

IN THE SUPREME COURT OF THE STATE OF NEVADA

THERESE K. ROHLING,
Appellant,
vs.
PAUL A. MARTIN,
Respondent.

No. 49986

FILED

APR 13 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY T. Warado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order establishing child custody. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

In April 2004, respondent Paul A. Martin filed a petition to establish paternity, for joint legal and primary physical custody of the parties' minor child, and for an order directing that the child be returned to Nevada. In the petition, Martin explained that appellant Therese K. Rohling, the child's mother, had left Nevada and moved to California with the child and that she had refused to return the child to Nevada or to allow Martin contact with the child.

In the meantime, Rohling petitioned for a domestic violence restraining order against Martin in a California court, alleging that, although she did not hear everything that Martin said during a July 2003 cellular telephone conversation, her sister, who was seated next to her in the car, overheard Martin threaten to kill Rohling. Rohling also alleged that, in September 2003, Martin grabbed her arm and would not let her leave the parties' then-home with the child. The petition was supported with written statements from two of Rohling's sisters and her mother, who explained that Martin was verbally and/or physically abusive toward Rohling. One sister stated that Martin "knocked [Rohling] into a wall" in

January 2004. Another sister stated that she overheard Martin (through the phone) threaten to kill Rohling.

Although an ex parte temporary protection order was initially entered, a hearing later was held in the California superior court, and that court denied the petition for a restraining order. After hearing testimony, the California court found that Rohling interpreted her unhappiness in the relationship as abuse, which she communicated to her family, and then the abuse story spun out of control. The court specifically found not credible the sister's statements regarding the alleged death threat, and that another sister's testimony was not consistent with her written statement outlining the alleged abuse. It also noted that, despite all of the alleged abusive conduct, the police were never called.

On April 29, 2004, a hearing on an order shortening time was held in the Nevada district court on Martin's petition for custody. Although Rohling was not present, she was represented through her attorney and, after hearing argument, the district court entered a temporary order confirming Martin as the child's natural father, ordering Rohling to surrender the child to Las Vegas police, and ordering Rohling, a Swedish national, to surrender her passport. Given that Rohling had just recently retained counsel and was not present at the hearing, the court did not make a custody determination. However, it expressed concern that Martin had been unable to see the child for two months, and thus allowed him make-up time to compensate until the next hearing. Rohling subsequently filed a general denial to Martin's petition and a counterclaim, seeking, among other things, joint legal and primary physical custody of the child.

At a subsequent hearing on May 27, 2004, the court, in accordance with the parties' stipulation, entered a temporary order

pending the evidentiary hearing, providing for joint physical custody of the child, with each parent having custody alternating weeks. On June 27, 2004, however, Rohling refused to return the child to Martin during his scheduled custody week, alleging that, during a phone conversation, Martin had threatened to kill her and the child. After Rohling subsequently refused to answer Martin's phone calls, Martin obtained a pick-up enforcement order from the Nevada district court, and the California district attorney's office then enforced the order, picking up the child from Rohling's residence on August 19, 2004.

An emergency hearing was then held in California court, during which Rohling asked the California court to take jurisdiction over the custody matter. At that hearing, the district attorney investigator who was involved in enforcing the pick-up order testified that, when law enforcement officers arrived at Rohling's family's home, Rohling's family was uncooperative and denied that the child was there, and Rohling attempted to flee with the child by exiting through the home's back door and into the adjacent alley. According to Rohling's attorney, Rohling left because she was scared and the child was upset by all of the commotion, not because she was trying to flee. The California court declined to exercise emergency jurisdiction, finding that Rohling had attempted to secrete the child from the exercise of the pick-up warrant and/or to remove him from the jurisdiction to avoid service of the warrant. Determining that Rohling had engaged in inappropriate conduct, the court directed that the child be returned to Martin.

At a hearing in the Nevada district court on August 25, 2004, the court determined that, pending the evidentiary hearing, Rohling should have only supervised visits with the child for four hours per week. That schedule was changed in August 2005 to allow Rohling unsupervised

visits with the child every weekend from Friday through Sunday. To cut travel time, the parties later agreed to modify the schedule to allow Rohling visitation every other week from Sunday through Thursday.

A three-day evidentiary hearing was held on August 12 and 15, 2005, and June 26, 2006. During the hearing, Rohling's sister testified that she witnessed Martin being physically abusive to Rohling on two occasions. The sister explained that, in January 2004, Martin knocked Rohling into a wall, and another time, shortly thereafter, he pinned her up against a wall and would not allow her to leave the room. Another sister also testified that she witnessed Martin being physically abusive to Rohling on two occasions. She stated that she saw Martin smack Rohling on the head in December 2003, and, on another occasion, she saw him grab Rohling's wrist. That sister testified that she overheard Martin threaten to kill Rohling during the telephone conversation Martin was having with Rohling in July 2003. She stated that she was driving and that Martin's voice was loud enough for her to hear everything that he said to Rohling, who was seated in the passenger seat, through the phone which was being held to Rohling's ear. Finally, Rohling's youngest sister testified that she also witnessed the head-smacking incident and a different incident during which Martin grabbed Rohling's wrist.

Rohling testified that Martin threatened to kill her in July 2003 and June 2004. According to Rohling, the child seemed traumatized and non-responsive, and "just wasn't the same baby," after he spent time in Martin's care. Martin denied ever physically abusing Rohling. He testified that Rohling appeared to be a good mother to the child, but due to problems that he had exercising his custody rights, and Rohling's Swedish citizenship, he feared that she might flee the jurisdiction with the child.

In June 2006, when the evidentiary hearing continued, Rohling testified that Martin had taken the child to the doctor without informing Rohling of his condition. She further testified that, in March 2006, she discovered that the child had a cavity and later, that he needed extensive dental work because all of his teeth were rotted. On cross-examination, Martin's attorney pointed out that Rohling had described only two domestic violence incidences, both of which occurred before April 2004, but listed only one incident of physical violence in her California restraining order application, which was filed in April 2004. Rohling acknowledged that her sisters testified about witnessing more than two occurrences of domestic violence. She also admitted that Martin never hit her and that she never reported any domestic violence to the police.

After the hearing, the court entered its final order for joint legal custody, and primary physical custody in favor of Martin, with Rohling having visitation every other week from Sunday through Thursday. The court later denied Rohling's motion for a new trial, which was grounded on allegations that the child's dental problems were caused by Martin's neglect, and that the child "acts out, exhibiting signs of severe stress and anxiety" after he spends time with Martin. Rohling appeals.

On appeal, Rohling argues that the district court abused its discretion by awarding primary physical custody to Martin despite clear evidence of domestic violence and despite NRS 125.480(5)'s presumption that custody in favor of the non-abusive parent is in the child's best interest. Rohling asserts that the court failed to adequately weigh evidence concerning other best-interest-of-the-child factors, including the physical, developmental, and emotional needs of the child, and the neglect the child suffered while in Martin's care. According to Rohling, the court abused its discretion and erred as a matter of law by relying on the

“friendly parent factor” as the main reason for awarding primary physical custody to Martin.

Generally, child custody matters rest in the district court’s sound discretion, Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996), and this court will not disturb the district court’s custody decision absent an abuse of that discretion. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). In evaluating a district court’s custody decision, this court must be satisfied that the decision was made for appropriate reasons and that substantial evidence supports the district court’s factual determinations. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). With regard to divorce proceedings,¹ NRS 125.480(1) mandates that when determining child custody, “the sole consideration of the court is the best interest of the child.” In determining the child’s best interest, the court must consider and set forth its specific findings concerning relevant factors, which include, among others, any conflict between the parents, the parents’ abilities to cooperate to meet the child’s needs, which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent, and whether either parent has engaged in an act of domestic violence against the child or the child’s other parent. See NRS 125.480(4). It is the role of the fact finder, in this case the district court, to determine witness credibility. Ellis v. Carucci, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

¹Here, the parties were not married, but they conceded Martin’s paternity. See NRS 126.031 (explaining that the parent and child relationship extends equally to every child and to every parent, regardless of the parents’ marital status).

Having reviewed the record, including the transcripts, and having considered the parties' arguments in light of the above standards, we conclude that substantial evidence supports the district court's custody order. In particular, the district court found and the record supports that the testimony concerning domestic violence allegations conflicted with other court filings documenting the alleged domestic violence, and that witness testimonies during the evidentiary hearing did not comport with Rohling's application for a restraining order. While Rohling asserts that she presented clear evidence of domestic violence, the district court appropriately weighed the evidence, including witness testimonies, and found that the allegations were not credible. Such determinations are within the district court's discretion to make. Ellis, 123 Nev. at 152, 161 P.3d at 244 (pointing out that it is not within the purview of an appellate court to weigh conflicting evidence or assess the credibility of the witnesses; instead, such evaluations are left to the district court). Thus, the court properly determined that the clear and convincing evidence did not support Rohling's domestic violence allegations, for purposes of invoking NRS 125.480(5)'s presumption against awarding primary or joint physical custody to a parent who engages in domestic violence.

In rendering its decision, the court also made specific findings that (1) Martin was likely to foster a relationship between the child and Rohling, (2) Rohling was immature and dependent on her family, while Martin was emotionally prepared for parenting, which would promote the child's best interest,² (3) neither parent was at fault with regard to the

²Rohling disputes the court's immaturity finding, and asks this court to review the hearing DVDs to make an assessment of her maturity. In


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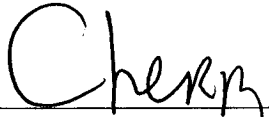
child's dental problems, (4) there was no act of abuse or neglect of the child while in Martin's care, and (5) Rohling was not a credible witness. In so finding, the court emphasized that, leading up to the evidentiary hearing, Rohling failed to comply with valid custody orders, prevented Martin from exercising his custodial rights, and demonstrated a reluctance to foster a relationship between the child and Martin.

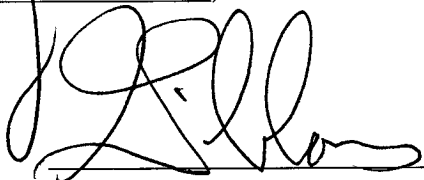
Although Rohling argues that the district court improperly gave too much weight to its finding that Martin was more likely to foster a relationship between the child and Rohling, without considering other relevant custody factors, the record does not support her argument. To the contrary, the district court made specific findings regarding the child's best interest and considered the relevant factors in making such a determination, as set forth under NRS 125.480(4).

Accordingly, as we perceive no abuse of discretion by the district court, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

... continued
light of this order, our review of the hearing DVDs was not necessary. Accordingly, we deny Rohling's August 25, 2008, motion.

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Michael J. Warhola, LLC
Richard Ducote & Associates, PLC
Barnes Law Group
Eighth District Court Clerk