IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AMBER MADRID,
Appellant,
vs.
NATHANIEL HERNANDEZ,
Respondent.

No. 75461-COA

ORDER OF AFFIRMANCE

Amber Madrid appeals from a district court order determining the custody of a minor child. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Amber Madrid and Nathaniel Hernandez, who were never married, have a minor child together, MH. The paternal grandparents became the guardians of MH shortly after MH's birth with the parents' consent. Amber later moved to Kentucky to pursue a relationship with her future husband and MH remained with the guardians. The guardians subsequently petitioned to terminate the parental rights of each parent. Amber opposed the termination proceedings and moved to end the guardianship.

Upon termination of the guardianship and dismissal of the termination of parental rights proceedings, Amber received temporary primary physical custody of MH and permission to join her husband with MH in Kentucky. Nathaniel received parenting time, but when he picked up MH for a scheduled visit in Tennessee, he noticed bruising on the child. He notified law enforcement in Tennessee and took MH to the hospital in

Las Vegas.[1] Because of the bruising, Nathaniel refused to return MH to Amber as planned and filed an emergency motion for physical custody.[2] The district court modified the original temporary custody order, granted Nathaniel temporary primary physical custody, and ordered an evidentiary hearing to resolve the abuse allegations.

Several more hearings were conducted and then a full evidentiary hearing lasting three days over a one-month period was held in which the court considered the child abuse allegation, custody, and relocation. Following the evidentiary hearing, the district court found Nathaniel had not proven parental abuse or neglect. Nevertheless, the district court awarded primary physical custody of MH to Nathaniel, finding that it was in MH's best interest and it would not be in MH's best interest to relocate to Kentucky.[3] Amber moved for reconsideration, which the district court denied.

On appeal, Amber argues the district court abused its discretion by (1) improperly expanding the scope of the evidentiary hearing into a custody hearing without providing proper notice; (2) improperly using the best interest factors and NRS 125C.007 when determining custody instead of using the "substantial change in circumstances" analysis, *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007); and (3) granting Nathaniel primary physical custody. We disagree.

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[1]Nathaniel also notified a child protective services' agency in Clark County and its counterpart in Kentucky.

[2]The former guardians also moved for emergency primary physical custody of the child and Amber moved for a pick-up order.

[3]We do not recount the facts except as necessary to our disposition.

This court reviews questions of law de novo. *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014). Custody decisions, including those regarding parenting time, are reviewed for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis*, 123 Nev. at 149, 161 P.3d at 242. This court will not reweigh conflicting evidence or assess the credibility of witnesses. *See id.* at 152, 161 P.3d at 244.

Notice and fair hearing

Amber first argues that the evidentiary hearing was ordered only to address the abuse allegation, and that the district court abused its discretion by addressing matters beyond this parameter. Further, she argues that because she lacked notice that custody could be changed or that she would have the burden of satisfying the factors for relocation, the hearing was unfair.

Initially, we note that the supreme court held in *Valley Health System, LLC v. Estate of Doe*, that even where "notice was deficient under due process principles" the "initial notice deficienc[y] [is] subsequently cured by [appellant]'s motion for reconsideration." 134 Nev. ____, ____, 427 P.3d 1021, 1033 (2018). In that case, the appellant law firm argued that the district court did not give it notice that the court was considering imposing attorney sanctions against it. *Id.* at ____, 427 P.3d at 1032. The appellant moved for reconsideration and extensively briefed the due process issue below that it later raised on appeal to the supreme court. *Id.* at ____,

427 P.3d at 1033. The district court concluded that a motion for reconsideration cured any due process defect "because 'the opportunity to fully brief the issue is sufficient to satisfy due process requirements.'" *Id.* (quoting *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1230 (10th Cir. 2015) (internal quotation marks omitted)). The supreme court, in agreement with the district court, held "[c]onsistent with the Tenth Circuit, . . . a subsequent opportunity to fully brief the issue . . . is sufficient to cure any initial due process violation, and any notice deficiency [is] similarly cured." *Id.*

Similarly, here, Amber moved for reconsideration below and extensively briefed the due process issue as it related to notice. The district court conducted a hearing and made oral and written findings including that custody and relocation issues were adequately considered at the evidentiary hearing and nothing was presented in the reconsideration motion to change that conclusion. Thus, in these circumstances, even if the notice of the evidentiary hearing was deficient under due process principles, Amber's reconsideration motion, which also included extensive briefing, and the district court's consideration of the motion, cured the deficiency in this case.

In the alternative, even if the holding of *Valley Health* is confined to the factual circumstances of that case, the district court's decision should still be affirmed. Due process protects certain substantial and fundamental rights, including the interest parents have in the custody of their children. *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005). Due process requires sufficient notice before substantial rights are affected. *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). Accordingly, parties must be given sufficient opportunity to disprove

evidence presented. *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996).

The Nevada Supreme court addressed the issue of notice in *Dagher v. Dagher*, 103 Nev. 26, 731 P.2d 1329 (1987). In *Dagher*, the supreme court reversed the district court's modification of physical custody when the parties did not request modification and did not have "prior specific notice." *Id.* at 27-28, 731 P.2d at 1329-30. The motion for modification of the divorce decree did not seek a change of physical custody, thus the mother was never apprised that the hearing might involve a change of custody. *See also Micone v. Micone*, 132 Nev. ___, 368 P.3d 1195 (2016) (holding due process requires notice and opportunity to be heard before custody could be awarded to the non-party grandparents).

Conversely, here, Amber and Nathaniel both moved for physical custody of MH in their pleadings and were therefore on notice that custody was at issue. Additionally, the order terminating the guardianship that initially gave Amber temporary custody stated that the case related to custody filed by each party would be heard at a subsequent date. Further, the record reveals that Amber was on notice that custody could be at issue at the evidentiary hearing. For example, Nathaniel's prehearing memorandum contained a thorough custody argument and discussion of the best interest factors. *See* EDCR 2.67(b)(8) (stating that the pretrial memorandum shall include a "statement of each principal issue of law which may be contested at the time of trial" and "include . . . the position of each party"). Additionally, all of the custody orders leading up to the evidentiary hearing were grants for temporary custody only, indicating that a final custody determination was still forthcoming. *See In re Temp. Custody of Five Minor Children*, 105 Nev. 441, 443, 777 P.2d 901, 902 (1989)

(holding that a temporary custody order is not a final order). Thus, Amber was on notice that custody could be decided at the evidentiary hearing.

Further, this court cannot fully analyze Amber's claim that the evidentiary hearing was unfair because she has not included the transcript from the hearing in her six-volume appendix. This court cannot consider matters that do not properly appear in the record on appeal. *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). An appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Upon review of the record provided,[4] we conclude that the record supports the district court's decision to adjudicate custody and relocation at the evidentiary hearing. Therefore, the district court did not abuse its discretion by deciding the custody and relocation issues at the evidentiary hearing.

Best interest factors and NRS 125C.007

Second, Amber contends the district court should have applied the "substantial change in circumstances" analysis in determining physical custody of MH because the court had already granted primary physical custody of MH to her upon terminating the guardianship. *See Ellis,* 123 Nev. at 150, 161 P.3d at 242. Further, Amber contends that because she

[4]As pertinent to this issue, Amber provided Nathaniel's prehearing memorandum, the minute order from the evidentiary hearing, the Findings of Fact, Conclusions of Law, and Decree of Custody following the evidentiary hearing, and the reconsideration hearing transcript and order.

never filed a motion for relocation, the court abused its discretion by applying relocation law as codified in NRS 125C.007.

The only orders before the evidentiary hearing were temporary in nature. Because the district court used the evidentiary hearing to determine the final custody order, the court appropriately used only the "best interest" test and examined the best interest factors enumerated in NRS 125C.0035. *See* NRS 125C.0035(1) ("In an action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child."); *Five Minor Children*, 105 Nev. at 443, 777 P.2d at 902.

NRS 125C.0065(1) requires a relocating parent to acquire written consent from the nonrelocating parent or court permission before moving a child outside of Nevada. NRS 125C.0065 is derived from former NRS 125A.350, which was "a notice statute intended to prevent one parent from in effect 'stealing' the children away . . . by moving them away to another state." *Trent v. Trent*, 111 Nev. 309, 315, 890 P.2d 1309, 1313 (1995). Because NRS 125C.0065 is intended to put a parent on notice that he or she must either obtain permission from the other parent or a court order before moving the child out of state, Amber had notice that relocation would be an issue for the district court to decide regardless of whether she filed a motion for relocation. Thus, because Amber, who lived in Kentucky, was asking for primary physical custody of MH, whose home state was Nevada, the district court was correct in applying NRS 125C.007 when determining whether relocation was in the best interest of the child.

Award of primary physical custody

Lastly, Amber argues the district court made misstatements of fact in its decree of custody and abused its discretion when it awarded Nathaniel primary physical custody because the court's rulings were

predicated upon those inaccurate findings. As previously discussed, Amber failed to provide this court with the transcript from the evidentiary hearing. Thus, this court presumes the missing parts of the record support the district court's decision. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1). Moreover, the district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Without specific findings and an adequate explanation for the custody determination, this court cannot determine with assurance whether the custody determination was appropriate. *Id.* at 452, 352 P.3d at 1143.

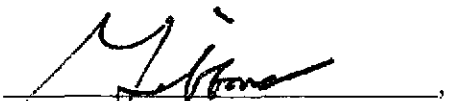
The district court issued a detailed 30-page order containing its findings of fact and conclusions of law. The order analyzed and applied each of the best interest factors set forth in NRS 125C.0035(4). Beyond NRS 125C.0035(4), the court considered factors based on *Rico*, 121 Nev. at 702, 120 P.3d at 816 (living conditions and environment, parties' interaction with the children, educational neglect, medical neglect, employment and stability). After the thorough analysis of the best interest factors, the district court considered the issue of relocation and applied the factors in NRS 125C.007. Based on the court's analysis of the best interest and relocation factors, the court concluded that Amber did not "provide sufficient proof that it is in [MH]'s best interest to grant her primary physical custody, and . . . that it is in [MH]'s best interest to move to Kentucky. Further, Nathaniel provided sufficient proof that it is in [MH]'s best interest that he have primary physical custody."

The 30-page district court order had specific findings of fact and an adequate explanation for its custody determination as required by *Davis*. We conclude that the district court did not abuse its discretion by awarding primary physical custody to Nathaniel.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., concurring:

I join in the majority order except to the extent that anything in it can be read to implicitly suggest that *Valley Health System, LLC v. Estate of Doe*, 134 Nev. ___, 427 P.3d 1021 (2018) stands for the broad

[5]Amber raises other arguments of which we can summarily dispose. She argues that (1) because she already lived in Kentucky, she was not a relocating parent under NRS 125C.007; (2) she was not able to have a fair hearing because the court-ordered case management conference was never conducted; (3) her motion for a pick-up order was ignored; (4) if relocation was properly at issue, the district court could consider only the relocation request and not change custody in addition to ruling on the relocation request; and (5) the district court improperly imposed a burden on her to prove "superior opportunities" for MH instead of the proper "actual advantage" standard. After careful consideration, we find these arguments either unpersuasive or belied by the record.

principle of law that a "motion for reconsideration" constitutes a generally applicable ex post facto "cure" for a due process defect in evidentiary hearings like the one conducted below in this case. The majority order does not go quite so far as to say that in any explicit way, but my concern is that the mere inclusion of a citation to the *Valley Health* case in the context in which it is cited could be loosely read as inherently suggesting just that.

Here is the nature of my concern. The due process clause requires that, before deciding any disputed issue, a district court must give advance notice to all parties clearly identifying the issues at stake so that the parties have a full and fair opportunity to prepare and present their side of the matter. In this appeal, Amber asserts that the district court originally scheduled an evidentiary hearing whose scope was narrowly limited to only allegations of abuse. She contends, however, that at the last minute the district court, sua sponte and without warning, expanded the hearing to include other unrelated matters (such as relocation) that she did not know would be considered and therefore was not prepared to address. Because of the lack of adequate notice, she alleges that she was caught off guard and deprived of a fair opportunity to respond to issues that she did not know were going to be resolved.

Concededly, I do not know if Amber's allegations are true; she neglected to provide a transcript of the relevant hearing for us to review in order to assess what actually happened. That defect alone is enough to warrant affirmance. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (the appellant is responsible for making an adequate appellate record and we presume that any missing portions support the district court).

But if Amber's allegations are indeed true, she has identified a potentially serious due process violation below. Nonetheless, the majority, citing *Valley Health*, concludes that (among other alternative reasons for affirmance) any due process error was effectively cured when Amber filed a motion for reconsideration after the hearing that supplied additional argument that the district court ultimately heard and considered.

I hesitate to join that analysis because I'm not sure I agree that *Valley Health* is enough to rectify the error. In *Valley Health*, the district court issued a written order noting that it was considering imposing sanctions against a party for committing discovery abuse. The order did not reference the possibility of sanctions against the party's attorney, but following a hearing the district court imposed sanctions upon the party's law firm anyway. On appeal, the Nevada Supreme Court held that attorneys are entitled to fair notice before such sanctions may be issued, but the notice requirement was satisfied when, following the imposition of sanctions, the law firm filed a motion for reconsideration through which the attorneys were given a full opportunity to "extensively brief the due process issues it now raises" on appeal. Under those circumstances, "a subsequent opportunity to fully brief the issue of imposition of attorney sanctions is sufficient to cure any initial due process violation." *Id.* ___, 427 P.3d at 1033.

I interpret this as an exceedingly narrow holding and not a general rule that applies to all kinds of due process errors outside of those involving attorney sanctions. In *Valley Health*, the motion for reconsideration was filed by the party's law firm, not the party that was the subject of the initial motion for discovery sanctions. The motion for reconsideration thus involved very different entities and, in that unique and

extraordinary situation (one of the very few in which a non-party can file a motion of any kind), it necessarily encompassed very different issues than the initial motion possibly could have.

But in the case at hand, the party complaining about the due process violation (Amber) is the very same party involved in the initial hearing. When a party attempts to file a motion for reconsideration relating to a motion or hearing it already litigated itself, "[p]oints or contentions not raised in the original hearing cannot be maintained or considered." *Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996). A party may seek reconsideration based upon substantially different evidence than originally presented or if the original decision was clearly erroneous, but in either case only as to issues "previously decided" in the original proceeding. *Masonry and Tile Contractors Ass'n v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

Given that limitation, a broad reading of *Valley Health* sets up a dangerous Catch-22. Amber couldn't have raised her due process challenge in a motion for reconsideration unless she had previously raised the exact issue during the original proceeding. But the nature of Amber's due process complaint is that she was surprised by the scope of the initial hearing and was therefore unprepared to raise all of the issues that she could have. So the analysis ends up devolving into circularity: *Valley Health* allows initial due process errors to be cured through reconsideration, but the cure is limited only to those errors that do not need to be cured because they were already raised in the original hearing. What remains not curable are any issues that were not previously raised precisely because of the due process error. Consequently, the most harmful errors that a due process

violation can produce are likely the very ones that cannot be cured through a motion for reconsideration.

All of which is why I do not believe that *Valley Health* ought to be read in such a broad manner. Accordingly, I concur in much of the majority order except to the extent that it suggests, even unintentionally, that *Valley Health* requires an outcome anything like this.

Tao, J.
Tao

cc: Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
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