. at 618-19, 119 P.3d at 1250. The moving parent has the burden of establishing that it is in the child's best interest to reside outside of Nevada with the moving parent as the primary physical custodian. Id. at 618, 119 P.2d at 1250.

Having reviewed the record and considered the parties' arguments as to these two issues, we reverse the district court's order.<sup>3</sup> First, the district court abused its discretion when it admitted evidence and allowed testimony that had not been disclosed to appellant before the hearing in violation of mandatory court rules and the court's own discovery order. While the court found that appellant should not have been surprised that respondent would seek to admit medical evidence and call her physician as a witness, that finding is contrary to NRCP 16.1's pretrial disclosure requirements and discovery rules. See NRCP 16.1(b) (family division version); NRCP 26(e); EDCR 5.87. Although respondent asserts that appellant failed to comply with discovery requests, the record indicates that the discovery production problems were resolved well before the discovery deadline and before the timelines set forth in the applicable pretrial disclosure and discovery rules. Thus, the district court's findings were based on evidence and testimony that should have been excluded.

---

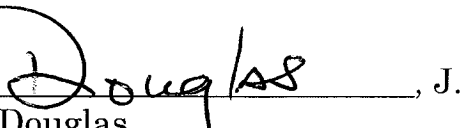
<sup>3</sup>In light of this order, any other issues raised need not be reached.

Second, even if the evidence had been properly considered, the district court's findings were contradictory and fail to support the court's conclusion that a change in custody for relocation purposes was in the child's best interest. While the court made many findings about the parties, it failed to adequately connect those findings to its determination that the change in custody and move served the child's best interest. In light of the moving party's burden to demonstrate that custody modification for the purposes of relocating is in the child's best interest, we conclude that substantial evidence does not support the district court's decision here.

Accordingly, we reverse the district court's order and remand this matter to the district court for it to resolve the visitation schedule.

It is so ORDERED.<sup>4</sup>

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

---

<sup>4</sup>In light of this order, we vacate the stay imposed by this court's March 7, 2008, order.

We also deny as moot, respondent's March 20, 2009, motion for a decision on the record.

PICKERING, J., dissenting:

The court has “repeatedly recognized the district court’s broad discretionary powers to determine child custody matters,” stating “we will not disturb the district court’s custody determinations absent a clear abuse of discretion.” Ellis v. Carucci, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007) (footnote omitted).

Appellant claims she was unfairly surprised by her own medical records and treating doctor’s testimony coming into evidence at the custody hearing. She did not object to the district court’s order waiving EDCR 5.87’s requirement that pretrial memoranda, with their accompanying final witness and exhibit lists, be exchanged and filed, and she knew from the subpoenas copied to her within EDCR 5.87’s ten-day time limits for serving witness lists whom the witnesses would be. This leaves her to argue her medical evidence should have been part of respondent’s initial disclosures under NRCP 16.1. But this argument reverses the parties’ obligations. Appellant, not respondent, controlled access to her medical providers and their records. Respondent came by appellant’s medical evidence only after serving appellant with written discovery, engaging in motion practice, obtaining an order compelling discovery, and using the HIPAA-compliant<sup>1</sup> releases appellant finally supplied to obtain appellant’s medical provider records. Under these circumstances, the initial disclosure obligations and duty to supplement stated in NRCP 16.1 (family division version) and 26(e) did not apply to respondent’s third-party discovery from appellant’s medical providers—

---

<sup>1</sup>The reference is to the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29 and 42 U.S.C.).



information appellant controlled and reasonably should have gathered and produced herself. Compare NRCPC 16.1(b)(1) and (4) (family division version) (recognizing a party's initial disclosure obligations apply to "documents then reasonably available to a party" and that the opposing party, on request, is obligated to provide relevant documents in her "possession, custody or control") with NRCPC 26(e) (stating a party's duty to supplement his disclosures under Rule 16.1(a) or response to an opponent's discovery request if his disclosure or response "is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing").

Further, the evidentiary hearing occurred over two days, the first in November of 2007 and the second in January 2008. If appellant's medical condition becoming an issue genuinely surprised her, she nonetheless had time and opportunity to meet respondent on the merits of this issue.

Appellant also asserts issue preclusion based on the 2002 stipulated judgment awarding joint physical custody. She argues respondent knew then about her medical condition yet failed to argue it disabled her from sharing joint physical custody, and that this should preclude respondent from making it an issue now. But the question now is which parent should have primary physical custody, given respondent's job-required relocation to Utah. The prior stipulated determination probably does not carry preclusive effect. Cf. Castle v. Simmons, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (declining to apply res judicata to bar challenge to prior stipulated custody determination in case involving prior instances of abusive conduct, deeming best interests of child paramount). Even clearer, the prior stipulated decree decided joint, not primary,

physical custody. A parent who shares joint physical custody may or may not be the parent who should have primary physical custody; the issue is not the parent's vested interests but the best interests of the child. Potter v. Potter, 121 Nev. 613, 616-19, 119 P.3d 1246, 1248-50 (2005). Respondent's job-required relocation represents a change in circumstance requiring determination of primary physical custody. See id. at 618, 119 P.3d at 1248. Since that issue was not presented, decided, or essential to the joint custody determination in 2002, issue preclusion does not apply. Restatement (Second) of Judgments § 27 (1982) (stating issue preclusion applies "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment"); see Five Star Capital Corp. v. Ruby, 124 Nev. \_\_\_, 194 P.3d 709 (2008).

The district court listened to the evidence and prepared detailed findings of fact and conclusions of law. Its findings process the evidence through each of the factors NRS 125.480(4) directs courts to consider in this difficult setting. The medical evidence comprised a legitimate part of the calculus. NRS 125.480(4)(f). That the district court made findings that some statutory factors favored appellant while others favored respondent does not undermine its final determination of where, on balance, the best interests of the child lie. If anything, the mixed findings attest to the care taken in hearing this case. Since I do not agree that the district court abused its discretion, I dissent.

Pickering \_\_\_\_\_, J.  
Pickering

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division  
Larry J. Cohen, Settlement Judge  
Ciciliano & Associates, LLC  
Bruce I. Shapiro, Ltd.  
Eighth District Court Clerk