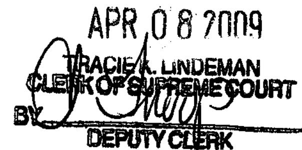
IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN BERRY A/K/A SUSAN BERRY-GUNTHER, Appellant, vs. SCOTT REED BERRY, SR., Respondent.	No. 52289



ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order modifying a child custody arrangement. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

FACTS

The parties were granted a divorce in 1999. Under the divorce decree, the parties were awarded joint legal custody with appellant having primary physical custody and respondent having liberal visitation. The minor child is currently approximately ten years old.

In 2007, respondent filed an ex parte motion for temporary primary physical custody, based in part, on allegations that appellant was physically and mentally abusing the child. Appellant opposed the motion. Pending further proceedings, the district court awarded temporary primary physical custody to respondent, with appellant having supervised visitation. The court appointed a child advocate (CASA) for an evaluation and recommendation regarding custody. In the interim, the district court further appointed a counselor to evaluate the child and the parties.

During the subsequent hearings, the district court heard evidence from the parties, spoke with the minor child in camera concerning appellant's alleged abusive conduct toward the child, heard testimony from the counselor, and considered the CASA's recommendation. Ultimately, the district court determined that the

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child's best interest would be served by respondent having sole legal and primary physical custody of the child, with appellant having supervised visitation. Accordingly, the district court entered an order modifying the child custody arrangement. This proper person appeal followed.

DISCUSSION

Matters of child custody rest in the district court's sound discretion. Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996). This court will not disturb the district court's custody decision absent a clear abuse of discretion. Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993). The district court may grant a motion to modify a primary physical child custody arrangement if 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." Ellis v. Carucci, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). In making a determination as to whether a modification of custody would satisfy the "best interest" prong, the court should look to the factors set forth in NRS 125.480(4), as well as any other relevant considerations. Id. Finally, "[i]t is presumed that a trial court has properly exercised its discretion in determining a child's best interest." Wallace, 112 Nev. at 1019, 922 P.2d at 543.

Here, appellant contends that the district court abused its discretion when it changed the child custody arrangement because the evidence does not support the decision, no written plan has been established to set a timeline for the modified custody arrangement for the purpose of future modification, and the district court, in its order, made inappropriate comments as to appellant's mental stability following her breast cancer diagnosis and treatment.

The district court order expressly determined that there has been a substantial change in the child's circumstances affecting his

welfare and that a modification is in the child's best interest. In particular, the court stated that based on the evidence presented during the proceedings, appellant has subjected the child to "incredibly cruel physical and mental abuse." In particular, the court noted that the child has been "punched, hit, had his hair pulled and been pushed down the stairs." Moreover, the court found that the child has been called names, sworn at, and regularly belittled, resulting in the child being fearful of appellant.

Moreover, the district court, after determining that the child is an "independent thinker" and is "extremely bright," considered the child's wish to live with his father. NRS 125.480(4)(a) (recognizing that the district court may consider the "wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody"). Further, the court considered the level of conflict between the parties, NRS 125.480(4)(d), the ability of the parties to cooperate to meet the child's needs, NRS 125.480(4)(e), the nature of the child's relationship with each parent, NRS 125.480(4)(h), the child's ability to maintain a relationship with his sibling, NRS 125.480(4)(i), and the child's physical, developmental, and emotional needs, NRS 125.480(4)(g).

As for the district court's comments regarding appellant's emotional state following her chemotherapy treatment, the court questioned appellant's emotional stability to be the custodial parent. NRS 125.480(4)(f). The court considered appellant's mental state, established during the proceedings, in light of the history of parental abuse or neglect of the child.[1] NRS 125.480(4)(j).

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[1]The district court noted that it considered whether appellant's conduct toward the child rose to the level of domestic violence, found that

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In the end, the court concluded that respondent is more likely to allow the child to have frequent associations and a continuing relationship with appellant. NRS 125.480(4)(c). The court further found that it is in the child's best interest to continue counseling and that the parents and half-sibling participate in counseling as well. Nothing in the district court's order precludes appellant from seeking to modify the custody arrangement in the future.

Having reviewed the appellate record and appellant's proper person civil appeal statement, we conclude that the district court did not abuse its discretion when it modified the child custody arrangement. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

. . . *continued*

the abuse was not sufficient to prove domestic violence by clear and convincing evidence, but concluded that the conduct established abuse by a preponderance of the evidence.

[2]We note that with regard to appellant's March 5, 2009, letter and attachments, this court cannot consider on appeal matters not properly appearing in the district court record. See Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 635 P.2d 276 (1981).

cc: Hon. Andrew J. Puccinelli, District Judge
Susan Berry
Torvinen & Torvinen
Elko County Clerk