

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATRINA CARTER,

Appellant,

v.

RUNNDLEY DUCKSWORTH,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 81966

CHILD CUSTODY FAST TRACK RESPONSE

1. Name of Party filing this fast response:

Runndley Ducksworth, Respondent.

2. Name, law firm, address, and telephone number of attorney submitting

this fast track response:

Ashlee Vazquez, Esq.
McFarling Law Group
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335

3. Proceedings raising same issues.

N/A

4. Procedural history.

In 2010, the parties entered into a Parenting Agreement that reflected a joint legal custody and joint physical custody arrangement of their minor child, Katron. 9/17/20 Transcript, 20.

On April 7, 2017, Appellant, Katrina Carter, filed a Complaint for Custody against Respondent, Runndley Ducksworth. 1ROA1-8. She also filed a Motion to Relocate to Dallas, Texas with Katron. 1ROA10-18. Runndley opposed her motion, 1ROA41-46.

At the August 1, 2017 evidentiary hearing, the court granted Katrina's motion to relocate to Texas and awarded Katrina primary physical custody of Katron, subject to Runndley's visitation. 1ROA160-161.

On September 6, 2019, Runndley filed a Motion for Order to Modify Custody and a Motion for an Order to Enforce and/or for an Order to Show Cause Regarding Contempt. 5ROA928-945. At the October 15, 2019 hearing, the court denied Runndley's Motion for not meeting the *Ellis* standard and that the court orders were not specific enough for the court to make contempt findings. 6ROA1152.

On February 27, 2020, Runndley filed another Motion to Enforce and/or For an Order to Show Cause Regarding Contempt for Katrina not allowing Katron to stay with Runndley for his full 2019 Thanksgiving break and because she did not send Katron for the 2nd half of the 2019 Winter break. 6ROA1165-1174. On April 20, 2020, the court issued an Order granting Runndley's Motion and an Order to Show Cause against Katrina and set it for hearing on May 28, 2020. 6ROA1245-1247. This order was noticed to Katrina and Runndley via email through the Odyssey e-filing system. 6ROA1248-1252. The Order to Show Cause was subsequently

issued on April 23, 2020, then deposited in the mail by certified mail to Katrina's address on April 24, 2020. 6ROA1255-1256. Katrina filed her Opposition thereto on May 4, 2020, 6ROA1291-1300, and a notice to appear by phone for the May 28, 2020 hearing. 7ROA1339.

On May 1, 2020, Runndley filed another Motion to Enforce and/or For an Order to Show Cause Regarding Contempt, this time for Katrina not sending Katron for Runndley's 2020 Spring break visit and 2020 summer visit. 6ROA122120. As such, the May 28, 2020 OSC hearing was rescheduled to also be heard on June 9, 2020, and such notice was emailed to the parties via the court's e-filing system. 7ROA1356-1357.

At the June 9, 20220 hearing, the court referred Katron for a child interview, and set an evidentiary hearing on Runndley's request to modify physical custody for September 15, 2020. 7ROA1358-1362. Further, the court continued the Order to Show Cause hearing to the Calendar Call set for September 1, 2020. 7ROA1379-1380. This Order was electronically served on Katrina. 7ROA1383.

On July 29, 2020, Runndley filed a Motion to Modify Custody, seeking temporary sole custody of Katron, because Katrina kidnapped Katron in the middle of his summer visitation. 7ROA1365-1375.

On August 10, 2020, a Notice of Appearance of Counsel was filed for Katrina. 7ROA1394. Thereafter, Katrina filed an Opposition and Countermotion claiming

that Runndley had not met his burden under *Rooney* to set an evidentiary hearing on modification of custody. 7ROA1403.

At the September 1, 2020 Calendar Call and Order to Show Cause hearing, the Court also addressed Runndley's Motion to Modify and Katrina's Countermotion. The Court also pushed the hearing to September 17, 2020.

On September 16, 2020, Notice of Association of Counsel was filed for Katrina. 8ROA1615.

The matter came on for an evidentiary hearing on September 17, 2020, both parties presented with counsel, where evidence was presented, testimony was provided, and arguments were heard by the Court. *Transcript of 9/17/20 Proceeding, page 2.*

On September 23, 2020, the district court issued its Findings of Fact, Conclusions of Law and Order. 8ROA1617-1643.

5. Statement of facts.

In April 2017, Katrina filed a motion to relocate to Texas with Katron. 1ROA10. Despite the parties having joint physical custody, she had already moved to Texas with Katron without Runndley or the court's permission. As such, Runndley filed a motion for return of child. The matter was set for trial.

At the August 1, 2017 evidentiary hearing, the court granted joint legal custody and Katrina primary physical custody in Texas. 1ROA160. Runndley's

visitations were to be seven (7) weeks of Summer break, Thanksgiving break in odd-numbered years, the 1st half of Christmas break in even-numbered years and the 2nd half in odd-numbered years, Spring break/Easter in even-numbered years, and visits in Texas with 48 hours' notice. 1ROA160-161.

Notably, the court specifically ordered, "The Court expects compliance with the Orders." 1ROA161. The court further reprimanded Katrina and told her that she had to comply with the court's orders and that if she violated the court's orders, the court could change its mind and require Katron to move back to Las Vegas. 8ROA1594-1595, 1618.

Unfortunately, since the evidentiary hearing in 2018, the parties returned to court numerous times as a result of Katrina depriving Runndley of his court ordered visitation with Katron, not allowing Runndley reasonable phone contact with Katron, and lack of communication such as Katrina not providing Runndley with updated addresses and health and school information for Katron. 8ROA1618-1619.

After nearly two (2) years of violations from Katrina, Runndley filed a Motion for Order to Modify Custody on September 6, 2019. 5ROA928-935. However, at the October 15, 2019 hearing, "although Katrina continued to take steps which were inconsistent with existing court orders, the Court could not, at that time, find a basis to set further proceedings on the request to modify custody." 8ROA1619.

On February 27, 2020, Runndley filed a Motion to Enforce and/or For an Order to Show Cause Regarding Contempt, because Katrina interfered with Runndley's 2019 Thanksgiving break and did not send Katron for the 2nd half of the 2019 Winter break. 6ROA1165-1174. On April 20, 2020, the court granted Runndley's Motion and issued an Order to Show Cause against Katrina. 6ROA1255-1256. Katrina filed an Opposition and Countermotion to address *Rooney*.

On May 1, 2020, Runndley filed another Motion to Enforce and/or For an Order to Show Cause Regarding Contempt, because Katrina did not send Katron for Spring break 2020, nor did she send Katron for his Summer 2020 visit. 6ROA1259-1264.

At the June 9, 2020 hearing, Runndley's counsel requested "a modification of custody, at this point, with my client having primary" 6/9/2020 *Transcript 11*, and "we need to have an evidentiary hearing to modify custody." *See id.* 3-4. In this regard, the court found:

[T]here are some issues with regard to your contempt. There was an order to show cause put in place previously that we're going to continue to -- to evaluate. This has been an ongoing problem and an ongoing issue. Dad is entitled to have visitation. You were permitted to relocate on the condition that Dad's relationship with the child would not be damaged by that. So there are some questions whether you're capable of making that happen from Texas or whether the child should be returned.

The analysis the Court has to look at is Ellis, and Ellis indicates that I have to have a substantial change in circumstance affecting the child and the child's best interest. The substantial change in circumstance is

that for more than a year this has been an issue. The motion that was filed by Dad that's before me today is almost identical to the motion that was filed by Dad that brought us to the hearing in October of last year which means that the pattern is continuing and we have some ongoing concerns. I'm not quite sure ma'am why you would come to Las Vegas to pick up the child in the middle of Dad's visitation and Thanksgiving, but we'll explore that a little further. And we need to understand that court orders are in place for a reason. We need to make sure that parents are able to maintain their relationship with children.

So I find sufficient basis to set an evidentiary hearing on the request to modify custody and the Court will make that analysis based on the evidence that is presented at that point in time. So we'll set that evidentiary hearing. *See id.* 12-13.

The court ordered Katrina to bring Katron to Las Vegas within seven (7) days and for Katron to stay with Runndley until school started in order to compensate Runndley for his missed visits with Katron. 6/9/20 Transcript, 13-14.

Katrina did bring Katron to Las Vegas on the seventh day. 9/17/20 Transcript, 43. However, Katron did not stay until school started, as ordered. *Id.* at 44. At trial, Runndley testified that, on July 26, 2020, Katrina went to Runndley's house, without advising him in writing in advance, called Katron, and had him run outside to her car. *Id.* Katrina testified that she did not inform Runndley in writing on Talking Parents as they are supposed to per the court order. *Id.* at 88.

On August 24, 2020, Katrina filed her Pre-Trial Memorandum, listing three witnesses, none of which were the minor child. 8ROA1570-1576. On August 25, 2020, Runndley filed his Pretrial Memorandum laying out his arguments for a modification of Mom's primary physical custody under *Ellis v. Carruci* and

argument for her to be held in contempt. 8ROA 1591-1605. Notably, within his PTM, Runndley objected to Katrina's proposed exhibit with the child interview, based on hearsay. 8ROA1608.

At the September 1, 2020 hearing, the court denied Runndley's motion for temporary custody because it was similar to the issues set for trial. *Transcript for 09/01/2020 Proceeding*. The court stated, "I already made a finding addressing Mr. Isso's point that we met the standards to set an evidentiary [. . .] back in June [. . .] There is a question as to whether Mom is doing what she should be doing pursuant to the court orders and that was the substantial change of circumstance that brought us to the point of setting the evidentiary hearing." *See 09/01/20 transcript, 11*. The Court further confirmed it would still be making a decision on Runndley's Motion for contempt. *See 9/1/20 Transcript, 14*.

Notably, at the Calendar Call, Katrina did not bring up the issue of having a child witness or Runndley objection to admitting the child interview report. *See entire Transcript of 9/1/2020 Proceeding*. However, when the matter came on for hearing on September 17, 2020, the court denied Katrina's oral motions to allow Katron to testify or to continue trial.

After the evidentiary hearing, where evidence and testimony was presented, and arguments were heard, the court ordered that Rundley's motion to modify physical custody was granted, because Runndley met his burden and that it was in

the best interest of the child that he be awarded primary physical custody.

8ROA1639. Katrina was awarded significant visitation. 8ROA1642.

6. Issues on appeal.

- A. The court did not err by not allowing the minor child to testify, because the child was not listed as a witness.
- B. The court did not err by not admitting the child interview, because it is hearsay and does not comply with NRCP 16.215.
- C. The Court did not err by failing to consider the child interview, because it did consider the child interview.
- D. The Court did not abuse its discretion because it did enter findings of facts based on the child interview.
- E. The Court did not abuse its discretion by finding Katrina in contempt because Katrina was properly served the Order to Show Cause.
- F. The Court did not abuse its discretion when it changed custody, because it was not to punish Katrina.
- G. The Court did not abuse its discretion, because it considered and analyzed the child's best interest.
- H. The Court did not abuse its discretion, because it made substantial findings supported by evidence and testimony at the time of trial.
- I. The Court did not err in setting this evidentiary hearing because it found adequate cause.
- J. The Court did not err in modifying custody because it found a substantial change in circumstances affecting the welfare of the child.
- K. The court did not abuse its discretion in modifying custody because it was based on real evidence, not on a theory of retaliation.

- L. The Court did not abuse its discretion because it considered all of the relevant best interest factors, including the physical developmental and emotional needs of the child.
- M. The court did not abuse its discretion because it made very specific factual findings to justify the modification of custody.
- N. The court did not err in not considering Runndley seeking modification for the sole purpose of minimizing financial exposure.
- O. The court did not err in considering abuse allegations mentioned in the child interview.
- P. The court did not err when it failed to consider Katrina's testimony regarding how she thinks the minor child feels.
- Q. The court did not err when it failed to apply the best evidence rule when it found that the child's grades were declining.
- R. The court did not err when because Katrina did testify as to why the child was not put on the plane and the court found her not credible.
- S. The court did not err when it failed to admit the child's medical record under the hearsay exception of statements made to a medical provider,
- T. The court did not err when it said Katrina provided proper notice to pick up child on July 26.
- U. The court did not err because it did consider the relationship between the dad and the child.
- V. The court did not err in failing to give more weight to the child interview.
- W. It was not an abuse of discretion to award Runndley primary physical custody.
- X. The district court did not err when it changed custody because it was found to be in the best interest of the child.

- Y. The court did not err in hearing this matter as it had continuing, exclusive jurisdiction of the minor child.
- Z. The court did not err in finding Katrina in contempt for violating orders related to Rundley's visits for 1) winter break 2019, 2) spring break 2020, 3) the start of summer break 2020, and 4) end of summer break 2020.
- AA. The Court did not err by modifying custody in the middle of the school year, during a global pandemic.
- BB. The court did not err in not considering factors to relocate a child out of the state of Nevada.

7. Legal argument,¹ including authorities:

A. The Court did not Err by Not Allowing the Minor Child to Testify at Trial or by not Admitting the Child Interview Report.

When determining the scope of a child witness's participation, in child custody proceedings, the court must use the procedures and considerations in Nevada Rules of Civil Procedure (NRCPP) 16.215.

First, a party must identify and disclose a child witness at the time of the Case Management Conference (CMC) or if after the CMC, by filing a notice of child witness no later than 60 days before the hearing in which the child would testify.²

Further, if a party wants child testimony by alternative methods, such as a child interview by a third-party, they would need to file a Motion to Permit Child

¹ As Appellant's many issues seem to be repetitive or redundant, Respondent will attempt consolidate the issues as they pertain to similar issues.

² See NRCPP 16.215(c)(1-2)

Testimony by Alternative Methods at the same time as their Notice of Child Witness, or 60 days before the hearing in which the child would testify.³ However, the child interview would need to follow the rules required in NRCP 16.215 to protect the parents' due process rights and preserve the record.⁴

In this case, Katrina did not timely or properly notice Katron as a witness at any time during the case. As for the child interview report from FMC, Katrina did not properly move the Court for alternative testimony under NRCP 16.215. Nonetheless, the court stated at the time of trial, "the Court has reviewed and will consider as part of the determination it makes today." *Transcript from 9/17/2020 Proceeding, page 7, lines 10-11*. Indeed, in the Findings of Fact, the court cited to the child interview in its findings regarding the child's preference to custody, which favored Katrina. 8ROA1635-1636.

Therefore, the Court did not err by not allowing the minor child to testify as he was not properly noticed as a witness, it did not err in not admitting the child interview report as it contains hearsay and did not meet NRCP 16.215 due process and record preservation rules, and did not err in considering the child interview, because it was considered.

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³ See NRCP 16.215(c)(3)

⁴ See NRCP 16.215(e-i).

B. The Court did not Abuse its Discretion in Modifying Custody, because the Proper *Ellis v. Carruci* Standard was Applied and the Court Made Very Specific Findings Supported by Substantial Evidence, Including the Child’s Best Interest.

This court will not disturb the district court's determination of child custody, absent an abuse of discretion.⁵ However, the district court's findings must be supported with substantial evidence.⁶ This court reviews modifications of child custody under an abuse of discretion standard. “[A] modification of primary physical custody is warranted 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.”⁷

Here, the court analyzed the correct *Ellis v. Carruci* standard and went through 12 pages of very specific findings of facts in its Order. 8ROA1617-1629. Throughout the findings made, the court references specific testimony made and evidence admitted through the evidentiary hearing. *Id.* Based on its findings, the Court found that since Katrina was granted primary physical custody in Texas, she has made Rundley’s ability to maintain a relationship with the child difficult through withholding visitation and electronic communication, as such this was found

⁵ *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009).

⁶ *Id.*

⁷ *Ellis v. Carruci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)

to be a substantial change of circumstances affect the child. 8ROA19. Then, the court proceeding with the required best interest analysis, indeed going through each factor per NRS 125C.0035(4) of which favored Runndley having primary physical custody of the child. 8ROA1635-1639.

C. The Court did not Err in its Rulings Regarding Evidence.

“This court reviews a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse.”⁸

Katrina argues that the court erred in not admitting in medical records under the hearsay exception of statements made to a medical provider per NRS 51.115. In this case, Katron was supposedly taken to the ER, because Katron was “limping” after running to Katrina’s car. 9/17/20 Transcript, 97. However, during trial, Katrina was trying to get in the statements made to the doctor of alleged past abuse by the father, which the court noted were not for “purpose of medical diagnosis or treatment,” 9/17/20 Transcript, 98-99.

Additionally, Katrina argues that the court erred when it failed to apply the best evidence rule, which would be NRS 52.235. At trial, Runndley was testifying to how he keeps track of Katron’s attendance and grades, through the school’s

⁸ *Klabacka v. Nelson*, 133 Nev. 164, 174, 394 P.3d 940, 949 (2017) (internal quotation marks omitted).

Skyward account. Id. at 29. At first, Katrina's counsel objected to best evidence rule, which was overruled by the court, Id., but when Runndley's counsel moved to admit page 1 of Exhibit J, the attendance record, there was no objection. Id. at 32.

Based on the foregoing, the trial court did not abuse its discretion on these evidentiary issues.

D. The Court did not Err or Abuse its Discretion in Findings Katrina in Contempt.

If an Order to Show Cause (OSC) is issued in advance of the first hearing, the moving party shall serve it and the application for OSC on the accused contemnor.⁹ This local court rule does not specify how service must be made, but NRS 31.853(4) gives guidance that service of an Order to Show Cause shall be made by personal service or in such other manner as the court may determine to be reasonably calculated to afford notice of the proceeding.

Here, the Order granting the Order to Show Cause was e-mailed to Katrina of which she had voluntarily signed up for electronic service through the court's e-filing system. 6ROA1248-1252. Then, Runndley had served both the Ex Parte Application for Order to Show Cause and the Order to Show Cause by certified mail. 6ROA1257-1258. Thereafter, Katrina had been served various orders regarding the order to show cause and had even filed an opposition and attended all hearings. In sum, Katrina

⁹ EDCR 5.504(d)

had sufficient notice to appear and show cause why she should not be found in contempt.

A civil contempt is said to be remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts. Moreover, a civil contempt order is indeterminate or conditional; the contemnor's compliance is all that is sought and with that compliance comes the termination of any sanctions imposed.¹⁰

In this case, the court found that the "evidence indicates, beyond a reasonable doubt that Katrina failed, on several occasions, to comply with this court's orders relating to Runddley's visitation." 8ROA1632. The court further found that Katrina did not provide credible evidence that her violations of the orders were not willful, and that Runddley established, beyond a reasonable doubt, that Katrina violated the orders. *Id.* As such, the court found that Katrina was in contempt of the September 19, 2017 Order and August 4, 2020 Orders of the court, specifically as it related to Runddley's winter break 2019 visit, spring break 2020 visit, beginning of summer 2020 visit, and end of summer 2020. 8ROA1634.

While the court ordered that Katrina was found to be in contempt of the court's orders relating to Runddley's visitation time with the child; the court would not issue

¹⁰ *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804–05, 102 P.3d 41, 45–46 (2004) (citations omitted).

a sanction for the contempt, other than compensatory time, which Runndley was to receive as a result of the custodial change. 8ROA1639-1640. The court went on further to explain that “while Katrina’s acts were considered as part of the request to modify custody, the custodial change is based on Runndley meeting the legal requirements for modification and not a sanction for Katrina’s contempt.” 8ROA1640. Katrina was presented by counsel at the evidentiary hearing.

E. The Court did not Err in Maintaining Continuing, Exclusive Jurisdiction of this Case.

A court of this state which has made a child custody determination consistent with NRS 125A.305 or 125A.325 has **exclusive, continuing jurisdiction** over the determination until:

(a) A court of this state determines that the child, the child’s parents and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child’s care, protection, training and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child’s parents and any person acting as a parent do not presently reside in this state.¹¹

Additionally, NRS 125A.365 states that “[a] court of this state which has jurisdiction pursuant to the provisions of this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that

¹¹ NRS 125A.315

it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.”

The court was not required to decline to exercise jurisdiction as it was never determined to be an inconvenient forum, nor had Katrina ever brought the issue before the court. As such, the court found that it had jurisdiction.

F. The Court did not Abuse its Discretion in not Applying the Relocation Factors.

The relocation factors in *Schwartz v. Schwartz* has since been codified in NRS 125C.006 and NRS 125C.007, as this standard only applies to a petition to relocate a child outside the state of Nevada, or to a place within Nevada that would substantially impair the non-custodial parent’s relationship.

Here, Runndley, the non-custodial parent, sought primary physical custody of the minor child back to the child’s home state of Nevada. Therefore, the court was not required to address the relocation factors in *Schwartz v. Schwartz*.

Based on the foregoing, this Court should affirm the trial court’s order.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track

statement has been prepared in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

Proportionately spaced, has a typeface of 14 points or more and contains

4168 words (no more than 4,845 words); or

Monospaced, has 10.5 or fewer characters per inch, and contains ___ words

or ___ lines of text; or

Does not exceed ___ pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response, or failing to raise material issues or arguments in the fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED this 11th day of January, 2021.

MCFARLING LAW GROUP

/s/ Ashlee Vazquez

Ashlee Vazquez, Esq.

Nevada Bar Number 14637

6230 W. Desert Inn Road

Las Vegas, NV 89146

Attorney for Respondent

CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 11th day of January, 2021, I served a true and correct copy of this Child Custody Fast Track Response as follows:

by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

Katrina Carter
969 W. Cartwright Rd., #101
Mesquite, TX 75149

/s/ Alex Aguilar
Alex Aguilar