IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SANDRA LYNN NANCE,

Appellant,

v.

CHRISTOPHER MICHAEL FERRARO,

Respondent.

FILED

AUG 07 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Supreme Court No.: 72454

District Court No.: D426817

APPELLANT'S MOTION FOR STAY PENDING APPEAL OF JANUARY 27, 2017, ORDER GRANTING RELOCATION

COMES NOW, Appellant Sandra Lynn Nance, by and through her attorney of record, Emily McFarling, Esq. of McFarling Law Group, and hereby requests that the Court issue an Order Staying the District Court's January 27, 2017 Order Modifying Custody and Granting Relocation, pending appeal. This Motion is based upon the Memorandum of Points and Authorities, Declaration of Emily McFarling, Esq. and all other papers and pleadings on file herein.

DATED this 2nd day of August, 2017.

MCFARLING LAW GROUP

By: _____

Emily McFarling, Esq.
Nevada Bar No. 8567
6230 W. Desert Inn Road
Las Vegas, NV 89146

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17-901582

I. FACTUAL BACKGROUND

Appellant Sandra Nance and Respondent Christopher ("Chris") Ferraro divorced in 2012 but started divorce and custody proceedings in 2010. The parties' have one child together, Evan (aged 8). The parties had two prior stipulated custody agreements, both with Sandra having most of the custodial time, the child attending school in Nevada and Chris living in New York and having visitation at times that Evan was not in school.

In June 2015, Chris filed a motion to modify custody and request for permission for Evan to relocate to New York, where Chris lives. The court conducted an evidentiary hearing and issued its decision at a hearing in December 2016. The court's decision was reduced to writing and entered on January 27, 2017.

The court granted Chris' request for relocation. But the court ordered Evan to remain with Sandra in Las Vegas to finish the 2016 – 2017 school year; and since Sandra would now be the out-of-state parent, for Evan to remain with Sandra in Las Vegas through the summer for her new custodial time.

Sandra appealed this court's decision on February 15, 2017. The parties have completed appellate briefing. Sandra filed for a stay in district court on June 8, 2016. The district court denied her request on July 27, 2017.

This motion follows.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. The Court Should Stay its Relocation Order

After a party files an appeal, they may obtain a stay by first requesting the stay in district court.[1] The appealing party motions the district court for "an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending."[2]

The Nevada Rules of Appellate Procedure also provide criteria the *appellate court*s must consider when an appellant requests a stay in a child custody case:

> (1) whether the child(ren) will suffer hardship or harm if the stay is either granted or denied;
>
> (2) whether the nonmoving party will suffer hardship or harm if the stay is granted;
>
> (3) whether movant is likely to prevail on the merits in the appeal; and
>
> (4) whether a determination of other existing equitable considerations, if any, is warranted.[3]

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[1] NRAP 8(a)(1).
[2] NRAP 8(a)(1)(c).
[3] NRAP 8(d).

Here, the court should grant a stay of its January 26, 2017 order granting relocation. An analysis of the above factors favors a stay of the relocation order:

1. Evan will not suffer hardship if the stay is granted

This was a close case and there is nothing in the court's findings that indicate Evan is at-risk in Nevada or will suffer grave harm— or harm of any kind if he were to remain in his home in Nevada longer. In fact, Sandra has been Evan's primary parent for years. Several people, including his principal, testified that Evan was an exceptional child and performing as a model student. Maintaining the status quo will not cause Evan any harm as he has been thriving in his current situation.

2. A stay will not harm Chris

As stated above, a stay in this matter preserves the status quo— which is fine. Sandra and Chris have had this custody arrangement for years. Chris will therefore not be harmed by a stay.

3. Sandra is likely to prevail on her appeal

Sandra's appeal largely revolves around evidence omitted through Chris' motion in limine, which includes domestic violence evidence as well as mental health evidence. The parties had never had evidentiary proceedings prior to the proceeding currently on appeal; thus, none of this evidence was ever before the court.

a. The district court erred by denying all evidence prior to the last custody order

In a custody proceeding, events that took place prior to the most recent court order are not admissible to demonstrate a *change of circumstances.*[4]

The Nevada Supreme Court later clarified that the changed circumstances doctrine does not apply when the moving party or the court was unaware of the existence or extent of the conduct when it made its previous order.[5] The *res judicata doctrine* (as articulated as the changed circumstances doctrine in custody cases) is meant to prevent dissatisfied parties from "filing repetitive serial motions in an attempt to manipulate the judicial system."[6] But *res judicata* principles "should not prevent the court from ensuring that the child's best interests are served."[7] *Res judicata* is defined as: "an issue that has been definitively settled by judicial decision."[8]

In every custody case, the court's sole consideration is the child's best interest.[9]

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[4] *McMonigle v. McMonigle*, 110 Nev. 1407, 1408 (1994). (emphasis added).
[5] *Castle v. Simmons,* 120 Nev. 98, 104 (2004).
[6] *Id.*
[7] *Id.*
[8] Res Judicata, Black's Law Dictionary (10th ed. 2014).
[9] NRS 125C.0035(1).

Here, the district court committed reversible error when it denied all evidence prior to the last custodial order— including domestic violence evidence as well as mental health evidence. The parties' prior custody orders had been established by stipulation of the parties; thus, they had never presented evidence to the court for consideration. Even if it had been, evidence prior to the most recent custodial order is only not allowed to demonstrate *change in circumstances*; it is not barred if it goes towards a child's best interests; and whether a parent has committed domestic violence or has mental health issues does. The Nevada Appellate Court has recently confirmed the above analysis in an unpublished decision containing very similar facts.[10]

4. There are no other relevant equitable considerations for the court

In a relocation case, the court has few options for compromise. The parties live on completely different sides of the country and Evan is school-aged. The court therefore has two choices: 1) Evan stay here in Nevada; or 2) Evan with Chris in New York. There are no other equitable situations.

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[10] *See Kashuba v. Adkins*, NV Court of Appeals Case # 69829 (2016).

III. CONCLUSION

Evan is school-aged and has only ever attended school in Las Vegas, Nevada. The court's current order has him moving to New York and beginning school there in the fall of 2017. If Sandra winds her appeal and her request for stay is denied, then Evan would start school in New York and then have to come back to Nevada. This instability is not in Evan's best interests. None of the district court's findings state that Evan is not doing well in Las Vegas. The court only felt he could do better in New York— something Sandra disputes. The district court wrongly excluded evidence from prior to the last custodial order, even though it was not for the purposes of demonstrating a change in circumstances, and even though the evidence was relevant to the child's best interests. This Court should therefore issue a stay pending the outcome of the appeal.

DATED this 2nd day of August, 2017.

MCFARLING LAW GROUP

By: _____

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(702) 565-4335
Attorney for Appellant,
Sandra Lynn Nance

DECLARATION OF EMILY MCFARLING, ESQ.

I, Emily McFarling, Esq., declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct:

1. I represent the Appellant in the above-entitled case.

2. I have read the attached motion and know the contents thereof; the same is true of my own knowledge, except for those matters stated upon information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the State of Nevada and the United States (NRS 53.045 and 28 USC § 1746), that the foregoing is true and correct.

DATED this 2nd day of August, 2017.

By: _____
Emily McFarling, Esq.

CERTIFICATE OF SERVICE

The undersigned, an employee of McFarling Law Group, hereby certifies that on the 2nd day of August, 2017, I served a true and correct copy of Motion, by U.S. Mail postage prepaid and addressed as follows:

Shannon R. Wilson, Esq.
Peccole Professional Park
10080 W. Alta Drive, Ste. 200
Las Vegas, NV 89145
Attorney for Respondent

By: _____
Maria Rios Landin