

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY A. MEHOVES,

Appellant,

vs.

BARBARA L. MEHOVES N/K/A

BARBARA L. DUFF,

Respondent.

No. 52123

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to modify child custody and support. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

FACTS

The parties divorced in April 2007, and pursuant to the divorce decree, which was entered in accordance with the parties' stipulation to waive child support, they were awarded joint legal and physical custody of their four minor children, with each party having custody of the children alternating weeks. In terms of child support, the decree provided that, should the children be awarded social security benefits after a determination was made on appellant's disability claim, those benefits were to be equally divided between the parties. Thereafter, appellant filed motions concerning modifying child support and custody, a qualified domestic relations order (QDRO), and contempt, as explained below.

Appellant's district court motions

Motion to modify child custody and support

First, in September 2007, appellant filed a motion to modify custody and child support, based on changed circumstances. He argued that custody should be modified to primary custody in his favor because respondent had not followed the court's orders regarding counseling for the children and because respondent had "poor parenting practices." In that regard, he pointed out that the children were fighting with each other and getting into trouble at school during respondent's custodial time. According to appellant, respondent had anger control issues and thus he felt the children's welfare was in jeopardy. Appellant also asserted that he should be awarded child support, pointing out that, six months after the decree was entered, his social security disability claim was approved and he then began receiving disability benefits. He acknowledged, however, that at the time the decree was entered, he had no income. Nevertheless, appellant pointed to the income disparity between the two parties as a basis for modifying support.

Respondent opposed the motion, asserting that appellant violated court orders by (1) using corporal punishment against the children, (2) not allowing the children to communicate by telephone with respondent while in his care, (3) making demeaning comments about respondent in the children's presence, (4) undermining respondent's parenting decisions, and (5) attempting to circumvent school choices set forth by the court. Respondent also asserted that appellant prevented the children from participating in extra-curricular activities. Respondent contended that she had not violated any court orders regarding counseling but, because she works full time, appellant had been taking the children to their counseling appointments. In terms of the children having troubles in

school, respondent maintained that appellant was unwilling to co-parent with her and instead continually put her down and harassed her by continuing to litigate to gain complete control over the children.

Motion regarding QDRO

Second, appellant filed a motion seeking a court order that would require respondent to sign a revised QDRO dividing retirement benefits earned during the marriage. Appellant argued that the benefits should be divided in accordance with the plan's second option. Respondent objected, arguing that the plan's first option, which would allow her to pick a plan beneficiary, should be selected.

Motion regarding contempt

Third, appellant filed a motion entitled renewed application for order to show cause regarding contempt, arguing that respondent violated several court orders. According to appellant's motion, respondent had undermined his relationship with the children, shared divorce information with them, failed to provide him with the children's medical appointment information, and failed to pay her portion of unreimbursed medical fees, all contrary to earlier court orders prohibiting such conduct. Respondent opposed the motion, generally denying the allegations contained therein.

The district court's order denying appellant's motions

The motions were heard on April 16, 2008, after which the district court entered an order denying appellant's motions. With regard to the request to modify child support, the court found that appellant could not seek to modify child support unless respondent had a 20 percent change in income or unless he waited three years from the time when the decree was entered, incorporating the parties' agreement to waive child

support in exchange for joint physical custody, neither of which circumstance applied.

With regard to physical custody, the court found that appellant did not meet his burden of establishing a substantial change in circumstances affecting the children's welfare. In particular, after hearing and considering the evidence, the court determined that the children's behavioral and academic issues had remained steady or improved under the joint physical custody arrangement, and that the stable arrangement was benefitting the children. The court also found that respondent's parenting techniques had improved, and that the major problem in the matter concerned the parties' divorce-related disagreements, which permeated all of their interactions. As for the children's best interests, the court found that the oldest child, who was 13 years old at the time, expressed an interest in spending more time with respondent and wished to remain at the same middle school. The court also found that respondent was more likely to foster the children's relationship with appellant than appellant would be to foster a relationship between the children and respondent. In terms of abuse or neglect, the court noted that both parents had violated the court's order prohibiting corporal punishment, however, overall, that factor was not applicable. The court then modified the parenting plan in an effort to reduce the conflict level between the parties, entering specific provisions with regard to telephone contact, reimbursement of medical expenses, and other issues that the parties disputed.

With regard to the QDRO, the court noted that respondent's retirement benefits were divided in the decree pursuant to the parties' stipulation, but that they now disagreed as to which option should be

selected as to how the benefits would be paid. The court determined that it had insufficient information to rule on the issue and directed the parties to submit further information on the available options and then rank them in preference order, at which time the matter would be set for hearing or conference so a decision could be rendered. As for appellant's motion for an order to show cause why respondent should not be held in contempt, the court determined that appellant failed to show that respondent had willfully violated any court orders, making contempt sanctions inappropriate. This appeal followed.

DISCUSSION

Child custody and support matters rest in the district court's sound discretion, Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996), and this court will not disturb a district court's custody and support decisions absent an abuse of that discretion. Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993) (custody); Edgington v. Edgington, 119 Nev. 577, 80 P.3d 1282 (2003) (support). In child custody matters, "the sole consideration of the court is the best interest of the child." NRS 125.480(1). When the district court determines a child's best interest, we presume that it has properly exercised its discretion. Wallace, 112 Nev. at 1019, 922 P.2d at 543. The district court, however, must have reached its conclusions for the appropriate reasons. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005); Sims, 109 Nev. at 1148, 865 P.2d at 330. This court will not set aside the district court's factual findings in a custody matter if they are supported by substantial evidence. Ellis v. Carucci, 123 Nev. 145, 161 P.3d 239 (2007).

Child custody determination

The party seeking to modify custody bears the burden of establishing that "(1) there has been a substantial change in

circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." Id. at 150, 161 P.3d at 242. It is not this court's role to reweigh evidence or testimony. Id. at 152, 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).

Here, with regard to the changed circumstances necessary to support custody modification, appellant alleged that respondent had not followed court orders, and had poor parenting practices and anger control issues, as evidenced by the children's problems in school. The district court, after considering evidence and testimony on appellant's motion, found that circumstances had not substantially changed and that the children had made some improvements in school and benefitted from the stable custody arrangement.

The court also made findings regarding the best interest of the children, analyzing the relevant factors under NRS 125.480(4), and concluded that those factors did not weigh in favor of modifying custody. See NRS 125.480(4) (explaining that the relevant factors for determining the children's best interests include, among others, the children's wishes, if they are of sufficient age and capacity to form an intelligent custody preference, which parent is more likely to allow the children to have frequent associations and a continuing relationship with the other parent, and the physical, developmental and emotional needs of the children). In this case, the district court interviewed the oldest child, who expressed a preference for spending more time with respondent, and the court found that respondent was more likely to foster the children's relationship with appellant and that the children's needs were being met by the joint

physical custody arrangement. As substantial evidence supports the district court's findings in that regard, we perceive no abuse of discretion in its custody decision.

Child support determination

If the parties stipulate to a child support amount that deviates from the NRS 125B.070 formula, the parties must stipulate to facts supporting the deviation and the court must make written findings in accordance with the factors outlined under NRS 125B.080(9). NRS 125B.080(2). One of the relevant factors under that provision includes the amount of time the children spend with each parent. 125B.080(9)(j). A parent may request a child support review of a child support order after three years have elapsed since the previous order or, at any time on the basis of changed circumstances. NRS 125B.145(3) and (4).

Here, the parties agreed, as incorporated in the divorce decree, that in light of the joint custody arrangement, no child support would be paid to either party. They both acknowledged that they were capable and willing to provide for their children without a support award. Thus, although the decree's support provision deviated from the NRS 125B.070 formula and Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998),¹ the deviation was supported by the parties' stipulation and the district court's specific findings, namely the amount of time each parent spends with the children. See NRS 125B.080(9)(j). Although appellant asserted that the support order should be modified, he acknowledged that at the time when he moved for support modification, he was receiving social security

¹Wright provides for an adjustment to the NRS 125.070 formula for calculating support when a joint physical custody arrangement is in place.

disability benefits that he was not receiving when the decree was entered. Appellant's motion to modify support was filed about nine months after the decree was entered. Thus, since less than three years had elapsed since the previous support order was entered, and circumstances had not changed, other than that he was now receiving disability income, the district court properly denied appellant's motion to modify child support. NRS 125B.145.

QDRO determination

The district court deferred ruling on appellant's request for an order directing respondent to sign a revised QDRO, indicating that it would hold an evidentiary hearing to consider evidence and the parties preferences regarding the distribution method chosen for the retirement benefits at issue. Thus, as no final decision has been rendered as to the QDRO, that portion of the district court's order is not appealable. See NRAP 3A(b)(1) (providing that an appeal may be taken from a final judgment); Rust v. Clark Cty. School District, 103 Nev. 686, 747 P.2d 1380 (1987) (noting that, generally, an appeal may not be taken before the entry of a final written judgment).

Contempt determination

This court reviews a district court's contempt decision for an abuse of discretion. Guerin v. Guerin, 114 Nev. 127, 134, 953 P.2d 716, 721 (1998), overruled on other grounds by Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 5 P.3d 569 (2000). Generally, a civil contempt order must be based on a finding that the party disobeyed a court. State, Dept Indus. Rel. v. Albanese, 112 Nev. 851, 919 P.2d 1069(1996).

In this case, the district court, after an evidentiary hearing, found that appellant failed to show that respondent had willfully violated any court orders, and thus, that respondent was not in contempt. Since

the district court found that respondent did not disobey court orders, and the record supports that finding, it acted within its discretion in denying appellant's contempt motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

Hardesty, C.J.
Hardesty

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Michael P. Gibbons, District Judge
Jeffrey A. Mehoves
Barbara L. Duff
Allison W. Joffe
Douglas County Clerk

²We deny as moot respondent's proper person motion for a limited remand under Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978), since, in light of this order, the district court is vested with jurisdiction to modify its earlier custody determination.

Also, although respondent filed her motion in proper person, we note that her attorney, Allison W. Joffe, has not filed a motion to withdraw.

Although appellant filed a civil proper person transcript request form requesting three transcripts of proceedings in this matter, the form was not properly served on the court reporter. Regardless, review of the transcripts is not necessary to resolving this appeal, and thus, appellant's request for transcripts is denied.