

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMY SPALDING F/K/A AMY CARSON,
Appellant,
vs.
ROBERT MARCUS CARSON,
Respondent.

No. 50883

FILED

MAY 08 2008

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

ORDER OF REMAND

This is an appeal from a district court order denying a motion to modify a child custody arrangement. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

The parties were divorced in 2005, and, under the divorce decree, they were awarded joint legal and physical custody of their minor child. Thereafter, in July 2007, when the child was eight years old, appellant filed a motion to modify primary physical custody based on changed circumstances.¹ In particular, appellant asserted that on July 7, 2007, after respondent's car became stuck on a dirt road near Fish Lake in Esmeralda County, respondent and the child began walking, but when the child could not keep up, respondent abandoned the child in the desert. In her motion, appellant asserted that respondent walked to Silver Peak, Nevada, arriving in the early morning hours of July 8, 2007, at which time he contacted emergency services and a grid search began. The child was found at about 9:30 that morning, and respondent returned the child to

¹In her motion, appellant also asked to modify child support, for a permanent protective order, and for attorney fees and costs. The district court denied these requests for relief.

appellant later that day, without telling appellant about the desert incident.

In her motion, appellant also maintained that respondent had physically abused the child on at least two occasions, once by throwing the child across the floor, and once by banging his head against a table. According to appellant's motion, respondent had also been consuming alcohol, despite having been directed in the divorce decree to refrain from drinking at all times. Appellant maintained that following the divorce, respondent was involved in an alcohol-related car accident, suggesting that the child could be endangered by respondent's drinking problem.

A hearing on appellant's motion to modify custody was held on an order shortening time, after which the district court entered an order denying the motion, without making any findings regarding the abuse, neglect, and endangerment allegations. This appeal followed.

Custody matters rest in the district court's sound discretion,² and this court will not disturb a district court's custody decision absent an abuse of that discretion.³ In child custody matters, "the sole consideration of the court is the best interest of the child."⁴ When the district court determines a child's best interest, we presume that it has properly exercised its discretion.⁵ The district court, however, must have reached

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

³Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993).

⁴NRS 125.480(1).

⁵Wallace, 112 Nev. at 1019, 922 P.2d at 543.

its conclusions for the appropriate reasons.⁶ A modification of the physical child custody arrangement is warranted when it is established that “(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

In determining the child’s best interest, the district court must set forth its specific findings, including whether a parent has engaged in acts of domestic violence against the child.⁸ A determination that a parent has engaged in one or more acts of domestic violence against the child creates a rebuttable presumption that joint custody of the child by that parent is not in the child’s best interest.⁹

Here, with regard to changed circumstances necessary to support custody modification, appellant alleged that that respondent had alcohol problems and that he exercised poor judgment in leaving the child in the desert, thus exposing the child to unnecessary danger. Appellant also alleged that respondent physically abused the child, a factor the court must consider and evaluate by setting forth its specific findings.¹⁰ At the

⁶Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005); Sims, 109 Nev. at 1148, 865 P.2d at 330.

⁷Ellis v. Carucci, 123 Nev. __, __, 161 P.3d 239, 242 (2007).

⁸NRS 125.480(4)(k).

⁹NRS 125.480(5). If the court makes a domestic violence determination, it must set forth its findings of fact supporting that one or more acts of domestic violence occurred and its findings that the custody or visitation arrangement ordered adequately protects the child. NRS 125.480(5)(a) and (b).

¹⁰NRS 125.480(5); see Ellis, 123 Nev. at __, 161 P.3d at 243 (indicating that changed circumstances should be evaluated from the child’s perspective).


hearing, the district court heard the child's testimony that after respondent's car became stuck in the desert, he walked with respondent to find help, but, although he tried to keep up, he eventually fell behind. The child also testified that respondent threw him across the kitchen floor, injuring his hip, and that respondent banged the child's head on a table. Although respondent, on cross-examination, testified that the child was prone to spread stories, respondent did not dispute that he left the child behind in the desert.

The district court minutes indicate that, in denying the motion to modify custody, the district court judge described an incident in which he apparently left his former wife, who was pregnant at the time, stranded. The court, however, made no oral or written findings to support its decision to deny appellant's motion. Although the district court's order directed respondent not to drink alcohol in the child's presence, no other issues were addressed in the order, including the alleged domestic violence problems, the apparent danger to which respondent exposed the child by leaving him alone in the desert, and the potential endangerment issues associated with respondent's purported alcohol problem.

Accordingly, we cannot determine whether the district court reached its conclusions for the appropriate reasons. In particular, without any factual findings, it is unclear whether the district court evaluated the testimony and evidence and whether it applied the best interest of the child standard in denying appellant's motion to modify custody. Indeed, the minutes reflect that the district court judge might have evaluated the merits of appellant's motion by analogizing the desert incident to his own past experiences, rather than by applying the best interest of the child standard. As the previous hearing was not recorded, we conclude that this matter warrants a new hearing. Thus, we remand this matter to the

district court for it to conduct a new hearing and to then evaluate the merits of appellant's motion based on the best interest of the child.¹¹ Thereafter, if the district court determines that the child's best interest would be furthered by modifying custody, the court shall set aside its order and enter a new order, properly supported by the requisite findings, granting the motion; if, using the correct standard, it determines that the motion should be denied, it shall amend its order to include the requisite findings to support its conclusion.

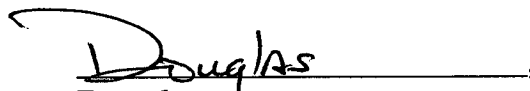
It is so ORDERED.¹²

 J.

Maupin

 J.

Parraguirre

 J.
Douglas

¹¹It appears from the district court minutes that respondent had requested a later hearing date, as his attorney was on vacation at the time when this hearing was called. Appellant argues that requiring respondent to proceed without counsel suggests that the district court had predetermined its ruling before hearing the testimony and considering any evidence, as ruling against respondent likely would have been grounds for reversal since respondent would have been prejudiced by having to proceed in proper person. See Bongiovi v. Sullivan, 122 Nev. 556, __, 138 P.3d 433, 444 (2006). On remand, respondent should be afforded the opportunity to have his attorney present at the hearing.

¹²In light of this order, we decline to address the other issues appellant raised on appeal concerning the short notice before the hearing was called and the district court's decision not to permit telephonic testimony.

cc: Hon. John P. Davis, District Judge
Nancy Theresa Lord
Robert Marcus Carson
Nye County Clerk