

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID PATTALIO,
Appellant,
vs.
MICHELLE PATTALIO,
Respondent.

No. 52650

FILED

JUL 24 2009

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order denying appellant's request for visitation with his minor children. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

FACTS AND PROCEDURAL HISTORY

The parties were married in Illinois in 1997 and divorced in March 2004 in Nevada. They have two minor children. Under the divorce decree, the parties were awarded joint legal custody with respondent having primary physical custody and appellant having visitation.

Subsequent to the parties' divorce, appellant was arrested and pleaded guilty to federal charges. Before his incarceration began, appellant moved the district court for specific visitation with the children. The district court granted appellant's request and modified the divorce decree by ordering that no visitation would be required while appellant was incarcerated. Appellant did not appeal.

During his incarceration, in August 2008, appellant, appearing in proper person, moved the district court to modify visitation. In his motion, appellant requested that the children be allowed to visit him at the Lompoc Satellite Prison Camp in California and that he be

granted additional telephone contact with the children. According to appellant, he made repeated requests to respondent to have visitation with the children and even offered to pay for the children's transportation from Las Vegas to California and to have their paternal grandfather travel with the children for the visitations. Appellant also asserted that since his incarceration, he had maintained telephone contact with the children and that they have told him that they want to visit him and speak with him more often.

Appellant also contended that the facility where he resides is a minimum security satellite prison camp that encourages family visits. The prison camp, according to appellant, provides a visiting room, which has vending machines and a television, and there is a large outdoor visiting area for inmates' use. Appellant further asserted that he has had exemplary behavior since being incarcerated. As part of his rehabilitative process, appellant stated that he successfully completed anger management classes, drug therapy, attended 12-step study groups, and completed courses in sales skills, job applications, math refresher, microtype keyboarding program, and a basic drug educational program.

Respondent failed to submit a timely opposition to appellant's motion.¹ Pursuant to EDCR 2.23, the district court, however, determined that it would "not authorize visitation between the minor children, ages 7 and 10, and an incarcerated individual." Thus, the district court denied appellant's motion. This proper person appeal followed.

¹Respondent filed a late opposition, after the district court's order was already entered, which is part of the district court record. We have considered the opposition's contentions in reviewing this appeal.

DISCUSSION

On appeal, appellant contends that the district court improperly denied his motion for visitation because the district court's decision is not supported by substantial evidence. In particular, appellant notes that respondent failed to timely oppose the motion, so appellant's contentions should have been accepted as true. Appellant further contends that his right to visit with his minor children was denied, solely on the basis that he is incarcerated, without any consideration of the children's best interests.

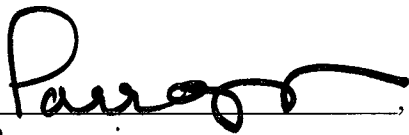
Matters of custody, including visitation, rest in the district court's sound discretion. Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). This court will not disturb the district court's decision absent an abuse of discretion. Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993). NRS 125C.010(1) provides, in relevant part, that a party's right of visitation must ensure that the child's best interest is achieved. "It 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. "[P]arents have a fundamental liberty interest in the care, custody, and management of their children." Kirkpatrick v. Dist. Ct., 119 Nev. 66, 71 64 P.3d 1056, 1059 (2003); see also Troxel v. Granville, 530 U.S. 57, 65 (2000). The United States Supreme Court has noted that this fundamental liberty interest does not evaporate simply because a parent has not been a model parent. See Santosky v. Kramer, 455 U.S. 745, 753 (1982). Visitation may not be denied solely because a parent is incarcerated. Frail v. Frail, 370 N.E.2d 303 (Ill. Ct. App. 1977) (noting that visitation with an incarcerated parent should not be denied

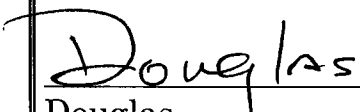
when arrangements can be made for visits in a nonprison atmosphere); McCurdy v. McCurdy, 363 N.E.2d 1298 (Ind. Ct. App. 1977).


Having considered appellant's civil proper person appeal statement and the district court record, we conclude that the district court abused its discretion in denying appellant's request for modification of the visitation order. In particular, we note that appellant appears to be in a minimum security facility, which is designed more as a camp than a prison, according to appellant's representations. Also, the prison camp encourages family visits and appears to have visitation areas that are conducive to family visits in a nonprison atmosphere. Further, the children are seven and ten and, as appellant represents, they can be accompanied by their paternal grandfather, or their mother if more appropriate, at the appellant's expense for visitation.

Accordingly, we reverse the district court's order denying appellant's motion for visitation and we remand this matter to the district court for further proceedings consistent with this order and guided by NRS 125C.010(1), so as to ensure that the children's best interests are achieved.

It is so ORDERED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. William S. Potter, District Judge, Family Court Division
David Pattalio
Michelle Pattalio
Eighth District Court Clerk