

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIE G. BAUMANN, N/K/A JULIE G.
BYRNES,
Appellant,
vs.
JON THOMAS BAUMANN,
Respondent.

No. 50367

FILED

JUL 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's motion to modify a child custody arrangement.¹ Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Appellant and respondent divorced in December 2005. The divorce decree incorporated the parties' stipulated child custody agreement to share joint legal and physical custody of their minor child.

In November 2006, appellant filed a motion to modify the custody arrangement to primary physical custody in her favor, with respondent having only supervised visitation with the child. Appellant's motion was based on her allegations that, during a sexually explicit telephone conversation with a third party adult, respondent was

¹Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this case.

masturbating while the parties' child, who was 18 months old at the time, was sitting on respondent's lap, or at least was present in the same room.²

In support of her motion, appellant sought to introduce deposition testimony from respondent's former stepdaughter and former wife, who apparently were deposed before the December 2005 divorce proceedings.³ According to appellant, the deposition testimony was relevant to demonstrate that respondent had engaged in a pattern of inappropriate sexual conduct in the presence of minors. The district court denied appellant's request to introduce the deposition transcripts, finding that because the depositions were taken before the divorce decree was entered, that evidence was inadmissible on res judicata grounds under this court's decision in Castle v. Simmons.⁴ The district court also found that the deposition testimony would have little evidentiary value, since respondent was not charged criminally as a result of the former stepdaughter's and former wife's allegations.

The district court ultimately denied appellant's motion to modify custody, after considering other testimony and evidence, including

²Based on the allegations, a temporary order was entered, limiting respondent to supervised visitation with the child.

³Although appellant has included excerpts from the depositions in her appendix, those excerpts do not appear to be part of the district court record and thus are not proper for this court's consideration on appeal. Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 635 P.2d 276 (1981). Accordingly, while we have considered appellant's argument that the deposition testimony was admissible and proper for the district court's consideration, we have not considered the actual content of the depositions in resolving this appeal.

⁴120 Nev. 98, 86 P.3d 1042 (2004).

(1) a written declaration and testimony from the third party who was on the phone with respondent at the time when he allegedly engaged in the inappropriate conduct; (2) testimony from the law enforcement officer who investigated the matter, which was reported by the third party; (3) testimony from one of respondent's former coworkers, who had accused respondent of sexual harassment, to which respondent admitted; and (4) the results of a psychosexual evaluation of respondent. In denying appellant's motion, the district court found that the third party's testimony was not credible and that the other witnesses and respondent offered credible testimony. Although the court was concerned with the former coworker's testimony, the court found that the psychosexual evaluation, which was ordered based on the court's concerns that respondent had an inappropriate sense of boundaries, did not reveal anything sufficient to deny respondent visitation with the child or to warrant continued supervised visitation. The joint physical custody arrangement was then reinstated with certain restrictions. In particular, based on the psychosexual evaluation, the court ordered respondent to (1) participate in psychosexual counseling focused on establishing appropriate relationship and sexual behavior boundaries, (2) obtain a psychological assessment to address any depression issues, and (3) attend parenting classes. Appellant has timely appealed from the district court's order.⁵

⁵Appellant's fast track statement fails to comply with NRAP 3E's briefing and appendix directives, which require her to provide "citations for every assertion of fact to the appendix." See NRAP 3E(d)(1) and Form 12 of the Appendix of Forms; see also NRAP 3E(d)(4). We caution appellant's counsel that failure to comply with the rules of appellate *continued on next page . . .*

On appeal, appellant argues that the district court abused its discretion by finding the deposition transcripts inadmissible under Castle. Appellant also argues that the district court improperly concluded that, notwithstanding its inadmissibility, the deposition testimony would have little evidentiary value because criminal charges were not pursued against respondent based on the former stepdaughter's and wife's allegations.

Child custody matters rest in the district court's sound discretion,⁶ and this court will not disturb the district court's custody decision absent an abuse of that discretion.⁷ In evaluating a district court's custody order, this court must be satisfied that the district court's decision was made for appropriate reasons and that the court's factual determinations are supported by substantial evidence.⁸ In matters concerning a post-divorce change of child custody, the party seeking to modify custody may present evidence of alleged physical abuse that occurred before the divorce.⁹ The party seeking to modify custody bears the burden of demonstrating that there has been a substantial change in

... continued

procedure in any future filings in this court may result in sanctions. See Barry v. Lindner, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003).

⁶Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

⁷Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

⁸Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

⁹Castle v. Simmons, 120 Nev. 98, 86 P.3d 1042 (2004).

circumstances affecting the child's welfare and that the child's best interest will be served by the modification.¹⁰

In Castle, we acknowledged that res judicata principles applied to the changed circumstances doctrine.¹¹ Nevertheless, we held that those principles do not preclude evidence of pre-divorce decree abusive conduct, when the court was not aware of the existence or extent of the alleged conduct.¹² Instead, such evidence was held properly admissible.¹³ Castle is grounded on the district court's obligation to make a custody determination based on the child's best interest and the fact that abuse findings likely would impact that determination.¹⁴ Although the factual context of Castle pertained to domestic violence evidence, its holding equally applies when one party is alleged to be engaging in a

¹⁰Ellis v. Carucci, 123 Nev. ___, ___, 161 P.3d 239, 242-43 (2007).

¹¹See McMonigle v. McMonigle, 110 Nev. 1407, 887 P.2d 742 (1994), and Murphy v. Murphy, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968), overruled on other grounds by Ellis, 123 Nev. 18, 161 P.3d 239 (explaining that to demonstrate changed circumstances to support custody modification, the moving party must rely on evidence showing that circumstances have changed since the most recent custodial order).

¹²Castle, 120 Nev. at 105, 86 P.3d at 1047.

¹³Id. at 105-06, 86 P.3d at 1047-48 (noting that even previously litigated abusive acts may need to be reviewed if additional acts occur).

¹⁴Id. at 105, 86 P.3d at 1047 (explaining that concerns for the child's best interest are paramount to any res judicata concerns); see NRS 125.480 (requiring the district court to make custody determination based on the child's best interest).

continuing and escalating course of conduct that could be harmful to the child.¹⁵

Here, the district court found that the deposition testimony was inadmissible under Castle and of little evidentiary value considering that the District Attorney's office did not pursue charges against respondent. The district court's finding that it was precluded from considering the deposition testimony under Castle is based on the fact that the former stepdaughter's and former wife's allegations were known to appellant before she stipulated to a joint custody arrangement and before the divorce decree was entered incorporating that custody stipulation. Appellant indicates, however, that she was not aware of the extent of respondent's alleged conduct, *i.e.*, engaging in a pattern of inappropriate sexual conduct in the presence of minors, until later. Regardless, she contends that the district court was not aware of any misconduct allegations before it entered the divorce decree. While respondent asserts that the court was aware of the former stepdaughter's and former wife's allegations before entering the decree, nothing in the appellate record, including the divorce decree and stipulated child custody agreement, indicates that the district court had been informed of those allegations.

Although we agree that the district court misconstrued Castle when it determined that it was precluded from considering the deposition

¹⁵NRS 125.480 (explaining that the district court is obligated to make a sound decision on the paramount concern in child custody matters—the child's best interest).

testimony,¹⁶ we nevertheless affirm the district court's order because, in the context of considering the psychosexual evaluation, the court necessarily took into account the deposition testimony, which the psychologists reviewed and considered during the course of evaluating

¹⁶Castle, 120 Nev. at 105-06, 86 P.3d at 1047-48 (concluding that evidence of pre-divorce decree abusive conduct is admissible in custody modification proceedings when the district court was not aware of the existence or extent of the alleged conduct before entering the decree and establishing custody).


While respondent argues that the deposition transcripts are inadmissible character evidence under NRS 48.045(2), nothing in the record suggests that the district court deemed the evidence inadmissible for that reason. At any rate, respondent's argument in this regard is not persuasive, as the issues here are whether changed circumstances support custody modification and whether appellant may present evidence of alleged pre-decree abusive conduct in support of her motion. Under Castle, 120 Nev. at 105, 86 P.3d at 1047, keeping in mind the paramount concern for the child's best interest, such evidence is admissible. Cf. Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006) (noting, in the criminal context, that uncharged sexual abuse evidence is not character evidence, but instead is admissible to explain motive, since the mental aberration that leads a person to engage in sexual misconduct with a minor child tends to explain why the event was perpetrated).


To the extent that the district court's order indicated that the deposition testimony would have little evidentiary weight given that no criminal charges were brought against respondent based on the former stepdaughter's and former wife's allegations, we point out that the governing standard for evaluating the evidence in child custody matters is the child's best interest. NRS 125.480. Thus, whether the alleged act is uncharged is not an appropriate measure for the court to employ in making its custody decision. Cf. Ledbetter, 122 Nev. 252, 129 P.3d 671. Nevertheless, as noted above, substantial evidence supports that the district court's decision to deny appellant's motion to modify custody was based on the court's consideration of the child's best interest.

respondent's risk of engaging in inappropriate sexual behavior toward the child. Thus, even though the district court improperly refused to admit the deposition testimony evidence in this case, we conclude that its custody decision is supported by substantial evidence, including the psychosexual evaluation and witness testimony, and that the restrictions the court imposed in reinstating the joint custody arrangement properly addressed any issues revealed during the psychosexual evaluation.¹⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Andrew J. Puccinelli, District Judge
Torvinen & Torvinen
Law Offices of Lisa K. Mendez
Elko County Clerk

¹⁷Although appellant also argues that the district court improperly concluded that the third party was not a credible witness based on the fact that no criminal charges were pursued against respondent, that argument is not supported by the record. Thus, any request for relief based on the district court's credibility determinations is denied. Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (recognizing that it is the role of the fact finder to determine witness credibility).