IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TARA THOMASON,
Appellant,
vs.
STEPHEN MYERS,
Respondent.

No. 66291

FILED

SEP 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to modify child custody. Fourth Judicial District Court, Elko County; Steven Elliott, Judge.

Appellant Tara Thomason and Respondent Stephen Myers had three minor children in common when they mutually signed a Marital Separation Agreement which was filed with the district court as part of a Summary Decree of Divorce on June 21, 2007.

Pursuant to the Agreement, the parties agreed to share joint legal custody of the children but Tara would have primary physical custody subject to Stephen's visitation (or parenting time). Stephen was to have parenting time two (2) nights per week overnight, on his nights off work; three (3) weeks for vacation per year; and shared holidays. Stephen was also ordered to pay Tara $1,545.77 per month in child support, which represented 29% of his gross monthly income (pursuant to NRS 125B.070(1)(b)(3)) less $56.59 per month for his share of the children's health insurance premium. Notably, Stephen's child support was established in a separate child support case, but was modified by the decree to reflect the health insurance premium paid by Stephen.

On November 10, 2011, Stephen filed a Motion to Modify Custody seeking joint physical custody over the children, asserting that

joint physical custody was in the children's best interest and that a substantial change in circumstances had occurred. In the Motion, Stephen argued that he had only agreed to give Tara primary physical custody because he did not want to put the children through the stress of a custody battle when they were already experiencing the difficulties of divorce. Stephen also argued that Tara exhibited erratic behavior around the children by, for example, telling them they could not go to friends' houses or the movies but then changing her mind at the last minute. He also contended that the children reported that they wanted to spend more time with Stephen, and that Tara only gave Stephen extra visitation when the children were ill.

In response to Stephen's Motion to Modify, Tara filed a Motion to Dismiss Stephen's Motion arguing there was no change in circumstances and, therefore, Stephen was not entitled to a hearing on his motion pursuant to *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993).

The Motions were originally presented to District Judge Alvin Kacin. Judge Kacin denied Tara's Motion to Dismiss, granted a hearing on Stephen's Motion to Modify Custody, and also ordered the parties to attend mediation. Shortly thereafter, a Court Appointed Special Advocate (CASA) named Janell Anderson submitted two reports recommending joint custody. Judge Kacin then disqualified himself from the case, and the matter was transferred to Senior District Judge Steven Elliott. Judge Elliott conducted a two-day evidentiary hearing on April 23 and 24, 2014, after which he entered an Order Granting Plaintiff's Motion to Modify Custody dated August 11, 2014 in which he found that a substantial change in circumstances had occurred affecting the welfare of the children

and that it was in the children's best interest to change the custody arrangement to joint physical custody. Tara appeals from this Order.

Tara contends that the district court must be reversed for four reasons: (1) the court erred in denying her Motion to Dismiss Stephen's Motion to Modify Custody despite acknowledging that there was no substantial change in circumstances; (2) the court erroneously disregarded the "substantial change in circumstances" test set forth in *Ellis v. Carucci*, appearing to suggest that the stipulated custody order was something other than final, contrary to *Rennels v. Rennels*; (3) the district court's decision to modify was not supported by substantial evidence and the facts do not meet the standard set forth by *Ellis v. Carucci*; and (4) the district court erred in granting attorney fees. Each of these will be discussed in turn.

First, Tara contends that the district court erred in denying her "Motion to Dismiss" Stephen's Motion to Modify Custody. As an initial observation, there is no such thing in the Nevada Rules of Civil Procedure as a motion to "dismiss" a motion filed by an opponent. An entire case may be "dismissed," but a mere motion may not be. A party may respond to a motion by filing an opposition to it explaining why it should not be granted, or by moving to strike it on the grounds that the original motion was procedurally improper. But here, Tara's motion sought to have Stephen's Motion "dismissed" not because of any alleged procedural irregularity, but rather because she disagreed with its substance and believed that Stephen's Motion should not be granted on its merits. Therefore, Tara's motion was not a motion to "dismiss" Stephen's Motion at all (because there is no such thing) or even, alternatively, a motion to strike Stephen's Motion, but rather a mere substantive opposition to

Stephen's Motion. Accordingly, the district court could not have "granted" Tara's motion because there was no proper relief for it to grant.

Therefore, we construe Tara's "Motion to Dismiss" as a substantive opposition to Stephen's Motion. Properly construed this way, Tara essentially argues that the district court erred in granting an evidentiary hearing to explore Stephen's Motion to Modify Custody when Stephen failed to establish a prima facie case for modification under *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993). But in *Rooney*, the Nevada Supreme Court held that the "district court *has the discretion* to deny a motion to modify custody without holding a hearing *unless* the moving party demonstrates 'adequate cause' for holding a hearing." 109 Nev. at 542, 853 P.2d at 124 (emphasis added). In other words, in response to a motion seeking to modify custody, a district court must grant an evidentiary hearing if the moving party demonstrates a prima facie case of some "substantial change in circumstances," but may grant an evidentiary hearing even if the moving party did not do so. Thus, even though Judge Kacin originally found that Stephen had not set forth prima facie evidence of a substantial change in circumstances, he committed no error in ordering that an evidentiary hearing be held nonetheless.

Tara next argues that Judge Kacin erred by disregarding the "substantial change in circumstances" prong of *Ellis* in its original Order denying Tara's "Motion to Dismiss" and ordering an evidentiary hearing on Stephen's Motion to Modify Custody. In his written Order, Judge Kacin observed that *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007) stands for the proposition that in order to change custody from a primary custody arrangement to a joint one, the non-custodial parent must show there has been a substantial change in circumstances affecting the welfare

of the child and that it is in the child's best interest to change custody. However, Judge Kacin concluded that the Nevada Supreme Court left open the possibility that if the parties originally stipulated to the custody arrangement, the question has not been "litigated" and, thus, *Ellis* does not apply to a stipulated custody order (as opposed to one entered following a contested trial) and on a later motion to modify, the court need only determine whether a modification is in the child's best interest, not whether there has also been a substantial change in circumstances affecting the child's welfare.

Judge Kacin's Order addresses a question that has not yet been decided by the Nevada Supreme Court in a published opinion. However, we need not reach the merits of that question in this appeal because his original Order was rendered moot when, following a two-day evidentiary hearing during which both parties presented evidence, Senior Judge Elliott found that a "substantial change in circumstances" had indeed occurred. Thus, whether or not Judge Kacin applied *Ellis* correctly when considering whether Stephen originally established a prima facie case in his moving papers, Senior Judge Elliot applied *Ellis* correctly to the evidence he heard during the two-day hearing. Because Judge Kacin's interlocutory order setting an evidentiary hearing on Stephen's Motion was supplanted by Senior Judge Elliott's final order granting Stephen's Motion, and only a "final" order can be the basis of an appeal. Therefore, the question of whether Judge Kacin's interpretation of *Ellis* was correct is not properly before us.

Tara's third argument is that the district court's decision to modify was not supported by substantial evidence and the facts do not meet the standard set forth by *Ellis*. Courts will generally uphold the

parties' custody agreements if "they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 227 (2009). However, once the parties ask the court to modify that agreement, the court must apply Nevada law. *Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1047. "A court decision regarding visitation is a 'custody determination'." *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). A court may modify a primary physical custody arrangement "only when (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." *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2009). A court may modify a joint physical custody arrangement when it is in the child's best interest. NRS 125.510(2); *Rivero*, 125 Nev. at 430, 216 P.3d at 227.

Matters of custody and support of minor children rest in the sound discretion of the trial court and this court reviews decisions regarding custody for an abuse of discretion. *Culbertson v. Culbertson,* 91 Nev. 230, 233, 533 P.2d 768, 770 (1975) citing *Fenkell v. Fenkell*, 86 Nev. 397, 469 P.2d 701 (1970); *Peavey v. Peavey*, 85 Nev. 571, 460 P.2d 110 (1969); *Cosner v. Cosner*, 78 Nev. 242, 371 P.2d 278 (1962). It is presumed that a trial court has properly exercised its discretion in determining a child's best interest. *Id.* citing *Howe v. Howe*, 87 Nev. 595, 491 P.2d 38 (1971). However, "substantial evidence must support the court's findings. Substantial evidence 'is evidence that a reasonable person may accept as adequate to sustain a judgment.'" *Rivero*, 125 Nev. at 428, 216 P.3d at 226 citing *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42.

In this case, the district court made the following findings in connection with the "substantial change in circumstances" prong: (a) the

children are substantially older than they were at the date of divorce seven years ago; (b) a great deal of time has gone by, and in that time period Stephen has improved issues he had early on when he first became a single dad; Stephen has significantly improved his living arrangements going from an apartment to a three-bedroom house; Stephen's situation has substantially changed, and that change has affected the children in a positive way; (c) the dynamic between the relationship between the children, Stephen, and Tara has changed; Stephen and Tara have gone from a nuclear family to both assuming the role of nurturing individual parents to the children; (d) the fact that Stephen has had less than equal time with the children has affected the children negatively, and the children are suffering under the current custodial arrangement; (e) the Temporary Protective Order taken out by Tara in March of 2013 had a very negative effect on the family and the children; (f) one child has had thoughts of suicide and needs parenting by both Stephen and Tara; (g) there was extensive testimony by the CASA, Janell Anderson LCSW, who is a trained expert, that the children need both parents; Stephen has stepped up considerably as a parent by sharing parenting responsibilities with Tara, including volunteering at the children's schools each year; although Ms. Slogter, the school psychologist, testified that split weeks would be difficult, the benefits to the children of having more time with both parents, as well as Stephen's unique schedule, overcomes that concern.

Regarding the "best interest of the child" inquiry, the district court found as follows: (a) one child is of sufficient age and capacity to form an intelligent preference as to his custody, and told Ms. Anderson that he wanted equal time with his parents; later, he said that he wanted

to stay with each parent as he wished; another child also told Ms. Anderson that she wanted equal time with her parents, although it is less clear whether she is of sufficient age and capacity to form an intelligent preference; (b) (found not applicable); (c) Stephen is more likely to allow the children to have frequent associations and a continuing relationship with Tara, as Tara has restricted access to Stephen; (d) the level of conflict between the parents is high; (e) Tara has shown she is often not willing to cooperate with Stephen; (f) Stephen is in good mental and physical condition, Tara is in good physical condition but has been diagnosed with depression, post-traumatic stress disorder and anxiety disorder and takes Klonopin and has taken Wellbutrin; the children describe her as stressed and nervous, and Tara has called for police intervention when circumstances did not warrant such action; the Temporary Protective Order she sought in 2013 was an unjustified overreaction which harmed the children as well as Stephen; (g) the children will benefit from equal participation from both parents for their physical, developmental, and emotional needs; (h) the children have a safe and loving relationship with both parents; (i) the children have maintained a relationship with each other which will continue in a joint custody arrangement; (j) there is no history of abuse or neglect; (k) although Tara has raised the issue of domestic abuse, there was no evidence that domestic violence ever occurred; (l) neither parent has abducted the children.

In this appeal, Tara essentially argues that the district court should have made different findings than it did. But on appeal, we cannot simply re-weigh the evidence heard by the district court, especially since the district court was able to see and hear the witnesses as they testified and was in a far better position to determine the credibility of the various

witnesses than we are. Our role on appeal is limited to determining whether the findings made by the district court were supported by "substantial evidence," which means we evaluate only whether the district court could have made the findings that it did based upon the evidence presented, not whether the judge could or should have made different findings based upon the same evidence. Here, the district court's findings were all supported by substantial evidence. The mere fact that Tara presented contradictory evidence which could have justified different findings is not a reason to reverse the district court; indeed, when contradictory evidence has been presented, it is the very role of the court hearing and seeing the competing evidence to determine which version of events is the more credible and whose expert opinions should be given more weight. So long as the findings made by the district court were properly supported by one version of the conflicting evidence, the district court did not abuse its discretion.

Finally, Tara challenges the district court's award of attorney fees. We generally review the district court's decision regarding attorney fees for an abuse of discretion. However, the district court may not award attorney fees absent authority under a statute, rule, or contract. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (internal citations omitted).

Under the Rules of Practice for the Fourth Judicial District Court, Rule 5(8) states:

> Absent good cause, any party who refuses to accept the terms and conditions contained within the Child Advocate recommendation and who is subsequently unable to obtain relief substantially better than is contained in the recommendation of the Child Advocate, may be required to pay

> reasonable attorney fees and costs incurred by the other party following the filing of said recommendation.

Here, the district court found Tara refused to accept child advocate Janell Anderson's recommendation of joint physical custody and then failed to obtain a better result at trial, as the court granted joint physical custody. Accordingly, the court ordered Tara to pay Stephen's attorney fees in the amount of $20,265.04 and costs in the amount of $2,110.00. *See* NRS 125.150(3). Because we find no grounds to reverse the district court's Order, we affirm its grant of attorney fees as well.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Carolyn Worrell, Settlement Judge
Law Office of Thomas L. Qualls, Ltd.
Silverman, Decaria & Kattelman, Chtd.
Elko County Clerk