

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTINA CALDERON F/K/A
CHRISTINA CALDERON STIPP,

Appellant,

vs.

MITCHELL DAVID STIPP,

Respondents.

Supreme Court No. 81888
Electronically Filed
Sep 20 2021 05:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

Christina Calderon

2. Name, law firm, address, and telephone number of attorney or proper person respondent submitting this fast track statement:

Aaron D. Grigsby, Esq.
Grigsby Law Group
2880 W. Sahara Ave
Las Vegas, Nevada 89102
(702) 202-5235

3. Lower court:

Eighth Judicial District Court, Clark County, D-08-389203-Z

4. Judge:

Judge T. Arthur Ritchie, Jr.

5. Length of trial or evidentiary hearing:

Three days; January 23, 2020, March 5, 2020 and August 27, 2020

6. Written order or judgement appealed from:

Notice of Entry of Order, September 17, 2021

7. Dates notice of entry served:

September 17, 2021

8. Tolling motion:

N/A

9. Date notice of appeal filed:

Notice of Appeal filed September 28, 2020

10. Law governing time limit for notice of appeal:

NRAP 4(a)

11. Law granting jurisdiction:

NRAP 3A(b)(1)

12. Pending and prior proceedings in this court:

57327, 57876 and 62299

13. Proceedings raising same issues:

None

14. Procedural history:

The parties were divorced by Decree in 2008. In the initial Decree of Divorce, the parties shared joint legal custody with Christina Calderon having primary physical custody. The parties came before the district court many times over numerous issues culminating in a stipulated custody agreement¹. The stipulated custody agreement which granted the parties joint legal and physical custody, created a period of stability in which the parties did not come before the district court for several years.

15. Statement of facts:

In early August 2019, Mitchell Stipp started withholding the parties' minor children, cutting off all contact between Christina Calderon and the minor children. Mr. Stipp unilaterally decided to ignore the week on/week off custody schedule prior to seeking judicial intervention. The current matter came before the district court August 23, 2019, on Mitchell Stipp's Motion². The Motion was opposed by Christina Calderon³ and a reply was filed⁴. Ms. Calderon filed a Motion requesting that Mitchell Stipp be held in contempt for withholding the parties' minor children on August 29, 2019.⁵

¹ AA000001-18

² AA000019-40

³ AA000407-419

⁴ AA000498-517

⁵ AA000114-143

On September 5, 2019, the district court issued an Order to Show Cause and set the matter for hearing on October 1, 2019⁶. At the subsequent hearing the district court refused to issue the order to show cause, instead deciding to push the matter out until the time of the eventual trial. The district issued an Order setting evidentiary hearing on November 13, 2019⁷. The evidentiary hearing was eventually conducted over three (3) separate court sessions on January 23, 2020, March 5, 2020, and August 27, 2020⁸.

16. Issues on appeal:

1. Whether the district court erred in making a finding of domestic violence without the required findings?
2. Whether Christina Calderon was unduly prejudiced by the district court failing to enforce the existing custody order?

17. Legal argument:

The district erred in making a finding of domestic violence without the required findings.

When making a determination of domestic violence in the context of a child custody matter, the district court is required to make the finding by clear and

⁶ AA000367-368

⁷ AA000677-681

⁸ AA2013-2763

convincing evidence⁹. Clear and convincing evidence means evidence establishing every factual element to be highly probable or evidence which must be so clear as to leave no substantial doubt¹⁰. The district court is also mandated to include findings of fact that support the determination that one or more acts of domestic violence occurred¹¹ and findings that the custody or visitation arrangement order by the court adequately protects the child and parent or other victim of domestic violence who reside with the child¹².

“Questions of law are reviewed de novo¹³.” A district court’s interpretation of a statute is subject to de novo review¹⁴. When construing a statute, this court looks first to the statutory language. If the language is unambiguous, this court need not look beyond the ordinary meaning of the language¹⁵. “However, the construction of a statute is a question of law and independent appellate review, rather than a more deferential standard of review, is appropriate¹⁶.”

⁹ NRS 125C.230(1)

¹⁰ Wynn v. Smith, 117 Nev. 6, 16 P.3d 424 (2001)

¹¹ NRS 125C.230(1)(a)

¹² NRS 125C.230(1)(b)

¹³ SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P. 2d 294, 295 (1993)

¹⁴ State, Emp. Sec. Dep’t v. Holmes, 112 Nev. 275, 283, 914 P. 2d 611, 616 (1996)

¹⁵ City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P. 2d 974, 977 (1989)

¹⁶ Tighe v. Las Vegas Metro Police Dep’t, 110 Nev. 632, 634-35, 877 P. 2d 1032, 1034 (1994)

As can be seen, when making a finding of domestic violence in a child custody dispute, the issuance of specific findings is mandatory. “[I]n statutes, ‘may’ is permissive and ‘shall’ is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature¹⁷.” The district court was required to issue specific findings of fact when making the finding of domestic violence¹⁸ and to ensure that there is clear and convincing evidence to support its findings. The purpose of the requirement that the district court make findings by clear and convincing evidence that domestic violence occurred is to protect innocent parents from unfounded allegations¹⁹. A review of the September 17, 2020 Order clearly shows that the district court failed to make the required findings by clear and convincing evidence.

Additionally, the district court failed to determine as to who was the primary aggressor in the altercations between Mia Stipp and Christina Calderon²⁰. The record reflects two allegations of domestic violence between Mia Stipp and Christina Calderon²¹. The first alleged incident occurred in May 2019, and the second in August 2019. In both incidents, the district court was unable to

¹⁷ S.N.E.A. v. Daines, 108 Nev. 15, 19, 824 P. 2d 276, 278 (1992)

¹⁸ NRS 125C.230(1)

¹⁹ Castle v. Simmons, 120 Nev. 98, 86 P.3d 1042 (2004)

²⁰ NRS 125C.230(2)

²¹ (need citation)

determine who was the primary aggressor and made no findings regarding Christina Calderon exercising self-defense.

A review of the testimony of Mia Stipp and Christina Calderon clearly demonstrates that the standard cited in Wynn was not met²². The evidence did not meet the standard enumerated under Nevada law which is why the district court was unable to make the factual findings²³. Further, the record is devoid of any evidence regarding the parenting/visitation ordered by the district court protecting the minor children²⁴.

“Findings of fact of the district court will not be set aside unless clearly erroneous.²⁵” “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed²⁶.”

An appellant attacking the factual findings of the trial court must show that substantial evidence admitted at trial compels a different conclusion²⁷. This court will not set aside a district court’s findings unless the findings are clearly erroneous

²² Wynn v. Smith, 117 Nev. 6, 16 P.3d 424 (2001)

²³ NRS 125C.230

²⁴ NRS 125C.230(1)(b)

²⁵ Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P. 2d 590, 591-92 (1990)

²⁶ Unionamerica Mtg. v. McDonald, 97 Nev. 210, 211-12, 626 P. 2d 1272, 1273 (1981) (quoting United States v. Gypsum Co., 333 U.S. 364, 395 (1948))

²⁷ Sandy Valley Assocs. V. Sky Ranch Estates, 117 Nev. 948, 953-54, 35 P. 3d 964, ___ (2001)

or not supported by substantial evidence²⁸. “Substantial evidence is that which ‘a reasonable mind might accept as adequate to support a conclusion.’²⁹”

Unless there has been a clear abuse of discretion, a district court’s determination of custody will not be disturbed by the reviewing court³⁰. An arbitrary or capricious exercise of discretion is one “founded on prejudice or preference rather than on reason,” or “contrary to the evidence or established rules of law³¹.” A manifest abuse of discretion is “[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule³².” “Manifest abuse of discretion does not rule from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or result of partiality, prejudice, bias or ill will³³.”

The Nevada Supreme Court has concluded that the failure to make specific findings of fact to support its determination is an abuse of discretion³⁴. In its Order, the district court noted that “[e]xcept for the fact that these disputed resulted

²⁸ Id. at 954, see NRCP 52 (a)

²⁹ Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P. 2d 661, 664 (1993) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P. 2d 497, 498 (1986)) (citations and quoted material omitted)

³⁰ Primm v. Lopes, 109 Nev. 502, 504, 853 P.2d 103, 104(1993)

³¹ Black’s Law Dictionary, 119 (9th ed. 2009)(defining “arbitrary”) and 239 (defining “capricious”)

³² State v. Eighth Judicial District Court, 127 Nev. 927, 267 P.3d 777 (2011)

³³ Blair v. Zoning Hearing Bd. Of Tp. Of Pike, 676 A. 2d 760, 761 (Pa. Commw. Ct. 1996)

³⁴ Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213 (2009)

in physical altercations,” the issues raised by Mr. Stipp did not warrant a loss of physical custody. A “decree or order must determine the child’s best interest as informed by specific, relevant findings³⁵.” Without specific findings it cannot be determined that the custody determination was made for appropriate legal reasons³⁶.

The district court’s findings make it clear that its decision to modify custody of Mia Stipp was primarily based on the physical altercations and its finding of domestic violence. Failure to make a finding of domestic violence by clear and convincing evidence eviscerates the underpinnings of the district court’s custody determination.

Christina Calderon was unduly prejudiced by the district court failing to enforce the custody order

Pursuant to the Nevada Revised Statutes this Court has the power to “compel obedience to its lawful judgments, orders and process.”³⁷ Nevada law provides that disobedience or resistance to any lawful writ, order, rule or process issued by the Court is deemed contempt³⁸. “A party commits contempt when he violates a definite and specific order of the court requiring him to perform or

³⁵ Davis v. Ewwlefo, 131 Nev. 445, 352 P.3d 1139 (2015)

³⁶ Id. At 452

³⁷ NRS 1.210(3)

³⁸ NRS 22.010(3)

refrain from performing a particular act or acts with knowledge of the court's order³⁹.”

In a civil contempt proceeding “[t]he contemtor’s disobedience need not be ‘willful’ to constitute civil contempt. Indeed, a district court is justified in adjudging a person to be in civil contempt for failure to be reasonably diligent and energetic in attempting to accomplish what was ordered⁴⁰.” “Willfulness” is defined as “additional act done by one who knows or should reasonably be aware that his conduct is wrongful⁴¹.”

Civil contempt is confined to the facts of the individual case⁴².

“Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main causes⁴³. “Civil contempt need only be proven by clear and convincing evidence and there is no right to a jury trial in civil contempt proceedings⁴⁴.”

³⁹ Securities and Exchange Commission v. First Financial Group of Texas Inc., 659 F.2d 660, 669 (5th Cir. 1981)

⁴⁰ Bad Ass Coffee of Hawaii v. Bad Ass Ltd. Partner, 95 F. Supp. 2d 1252, 1256 (D. Utah 2000)

⁴¹ U.S. v. Armstrong, 781 F. 2d 700, 706 (1986)

⁴² In the Matter of the Examination of DI Operating Company, 340 F. Supp. 672 (1965)

⁴³ Gompers at 445

⁴⁴ Cheff v. Schackenberg, 384 US 373 (1966)

civil contempts are those prosecuted to enforce the rights of private parties and to compel obedience to orders or decrees for the benefit of opposing parties⁴⁵.” Civil contempt is more properly considered a compensatory remedy and an encouragement to comply with court orders⁴⁶.

Christina Calderon requested that the existing custody agreement be enforced but the district court declined to hold Mr. Stipp in contempt. Thereafter, in its final order, the district court in making its decision to change custody of Mia Stipp, cited to the fact that Ms. Calderon had no meaningful custody since August 2019. In its September 17, 2020, Order, the district court found that Mitchell Stipp’s withholding of the minor children was unjustified and contrary to the best interest of the minor children⁴⁷. It is manifestly unjust to penalize Christina Calderon for not having meaningful contact with the minor children in over a year, when the district court refused Ms. Calderon’s request to exercise its contempt power to encourage Mitchell Stipp to comply with the existing custody orders.

18. Issues of first impression or of public interest:

This is not a matter of first impression but it is in the public interest of whether the failure to make the required statutory findings is an abuse of discretion. The due process rights of litigants will be protected. Additionally, the

⁴⁵ Warner v. Second Judicial District Court, 906 P.2d 707, 709 (1995)

⁴⁶ Electrical Workers v. Gary’s Electric, 340 F.3d 373 (2003)

⁴⁷ AA001988-2012

issue of whether a district court can refuse to enforce its custody orders and thereafter use the inability of a parent to exercise custody to adversely impact its custody determination.

DATED this 20th day of September, 2021.

RESPECTFULLY SUBMITTED
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Fast Track Statement 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:
2. This Fast Track Statement has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14;
3. I further certify that this Fast Track Statement complies with the page or type-volume limitations of NRAP 32(a)(5) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points containing 2,544 words;
4. 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 Statement. 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 20th day of September, 2021.

RESPECTFULLY SUBMITTED
GRIGSBY LAW GROUP

BY /s/ Aaron Grigsby
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 20th day of September, 2021, a copy of the foregoing Fast Track Statement was served as follows:

BY ELECTRONIC FILING TO

Radford J. Smith, Esq.
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/s/ Aaron Grigsby
An employee of the Grigsby Law Group