

IN THE SUPREME COURT OF THE STATE OF NEVADA

TORRANCE A. SHIMMIN,
Appellant,
vs.
LARISSA A. TARANGO,
Respondent.

No. 45886

FILED

NOV 07 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court divorce decree regarding an award of primary physical custody. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Child Custody

A trial court has broad discretion when making child custody determinations. This court reviews those determinations for an abuse of discretion.¹ In child custody cases, “a presumption exists that the trial court properly exercised its discretion in deciding what constitutes a child’s best interest.”² When a trial court has exercised its discretion in a child custody case after a full hearing on the merits and the decision is based on substantial evidence, its determination will not be disturbed on appeal.³

¹Primm v. Lopes, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993).

²Id.

³Norris v. Graville, 95 Nev. 71, 73, 589 P.2d 1024, 1025 (1979).

We have reviewed the record and the parties' briefs. We conclude that the district court did not abuse its discretion in failing to provide a full evidentiary hearing to determine the physical custody arrangement for the parties' minor child, because Torrance failed to show adequate cause for why a full evidentiary hearing was necessary under the circumstances.⁴ Torrance also failed to show why the court-ordered custody arrangement, which mirrored the de facto pre-divorce custody arrangement, was not in the best interests of his child.⁵

Due Process

We conclude that the district court did not violate Torrance's due process rights when it failed to hold a full evidentiary hearing. Torrance had already received timely notice and an opportunity to be

⁴See Rooney v. Rooney, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993) ("a 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"). As Torrance correctly points out, Rooney involved custody modification as opposed to an initial custody determination. However, we reject the implication that the district court must hold a full evidentiary hearing every time an initial custody determination is at issue. Where, as here, the parties have had an opportunity to fully brief the issues; to present affidavits; and to argue the merits at a motion hearing; the district court need not subsequently hold a full evidentiary hearing unless the party seeking the hearing can show adequate cause for why an evidentiary hearing is necessary.

⁵NRS 125.480(1) provides that when determining custody of a child in a divorce action, "the sole consideration of the court is the best interest of the child." Torrance's grievance appears to be with the district court's calculation of child support, not with the district court's custody award as it applies to the child's best interests.

heard⁶ before the district court entered its divorce decree. The parties filed several motions and several affidavits before the district court held a hearing on the motion for temporary custody.⁷ Torrance had adequate notice that custody and child support were at issue. Both he and his counsel appeared at the hearing. The district court made a decision on the merits, based upon the parties' arguments and affidavits, and subsequently awarded joint legal custody to both parties. The only custody right affected by the district court's decree was the award of primary physical custody to Larissa, with Torrance receiving substantial visitation rights. Even then, the district court essentially awarded custody according to the parties' de facto pre-divorce custody arrangement.⁸ In addition to the temporary custody hearing, the district

⁶See Kirkpatrick v. District Court, 119 Nev. 66, 76, 64 P.3d 1056, 1063 (2003) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

⁷Torrance contends that he should have been afforded a full evidentiary hearing before the temporary order was made permanent by the entry of the divorce decree. Torrance failed to indicate below, and fails to argue on appeal, how an evidentiary hearing would have changed the custody arrangement. Torrance argued no new material facts, named no witnesses, and failed to specify what material facts these unnamed witnesses would testify to.


⁸After reviewing the parties' affidavits, we conclude the de facto pre-divorce custody arrangement was not substantially disputed. Both parties generally agreed on the work week schedule. Torrance alleged that he shared their child on the weekends and Larissa alleged that Torrance rarely had custody of the child on the weekends. Where conflicting affidavits arise, it creates a question of credibility. As the ultimate fact finder in a custody dispute, the district court has broad discretion to determine the credibility of the statements in the parties' opposing affidavits. Based upon the parties arguments and affidavits, the district


continued on next page . . .

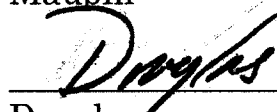
court held a hearing to entertain Torrance's motion for reconsideration. Torrance was afforded two hearings on the merits of his custody dispute.⁹

The alleged failure of the district court to hold a full evidentiary hearing on the parties' custody dispute is not a per se violation of Torrance's right to due process. Due process is a fact-intensive inquiry that requires notice and an opportunity to be heard that is appropriate for the circumstances at hand. In light of the procedures and opportunities afforded to Torrance below, we conclude that Torrance received adequate notice and a sufficient opportunity to be heard to satisfy due process requirements. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

... continued

court had broad discretion to determine what was in the child's best interest. We will not overturn this determination where it is supported by the record, as it is here.

⁹We reject Torrance's contention that these hearings were deficient because they were not full evidentiary hearings. The affidavits presented by both parties prior to the hearings were sufficient evidence to support the district court's custody award.

cc: Hon. N. Anthony Del Vecchio, District Judge, Family Court Division
E. Paul Richitt Jr., Settlement Judge
Mark A. Jenkin
Beckley Singleton, Chtd./Las Vegas
Clark County Clerk