IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KAREN LYNN GILLISPIE-BURTON N/K/A KAREN SMITH,
Appellant,
vs.
WILLIAM R. SPEZIALETTI, JR.,
Respondent.

No. 66983

FILED

OCT 1 3 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a motion to modify parenting time. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

FACTS

The primary issue in this case is whether the district court abused its discretion in determining reunification therapy was not in the child's best interest, thereby effectively denying all contact between Brianna and appellant for an indefinite time. Other issues on appeal are: 1) whether a Colorado court had jurisdiction to make custody orders pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); and 2) whether the district court abused its discretion in making certain findings and conclusions regarding an expert's testimony and report.

The parties have one daughter, Brianna Spezialetti, age 15. In 1999, a Colorado court awarded appellant Karen Gillispie-Burton primary physical custody of Brianna. The parties and Brianna continued to reside in Colorado until 2005.[1] At that time, Karen and Brianna moved

[1]The record contains conflicting dates for departure, but 2005 is the most recent date in the record.

to North Carolina and respondent William Spezialetti, Jr. moved to Nevada. Neither party was a Colorado resident in 2007.

In March 2007, William filed a motion for emergency custody in Colorado alleging Karen had absconded with Brianna from North Carolina to South Carolina. Both parties appeared at the hearing and Brianna was physically present in Colorado for that hearing. The Colorado court determined that it had emergency jurisdiction under the UCCJEA, which Colorado had adopted prior to the hearing, and awarded William temporary primary physical custody of Brianna. Karen was awarded daily telephonic contact.[2] The court found that it had exclusive jurisdiction, ordered the parties not to file motions to modify its temporary order in any other state, and set a hearing to permanently resolve the custody/parenting time issues. William returned to Nevada with Brianna after the hearing and both Brianna and William have resided in Nevada since that date.

At the permanent hearing in July 2007, the Colorado court awarded William sole physical custody and Karen was awarded supervised visitation, but only in Nevada, even though she resided in North Carolina. Karen relocated to Nevada in late 2009 and has remained a Nevada resident since that date. She apparently has not seen Brianna since July 2007, despite her requests for visitation pursuant to the Colorado court's order.

In September 2013, Karen filed a motion to modify parenting time, child support and child support arrears in the Eighth Judicial

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[2]The court stated that it would conduct a status hearing to award Karen in-person parenting time should the permanent hearing be later than May 2007. The record does not indicate whether this status conference took place.

District Court. William filed a countermotion for a UCCJEA jurisdiction conference, outsourced reunification, attorney fees and costs and related matters. The Nevada court conducted a UCCJEA conference with the Colorado court pursuant to NRS 125A.335(4). The Colorado court relinquished jurisdiction to Nevada.

The parties stipulated to reunification counseling and the district court appointed a therapist, Ms. D'Amore, to "initially assess and evaluate the child with a goal of moving toward reunification" between Karen and Brianna. During one of the sessions, Brianna stated that she did not want to see her mother at this time, but may decide to see her in the future, but on her own terms. In her report, Ms. D'Amore opined "it is not in the best interest of Brianna Spezialletti to be forced to see Karen . . . at this time."

At Karen's request, the district court held an evidentiary hearing to determine whether it was in Brianna's best interest to pursue reunification therapy. The testimony of Karen's expert witness, Dr. Childress, focused on the types of reunification therapy that were available and that therapy was in Brianna's best interest to help her resolve grief issues that were a result of the lack of contact with Karen. Dr. Childress' written report was admitted into evidence. Ms. D'Amore did not testify. Neither Karen nor Brianna testified.

The district court found Dr. Childress not credible based on a number of factors outlined in its order, including inconsistencies in the testimony and report, reliance on facts not proven in court, and the methodologies of the proposed therapies.

The district court found reunification therapy was not in Brianna's best interest "at this time" and denied Karen's motion. It found Brianna was "mature enough to be aware that her mother is seeking contact and expressed the possibility of pursuing that path in the future.

This Court will respect those wishes." The district court ordered William to "pursue therapy" for Brianna to determine whether she needs to "deal with any grief associated with the lack of contact with her mother." The district court did not modify the Colorado order that allowed supervised visitation, nor did the court order any form of contact between Karen and Brianna despite not finding Karen an unfit or unsafe parent.[3]

ANALYSIS

Karen contends the Colorado court did not have subject matter jurisdiction when it entered its temporary and permanent orders, and therefore, the Nevada court used the wrong standard when determining her motion to modify parenting time. William contends the doctrine of laches should apply because Karen has not raised this issue for seven years and parties are entitled to finality of judgments.

Karen's subject matter jurisdiction argument is not barred by laches

William claims laches is a defense in this case because of the seven year delay in asserting a jurisdictional defect. The Nevada Supreme Court has held that subject matter jurisdiction in custody matters "cannot be waived and may be raised at any time, or *sua sponte* by a court of review." *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002); *see also Bello v. Kruzel*, 732 So. 2d 1113, 1116 (Fla. Dist. Ct. App. 1999) ("Because subject matter jurisdiction is conferred upon a court by constitution or statute, it can never be waived by litigants. Thus, neither the affirmative defense of estoppel nor laches precludes the Former Wife from raising the issue of lack of UCCJA jurisdiction.")

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[3]The case at bar is distinguished from cases brought under NRS Chapter 432B, where the state or county seeks to remove a child from a parent's custody for abuse or neglect.

(internal citation omitted). Therefore, William's laches argument is not persuasive.

The Colorado court had subject matter jurisdiction to issue the temporary order

We review subject matter jurisdiction over UCCJEA cases de novo. *Friedman v. Eighth Judicial Dist.* Court, 127 Nev. ___, ___, 264 P.3d 1161, 1165 (2011). The UCCJEA provides that a court may exercise temporary emergency jurisdiction. UCCJEA §204 (1997). Nevada and Colorado have adopted identical versions of this provision. NRS 125A.335; Colo. Rev. Stat. § 14-13-204. These statutes state:

> A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

NRS 125A.335(1); Colo. Rev. Stat. §14-13-204(1).

At the time of the emergency hearing, Brianna was in Colorado.[4] The Colorado court found that the child was in "imminent danger" because Karen had removed Brianna from school. Thus, that court had jurisdiction and the authority to issue the March 20, 2007,

[4]The record does not indicate why Brianna was in Colorado at the time of the hearing after being absent from the state for approximately two years. Nonetheless, we note that Colo. Rev. Stat. §14-13-204 only states the child must be "present" in the state and does not impose any other time or purpose restriction on this element of the statute. Therefore, we conclude that this element of the temporary emergency jurisdiction statute was satisfied. *See also* NRS 125A.335.

temporary orders regarding custody and parenting time.[5]

The district court's discounting of Dr. Childress' report and testimony was not an abuse of discretion

Karen contends the district court made numerous errors in evaluating Dr. Childress's report and testimony, and thereby erred when it found Dr. Childress not credible. Karen first argues the district court improperly used Dr. Childress' reliance on facts not established in court to form his conclusions as a reason for finding Dr. Childress not credible. Karen's argument only has superficial merit. An expert may base an opinion on facts or data "made known to the expert at or before the hearing." NRS 50.285. The district court, however, concluded that the "facts" used by Dr. Childress were not actually true statements or events. Therefore, the use of these "facts" made the conclusion unreliable.

Karen's argument that the district court improperly refused to give any weight to Dr. Childress' report is without merit. "It is the prerogative of the trier of fact to evaluate the credibility of witnesses and

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[5]We note that it is unlikely the Colorado court had subject matter jurisdiction when it entered its July 10, 2007, order awarding William permanent primary custody of Brianna because no one involved in the case lived in Colorado. *See In re Guardianship of N.M.*, 131 Nev. ___, ___, ___ P.3d ____, (Adv. Op. No. 75, September 24, 2015). (stating a court exercising emergency jurisdiction under the UCCJEA cannot enter a final order unless the state has become the home state of the child). The record, however, is insufficient for us to make this jurisdiction determination. The arguments were not developed regarding the final order and not all pertinent Colorado documents are in the record. Nevertheless, the district court and the parties may determine to forego the resolution of this issue on remand, because, even if the lack of Colorado jurisdiction can be proven, Nevada law provides for a custody determination based upon the actual living arrangements that are in place, and not the label in a custody order, so William had primary custody at the time of the Nevada hearing. *See Rivero v. Rivero,* 125 Nev. 410, 430, 216 P.3d 213, 227 (2009).

determine the weight of their testimony, and it is not within the province of the appellate court to instruct the trier of fact that certain witnesses or testimony must be believed." *Douglas Spencer and Assocs. v. Las Vegas Sun, Inc.*, 84 Nev. 279, 282, 439 P.2d 473, 475 (1968).

Several other contentions by Karen were not supported by cited authority. Therefore, we need not consider these contentions. *See Humane Soc. of Carson City & Ormsby County v. First Nat'l Bank of Nev.*, 92 Nev. 474, 478, 553 P.2d 963, 965 (1976). Nonetheless, our review of the record reveals that these contentions either lack merit[6] or the alleged improprieties were not to the level to conclude that the district court's determination regarding Dr. Childress' credibility was an abuse of

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[6]For example, Karen asserts that the court erred in disregarding Dr. Childress' testimony and report when an opposing expert did not testify. The trier of fact, however, may disbelieve testimony of a witness even though there is no direct evidence to refute or discredit that testimony. *Douglas*, 84 Nev. at 281, 439 P.2d at 475. Karen also contends the court erred by determining Dr. Childress' recommendations exceeded the scope of the hearing. While the order did note the recommendations exceeded the scope of the hearing, it went on to state that the methodology behind those recommendations was questionable, and to explain the reasons the court made that finding. Karen's contention that the order should have listed more than one inconsistency, and that the district court should not have discounted the expert's conclusions because there is insufficient acknowledgment of Karen's role in creating the current situation, also lacks merit. Her assertion that Ms. D'Amore misunderstood her role may be valid. But its effect is unclear since Ms. D'Amore did not testify and only submitted her report. As a result, this issue should be reevaluated by the district court upon remand.

discretion.[7] *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (providing that an appellate court "will not reweigh the credibility of witnesses on appeal; that duty rests within the trier of fact's sound discretion.").

The district court erred by not making specified findings regarding all of the factors relevant to the best interest analysis

Karen asserts the district court impermissibly infringed on her parenting rights without first finding either 1) she was unfit, or 2) there were powerful countervailing interests that would trump her parenting rights. She also contends that the district court's order is tantamount to a termination of her parental rights.

Parents have a liberty interest in maintaining the parent-child relationship, but those rights are not absolute. *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003) (citing *Troxel v. Granville*, 530 U.S. 57 (2000); *Prince v. Mass.*, 321 U.S. 158 (1944); and *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981)). The overriding concern in parenting cases, whether the case is for custody or parenting time under NRS Chapter 125, or for termination of parental rights under NRS Chapter 128, is the best interest of the child. NRS 125.480(1) ("In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest

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[7]Karen's contention that the district court improperly found that Dr. Childress failed to explain how he reached his conclusion without evaluating the child has arguable merit. The record reflects that Dr. Childress' report stated the basis for his conclusion, and the court precluded evaluation of Brianna without William's or the court's permission. On remand, the district court should clarify the basis for its conclusion with specific findings or, if necessary, re-evaluate its determination.

of the child."); NRS 128.105 ("The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination.").

In *Radford v. Matczuk*, 164 A.2d 904, 905-06 (Md. 1960), the court used a best interest analysis in a situation factually similar to the case at bar. The father appealed an order that eliminated parenting time that had been awarded pursuant to a decree of divorce. Id. at 905. He had not seen the child for several years. *Id.* at 906. Additionally, his efforts to see the child were rebuffed by the custodial parent, he had been convicted of a crime, had not paid child support, and had remarried. *Id.* at 906-08. Nonetheless, there was nothing in the record to indicate the father was unfit at the time he filed his motion for parenting time. *Id.* at 906-07.

The court's probation officer interviewed the child. *Id.* at 906. According to the probation officer, the child appeared to be well-adjusted and did not want contact with his father. *Id.* The officer believed the child might later want to have contact with his father, but at present it was not in the child's best interest to "force on him a relationship with a total stranger in the home of strangers." *Id.* (internal quotations omitted).

The trial court accepted the recommendation of no contact but the appellate court rejected the result. The court noted "[i]n other jurisdictions, it has been held that it would require the clearest kind of evidence to justify a complete cutting off of visitation rights to a parent." *Id.* at 908. The court, while acknowledging that wishes of a child should be given consideration, went on to state:

> where the father has asked only that he be allowed to see his son at reasonable times, and where the child has not seen or known his father nor had an opportunity to make an independent choice based on something more than what had been imparted to him by others, we think the

> wishes of the child should be given slight, if any, consideration.

Id. at 909.[8] The court further noted a series of cases where abandonment did not negate parenting rights.[9] *Id.* at 909-910.

The court's analysis focused on whether the father had lost his previously granted parenting time rights by "any present unfitness to associate with him." *Id.* at 908. In that analysis, the court repudiated the mother's arguments against parenting time, many of which are very similar to William's arguments here.[10] *Id.* at 908. We find the court's reasoning persuasive.

In the case at bar, the district court recognized that the Legislature has declared that it is state policy for both parents to have a continuing relationship with their children, and share child rearing rights and responsibilities, after separation or divorce. NRS 125.460. Moreover,

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[8]In *Radford*, the child was seven years old and had not seen his father since infancy. *Id. at 905-06.* However, the court's reasoning is applicable to this case because the record indicates that Brianna has not seen Karen since Brianna was young and Brianna formed her opinion of Karen, at least in part, based upon information given to her by others (e.g., her half-brother Trey).

[9]The cases cited include *Dunnigan v. Dunnigan*, 31 A.2d 634, 637 (Md. 1943) (holding that a father who had abandoned his children for three years retained his right to parenting time) and *Commonwealth ex rel. Turner v. Strange*, 115 A.2d 885, 886 (Pa. Super. Ct. 1955) (holding a parent who had not seen her children for seven years except for chance meetings and did very little to recognize birthdays and holidays retained parenting time rights)

[10]The similar arguments are: 1) the parent requesting parenting time was convicted of a crime; 2) the child declared a desire not to see the requesting parent; 3) the requesting parent did not attempt to enforce parenting time rights for several years; and 4) the requesting parent abandoned or waived parenting time rights due to lack of contact and lack of monetary support for the child. *Radford* at 908.

the Nevada Supreme Court has emphasized this policy. *See Rivero,* 125 Nev. at 426, 216 P.3d at 223 ("The policy of Nevada is to advance the child's best interest by ensuring that after divorce minor children have frequent associations and a continuing relationship with both parents . . . and [t]o encourage such parents to share the rights and responsibilities of child rearing.") (citation omitted).

The district court believed that NRS 125.480 was not completely applicable to this situation, but properly used the statute in determining what was in Brianna's best interest, but it needed to go further. NRS 125.480(4) sets forth a list of factors which the district court "*shall consider* and *set forth its specific findings* concerning" "[i]n determining the best interest of the child." (emphasis added). Because the list of factors set forth in NRS 125.480(4) is not exhaustive, however, the district court may consider other relevant factors aside from those delineated in the statute. NRS 125.480(4) (providing that "[i]n determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things . . ."); *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (determining the best interest of a child "is not achieved . . . simply by processing the case through the factors that NRS 125.480(4) identifies as potentially relevant. . . . [T]he list of factors in NRS 125.480(4) is nonexhaustive.").

In making the required findings, the district court must be specific and explain how the factors support the judge's decision. 131 Nev. at ___, 352 P.3d at 1143-44. Findings that are merely conclusory are insufficient because they do not inform the parties of the basis for the decision, and do not give guidance as to how a party may show a change of circumstances should a motion to modify custody or parenting time be filed in the future. *Id.*, 352 P.3d at 1144. Failure to set forth specific findings is legal error. *Id.*, 352 P.3d at 1143. "The district court has broad

discretionary power in determining child custody, including visitation." *Id.*, 352 P.3d at 1142 (citation omitted) (internal quotation omitted). That deference, however, does not apply if the district court makes a legal error. *Id.*

Here, the district court made findings on four factors enumerated in NRS 125.480 and three other relevant factors.[11] It did not make findings as to the other enumerated factors that the court "shall" consider. Further, it did not make findings regarding Karen's current fitness to parent, which under the facts of this case, is considered a relevant factor. *See Radford*, at 909. Additionally, other than the findings regarding Brianna's physical, developmental and emotional needs, the district court's findings were conclusory. We do recognize the court was hamstrung in the decision making process because Karen did not testify and an inordinate amount of time was spent hearing Dr. Childress' testimony.

[11]The enumerated factors used by the court were: 1) the wishes of the child if the child is of sufficient age and capacity to form an intelligent preference (NRS 125.480(4)(a)); 2) the physical, developmental and emotional needs of the child (NRS 125.480(g)); 3) the nature of the relationship of the child with each parent (NRS 125.480(h)); and 4) any history of parental abuse or neglect of the child (NRS 125.480(j)). The other factors the court relied on in making its decision were: 1) both parties were to blame, but Karen was more to blame for the current situation; 2) Karen's "apparent abandonment" of Brianna; and 3) William "presented evidence that supports" that it is not in Brianna's best interest to change her day-to-day routine.

Brianna's wish not to pursue reunification therapy appears to have been the determinative factor in the court's decision.[12] The child's preference is one of the factors enumerated in NRS 125.480(4). Nevertheless, this is only one of twelve possible enumerated factors that the court must consider to determine what arrangement is in the child's best interest.

In finding Brianna did not want to pursue reunification therapy, the court apparently relied solely on the report of Ms. D'Amore and William's testimony. We are concerned that the district court relied so heavily on this factor without having the benefit of hearing directly from Brianna[13] or hearing testimony from Ms. D'Amore, which would have been subject to cross-examination.[14]

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[12]The district court's order states "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that it is not in Brianna's best interests to continue participating in reunification therapy at this time. Brianna is mature enough to be aware that her mother is seeking contact and expressed the possibility of pursuing that path in the future. *This Court will respect those wishes.*" (emphasis added).

[13]Although not enacted at the time of the hearing, we note that NRCP 16.215 provides several alternatives to outsourced services that ensure a child witness is protected while also protecting the parents' due process rights. Those methods include: 1) the court interviewing the child with counsel present; 2) allowing that parties' counsel to question the child in the presence of the court without the parties present; and 3) the court interviewing the child while counsel (or counsel and the parties) view the interview electronically.

[14]For example, Ms. D'Amore could have testified regarding her understanding of her role in the process, the circumstances surrounding Brianna's statements, including the nature and source of the information Brianna used to form her opinion, the methodology used in interviewing Brianna, whether at any time Brianna wavered in her stance that she did not want to pursue reunification therapy at that time, Brianna's maturity, etc.

Therefore, we remand this matter to the district court to fully conduct the best interest analysis, including assessing whether Karen is currently unfit to have parenting time, and to make specific findings. The other applicable best interest factors include allowing frequent associations and a continuing relationship, level of conflict between the parents, ability of the parents to cooperate to meet the needs of the child, current mental and physical health of the parents, ability of the child to maintain a relationship with any sibling, any history of abuse or neglect of the child or a sibling of the child, whether either parent or any other person seeking custody has committed any act of domestic violence or abduction against the child or any other child, and any other relevant present circumstances.

Because we are deciding this case on the best interest analysis and are remanding for further proceedings, we do not reach Karen's contention that the district court's order is tantamount to the termination of her parental rights. Nevertheless, we are concerned that the district court's order may have unconstitutionally infringed on Karen's parental rights, because no contact was allowed between Karen and Brianna, now or in the future, without the court having made any findings that Karen was unfit or would present a risk of harm to Brianna.[15] *See Matter of Norwood*, 445 So. 2d 301 (Ala. Civ. App. 1984) (granting mother parenting time after serving time in prison for killing the child's father, because she demonstrated efforts toward rehabilitation); *see also In re Two Minor Children*, 173 A.2d 876, 879 (Del. 1961) (parenting time may be denied

[15]The United States Supreme Court recognizes the right to parent as a fundamental liberty interest that is protected by the Fourteenth Amendment. *Troxel* at 60. The Nevada Supreme Court has likewise recognized this interest. *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1175 (2013).

until the parent demonstrates that the parenting time will not injuriously affect the child.).

Additionally, the district court did not establish any method for Karen to receive any information about Brianna or vice versa. The record reflects that William returned as undelivered cards and presents Karen sent to Brianna in the past. Further, the court did not establish a way that Brianna could make contact with Karen if she so chooses.[16] The court did not even order William to give Karen any information about Brianna. Additionally, the court did not establish any criteria that Karen could meet that would allow her to seek contact with Brianna in the future, or set a review hearing to determine the effect of Brianna's grief counseling. Finally, the court never modified the Colorado order that allowed supervised visits, yet the court closed the case.

Although Karen may be able to file a motion to modify parenting time in the future, it will be extremely difficult for her to meet her burden of proof given the lack of benchmark criteria, and the barriers to access and information that the court has imposed. *See Davis*, 352 P.3d at 1144. Consequently, Karen may be required to file multiple motions until she ultimately produces the evidence desired by the court. This would be contrary to public policy. *See Rennels v. Rennels*, 127 ___, ___, 257 P.3d 396, 402 (2011) (acknowledging the need to prevent serial motions in family law cases). Thus, the only realistic option for Karen to have contact with Brianna prior to Brianna reaching the age of majority is

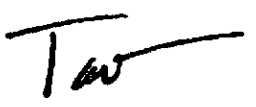
[16]For example, the court could have ordered a person such as a child advocate or mediator to act as an intermediary. This process would have ensured that a neutral person would receive and screen any cards, letters or presents sent by Karen to Brianna and vice versa.

for Brianna to initiate the contact outside the judicial process. This situation is analogous to a termination of parental rights because the parent has no right to a parental connection with the child prior to the child attaining the age of majority. The child may reach out to that parent if she so chooses, but the child may not know that the parent still cares about her and wants to have contact, or is remorseful for her transgressions in the past.[17]

Our concerns would have been diminished had the district court allowed some contact, now or in the future, or outlined a method for Karen to rehabilitate herself if needed, or had the court set a future hearing to determine whether grief counseling had changed Brianna's position regarding contact with her mother.

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



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[17]NRS 128.190 is also somewhat analogous. Had Karen's parental rights been terminated, she probably could not meet the criteria of NRS 128.190 to have her rights restored because Brianna, who is 15, would probably not consent to the restoration of parental rights.

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
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Eighth District Court Clerk