IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BALL,
Appellant,
vs.
MARGARET BALL,
Respondent.

No. 51181

ORDER OF AFFIRMANCE
AND ORDER TO SHOW CAUSE
WHY SANCTIONS SHOULD NOT BE IMPOSED

This is an appeal from a district court order denying a motion to modify primary physical custody of the parties' minor child.[1] Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

The parties divorced in November 2006. By the terms of the divorce decree, which was uncontested, they were awarded joint legal custody of their two minor children, with respondent having primary physical custody of the younger child and appellant having primary physical custody of the older child. Respondent was permitted to relocate with the younger child to Ohio at that time. In April 2007, appellant, acting in proper person, filed a motion to modify primary physical custody as to the younger child, based on changed circumstances. In his motion,

[1]Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this case.

appellant asserted that the two children missed each other, that the younger child was suffering from allergies due to environmental factors in Ohio, and that respondent was making it difficult for the children to have frequent association with each other.

After an evidentiary hearing, at which both parties were represented by counsel, the district court denied appellant's motion to modify custody, finding that appellant had not demonstrated a change in circumstances to support modifying the custody arrangement or that modifying primary physical custody of the younger child in his favor would serve the child's best interest.[2] In particular, the court found that appellant had failed to show that Nevada's environment was better suited than Ohio's environment for the child's allergy condition. Appellant then appealed.

On appeal, appellant asserts that respondent's testimony at the hearing was inconsistent, in that she indicated that the child's allergy problems were an issue no matter what climate he was living in, but she also stated that the child is allergic to a certain tree native to Ohio. According to appellant, he, respondent, and the children moved from Ohio to Nevada in 2003 because Ohio is more humid than Nevada,

---

[2]At the hearing, appellant argued that respondent should be estopped from presenting a defense to his motion to modify custody, since respondent never filed a written opposition to the motion. Although the district court may treat the failure to file and serve a timely opposition to a motion as an admission that the motion is meritorious and a consent to granting it, see EDCR 2.20(c), the district court here apparently chose not to treat it as such, instead merely noting appellant's objection.

demonstrating that climate is a factor with regard to the child's allergies. Appellant also argues that his testimony was more credible than respondent's testimony.

Child custody matters rest in the district court's sound discretion,[3] and this court will not disturb the district court's custody decision absent an abuse of that discretion.[4] In evaluating a district court's custody order, 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.[5] In matters concerning a post-divorce change of child custody, the party seeking to modify custody bears the burden of demonstrating that there has been a substantial change in circumstances affecting the child's welfare and that the child's best interest will be served by the modification.[6] We will not set aside the district court's factual findings in a custody matter when they are supported by substantial evidence.[7]

Here, with regard to changed circumstances necessary to support custody modification, appellant alleged that the younger child had allergy problems that were aggravated by Ohio's environment and that respondent failed to adequately treat the child's symptoms. At the

---

[3]Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

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

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

[6]Ellis v. Carucci, 123 Nev. ___, ___, 161 P.3d 239, 242-43 (2007).

[7]Id. at ___, 161 P.3d at 242.

hearing, however, appellant acknowledged that the custody arrangement outlined in the divorce decree was uncontested and that the child had had allergy problems all of his life. Appellant and respondent, who were the only witnesses who testified at the hearing, provided conflicting testimony with regard to whether the child's allergies were significantly affected by Ohio's climate. In particular, respondent testified that in addition to allergies caused by grasses and trees, the child was allergic to dust and certain conditions that arguably would be worse in Nevada's arid climate. Respondent also testified that the family originally had moved from Ohio to Nevada because appellant had left his job in Ohio and decided to move the family to Nevada, not because of the child's allergies. Appellant also acknowledged that the move to Nevada was made in part due to his own medical conditions. Although appellant maintained that prescription drugs were necessary to treat the child's allergy conditions, respondent testified that she was concerned with the steroid ingredients in the medication and that she was successfully treating the child with homeopathic and over-the-counter remedies.

The court's written findings supporting its decision to deny appellant's motion indicate that it considered the parties' conflicting testimonies in rendering its decision and, in the absence of expert testimony to the contrary, it determined that the two environments were comparable with regard to their affects on the child's allergies. Thus, according to the court, appellant failed to prove changed circumstances to support the modification. The court also determined that appellant failed to show that modifying custody would be in the child's best interest.

Although appellant asserts that his testimony was uncontroverted and demonstrates that the child's best interest would be

served by the modification and the changed circumstances necessary to warrant a change in custody, we disagree. To the contrary, the parties disputed the child's condition, what caused it, and how it should be treated. Accordingly, having reviewed appellant's fast track statement, appendix, and the transcripts, we perceive no abuse of discretion in the district court's decision. Therefore, we affirm the district court's order denying appellant's motion to modify custody.[8]

As an additional matter, respondent's fast track response was due on August 21, 2008.[9] When respondent failed to file her response by that date, this court, on September 10, 2008, entered an order directing her to file her fast track response or to show cause why this appeal should not be decided on the fast track statement and record, within ten days from that order's date. Respondent, however, neither filed her fast track response nor responded in any other way to the September 10 order. Accordingly, respondent shall have ten days from the date of this order within which to show cause why sanctions should not be imposed for her

---

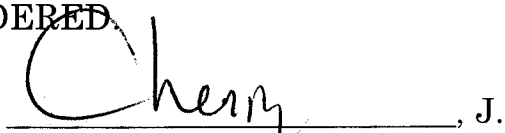
[8]See id. at ___, 161 P.3d at 244 (pointing out that it is not within the purview of an appellate court to weigh conflicting evidence or assess the credibility of the witnesses; instead, such evaluations are left to the district court).

To the extent that appellant asserts that custody modification was warranted because respondent failed to facilitate a relationship between the younger child and appellant or between the younger child and the older child, the record does not support such an assertion.

[9]See NRAP 3E(d)(2) and (e).

failure to comply with the rules of appellate procedure and this court's September 10 directive.[10]

It is so ORDERED.



_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Saitta

cc: Department K, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Michael J. Warhola, LLC
Ronald J. Von Felden
Eighth District Court Clerk

---

[10]NRAP 3E(h); Moran v. Bonneville Square Assocs., 117 Nev. 525, 25 P.3d 898 (2001).