IN THE SUPREME COURT OF THE STATE OF NEVADA

KARI HALEN SHAW, F/K/A KARI HALEN THEISS,
Appellant,
vs.
DAVID THEISS,
Respondent.

No. 39915

FILED

MAY 0 5 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order changing primary physical custody and from all other appealable orders. The parents, David Theiss and Kari Helen Shaw, were granted a divorce in October 1998, in which the parties agreed that Kari would have primary physical custody of the four children and that David would pay $2,000 per month in child support.

On September 27, 2001, David filed a motion to change primary physical custody from Kari to himself. After a three-day evidentiary hearing, the district court determined that changed circumstances existed and that it was in the children's best interests to reside with their father. Kari now appeals the custody determination, as well as all prior appealable orders. For the reasons discussed below, we affirm the district court's orders.

The record reveals that the parties have a contentious history. A year after the divorce decree was entered, on November 8, 1998, David filed a motion for order to show cause, alleging that Kari had improperly denied him his visitation rights. Kari countered with a motion for order to show cause for failure to pay alimony. Kari then asked the district court to hold David in contempt for failure to pay child support. After a hearing on February 24, 2000, the district court adjusted the visitation schedule to

allow David to make up missed visits and ruled on the financial issues, but held neither party in contempt.

On April 3, 2000, David again filed a motion for order to show cause, alleging another denial of his visitation rights. He also sought to modify his child support obligation. After a hearing on June 7, 2000, the district court issued an order clarifying David's visitation schedule and adjusting his child support obligation downward to conform to the statutory guidelines.

On June 18, 2001, David moved the district court to again reduce his child support obligation, as the parties' eldest child had reached the age of majority and had graduated from high school. Before the scheduled hearing could be held, Kari filed a motion for order to show cause on July 2, 2001, alleging that David had unlawfully removed the children from the state. David countered with a motion for order to show cause why Kari should not be held in contempt for interfering with his court-ordered two-week summer visitation with the children. Kari then obtained a temporary restraining order from Washoe County against David, which specifically stated that David's visitation schedule was to remain in place. David filed an emergency motion for order to show cause, alleging that Kari had twice denied him visitation since his two-week summer visitation with the children. David also filed a motion to modify the divorce decree to increase his visitation and decrease his child support obligation.

At an August 14, 2001 hearing, the parties stipulated to dissolve the temporary restraining order. However, Kari alleged that the parties' second eldest child said that David had sexually abused her. The district court suspended the hearing, reported the allegation to the Division of Child and Family Services and ordered that David only have

supervised visitation. The decision was formalized in a temporary order filed September 6, 2001.

The district court then appointed a guardian ad litem and a Court-Appointed Special Advocate ("CASA"). After a September 21, 2001 conference call, the district court ordered that David's visitation be expanded for two weekends, that the parties have no contact with each other, that they send a confidentiality release to Dr. Sheri Skidmore, Ph.D., a psychologist specializing in marital therapy and child sexual abuse, and that the parties' second eldest child receive counseling. On September 27, 2001, David moved to change primary physical custody from Kari to himself.

A hearing on David's motion for increased visitation and decreased child support was held on October 16 and 17, 2001. The parties stipulated that there was no evidence that David had sexually abused any of the children.

By order issued December 11, 2001, the district court found that Kari had clearly violated the court order establishing David's visitation rights; that she had needlessly involved law enforcement, alleging that David had kidnapped the children, which resulted in a mark on David's record; that she failed to prove that David was underreporting his income; and that David was entitled to a reduction in child support since their eldest child had become emancipated. The district court held Kari in contempt for violating David's visitation rights, granted David's request for attorney fees, ordered make-up visitation, reduced David's child support obligation, ordered a custody evaluation, ordered Kari and the parties' second eldest child into counseling and forbade Kari from calling David's home while the children were with him.

On January 14, 2002, David moved to restrict Kari's time at the youngest girls' school, where she volunteered several times a week, alleging that Kari disrupted their educational environment. Kari then moved to continue the child custody hearing scheduled for February 20 and 21, 2002, which the district court denied.

The child custody hearing was held on February 20 and 21 and April 23, 2002. After the first two days of the hearing, the district court entered an order on March 6, 2002, extending David's visitation time, allowing Kari to participate in the children's classrooms as a volunteer, and ordering psychological evaluations on the minor children and parents. On April 25, 2002, the district court issued a temporary injunction, enjoining Kari from harassing witnesses. Finally, on June 10, 2002, the district court entered a twenty-two page order granting David's motion to change primary physical custody of the two youngest children. Kari then filed a timely notice of appeal from the order granting the change of custody. She also appealed from all of the district court's prior orders regarding visitation and child support, which amounted to fifteen orders dating from July 31, 2000, to June 10, 2002.

First, we note that although Kari appeals from all orders entered prior to the final order changing custody, her arguments focus only on the order changing primary physical custody. It appears that Kari directs our attention to the prior orders only to demonstrate the district court's alleged bias against Kari. Because Kari does not substantively appeal the prior orders, we do not focus on them except to the extent that they might show alleged bias against her.

"'A change in custody is warranted only when: '(1) the circumstances of the parents have been materially altered; and (2) the

child's welfare would be substantially enhanced by the change."'"[1] We presume that the district court properly exercised its discretion, and we will not overturn a custody determination unless the district court clearly abused its discretion or based its reasons on inappropriate grounds.[2]

Kari argues that the district court abused its discretion because it changed custody to punish parental misconduct. She further contends that David failed to show that there were changed circumstances. She asserts that the district court improperly relied on Dr. Skidmore's diagnosis of Kari as having a borderline personality disorder because that diagnosis existed prior to the parties' divorce.[3] Finally, Kari contends that the district court improperly disregarded the fact that Kari's post-divorce circumstances have greatly improved, resulting in a large house in which the family resides and Kari's ability to be a stay-at-home mother.

The record reveals that, while Dr. Skidmore's diagnosis of Kari as having a personality disorder occurred while the parties were still married, the diagnosis was not disclosed to the parties until after the divorce decree was entered. David was unaware of the diagnosis when he agreed to allow Kari to have primary physical custody. Moreover, in

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[1]Hopper v. Hopper, 113 Nev. 1138, 1142, 946 P.2d 171, 174 (1997) (quoting Wiese v. Granata, 110 Nev. 1410, 1413, 887 P.2d 744, 746 (1994) (quoting Murphy v. Murphy, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968) (emphasis added))).

[2]Id.; Primm v. Lopes, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993).

[3]McMonigle v. McMonigle, 110 Nev. 1407, 1408, 887 P.2d 742, 743 (1994) (stating that the change in the parents' circumstances justifying a custodial modification must have occurred "'since the most recent custodial order'") (quoting Stevens and Stevens, 810 P.2d 1334, 1336 (Or. Ct. App. 1991)).

evaluating the parties' stipulation and whether their custody and visitation agreement was in the children's best interest, the court was unaware of Kari's diagnosis. Even supposing for a moment that the district court had had the opportunity to consider her diagnosis in deciding custody, a mental or emotional condition is often not static and unchanging but may wax and wane in concert with other stresses, conditions and happenings in a person's life. This being so, we cannot at this time agree, as a general proposition, that a court abuses its discretion when it further considers emotional, physical or mental conditions that may bear upon a person's ability to parent well when determining whether to alter an existing custody arrangement. The district court did not abuse its discretion by admitting the evidence or in relying on such evidence to determine the change of custody issue.

The record further reflects that Kari has gone to great lengths to interfere with David's visitation rights and to alienate the children's affection from David. During his two weeks of summer visitation, Kari called the police, alleging that David had kidnapped the children and taken them out of state, even though Kari knew their whereabouts at all times. Kari also denied David visitation three weekends in a row after the children returned from summer visitation with David. The evidence also shows that Kari speaks negatively about David in front of the children. For example, Kari stated, in front of their second eldest child, that David hated the second eldest child. The record further reflects that the two oldest children used to be close to their father, but became distant after the divorce, and that one of the youngest children is cold and withdrawn when she first leaves Kari's house.

Substantial evidence supports the district court's determination that David did not get the benefit of his bargain regarding

visitation in the divorce decree, as Kari has consistently frustrated his attempts to visit his children. Nor did David know that Kari would so adamantly try to alienate his relationship with the children. Kari's reliance on Hopper v. Hopper[4] to support her contention that none of these events constitute changed circumstances because they existed prior to the divorce is misplaced. Whereas in Hopper the father knew that the mother was abusive to the parties' daughter but agreed to let her have primary physical custody anyway, here David did not know that Kari had been diagnosed with a personality disorder, that she would consistently frustrate his attempts to exercise his visitation rights and that she would try to alienate the children's affection for David.

Kari next contends that the district court erred by finding that a change of custody was in the children's best interests because the district court did not give enough weight to the opinion of Dr. Linda Peterson, a family and marriage therapist, that the children would be happier by remaining with Kari.

The record substantially supports the district court's determination. The CASA and the custody evaluator testified that the youngest children are tense and anxious in Kari's home, but relaxed and free to be children in David's home, and that, in response to the stress of their situation, one child exhibited psychosomatic symptoms while the other child retreated into a fantasy world. David, his girlfriend Susan Hudacko, and their friend Claudia Dossey all testified that the second youngest child becomes quiet and withdrawn after speaking with Kari on the telephone.

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[4]113 Nev. 1138, 946 P.2d 171.

On the other hand, the parties' eldest two children testified that the girls are tense at David's house but relaxed and happy at Kari's. The girls' teachers testified that the siblings appear to be very close to each other and to their mother, and that the second youngest child stated that she preferred to live with Kari.

"'The weight and credibility to be given trial testimony is solely the province of the trier of fact, and a district court's findings of fact will not be set aside unless clearly erroneous.'"[5] It was within the district court's province to determine that David and his witnesses were more credible than Kari and her witnesses, especially given the strong recommendations by the CASA and custody evaluator that custody be changed from Kari to David. Furthermore, the credibility of Kari and the parties' eldest daughter had already been undermined by the daughter's unsubstantiated allegations of sexual abuse by David, and Kari's efforts to bolster those allegations. Kari's credibility was further damaged by the fact that, shortly before the custody hearing, she asked the CASA to meet her and the children to hear about "bad things" allegedly occurring at David's house, but refused to give details or to report the situation to the proper authorities. Moreover, the CASA's reports over time reflected that she initially did not recommend a custody change, but within less than a year, changed her recommendation based on her observations that the girls were being emotionally abused by Kari. In fact, the only expert who recommended that the children remain with Kari was Dr. Peterson, who based her recommendation on the fact that Kari is a full-time homemaker

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[5]Matter of Guardianship & Estate of D.R.G., 119 Nev. ___, ___, 62 P.3d 1127, 1132 (2003) (quoting Locklin v. Duka, 112 Nev. 1489, 1497, 929 P.2d 930, 935 (1996)).

and that the children stated a preference to remain with Kari. Based on the foregoing evidence, we conclude that substantial evidence supports the district court's decision that a change of custody was in the girls' best interests.

Kari next asserts that the district court erred in several other ways: (1) that the court did not give enough weight to the girls' stated custodial preferences; (2) that the district court placed too much weight on the CASA's reports and the custody evaluator's recommendations; (3) that the district court failed to properly weigh Kari's past parenting, which has resulted in two successful young adults; (4) that the district court failed to consider that the girls have thrived in Kari's custody; (5) that the district court effectively removed the girls from their biological mother and placed them with David's girlfriend, as David works long hours; and (6) that the district court erred by admitting the reports by the CASA, the custody evaluator, and Dr. Patricia Chatham, the independent psychological evaluator.

We conclude that Kari's arguments lack merit. Both the CASA and the custody evaluator indicated that a seven-year-old and a nine-year-old were not mature enough to make an informed decision as to their custodial preference, and that asking the children to choose would put them in a losing situation by forcing them to betray one parent. Although NRS 125.480(4)(a) provides that the district court must take the children's preference into consideration if the children are mature enough to make such a decision, the record reflects that the girls in this case were not mature enough to express a preference. Even so, the district court heard ample testimony that the girls preferred to live with their mother.

Next, Kari asserts that the CASA was biased against her. The evidence she submits in support of this contention merely shows that the

CASA apologized to Kari's counsel for her reaction when Kari's counsel implied that she was biased. This letter does not demonstrate bias but rather that the CASA took her job seriously and made her recommendations based on the best interests of the children, regardless of her personal feelings toward the parents. Nor is there any evidence that the custody evaluator harbored bias against Kari.

Kari asserts that her past parenting indicates her likely success with the two youngest girls. We conclude that the record belies this assertion. Dr. Chatham testified that the older children would likely experience problems in their early twenties as they tried to exercise independence from Kari. Also, the fact that the parties' eldest daughter made false allegations that her father had sexually abused her indicates a deeply disturbed young woman. Finally, there was ample evidence that both of the younger children were highly stressed.

Kari asserts that the district court failed to properly weigh how the girls have thrived in her custody. This argument also lacks merit because, although the girls do well in school, there was significant testimony that they suffered severe stress.

Kari asserts that the change of custody order effectively placed the children with David's girlfriend, Susan, because David works long hours. This argument also lacks merit because the fact that David is not married and works while Kari is married and is a full-time homemaker is an insufficient reason to allow the girls to remain in a stressful, unpredictable environment in which Kari tries to frustrate David's visitation rights and alienate the children from him. NRS 125.480(3)(a) requires the district court to consider which parent is more likely to foster the children's relationship with the other parent. The evidence strongly showed that David is the parent most likely to promote the girls'

relationship with their mother. Furthermore, Susan is the girls' step-aunt by virtue of being Kari's stepsister. Also, the custody evaluator opined that Susan's parenting skills were eminently reasonable. The CASA found Susan's two boys to be well-behaved and well-disciplined.

Kari asserts that the district court erred by admitting the CASA's reports and the custody evaluator's report over her hearsay objections. This argument also lacks merit, as the record reveals that the district court, in admitting the reports, excepted the hearsay portions unless there was an independent basis by which the hearsay portions would be admissible.

The district court properly exercised its discretion in changing primary physical custody from Kari to David. Accordingly, we

AFFIRM the district court's order changing primary physical custody.

_____, C.J.
Shearing

_____, J.
Becker

_____, J.
Agosti

cc: Hon. Michael P. Gibbons, District Judge
Lee T. Hotchkin Jr.
Allison W. Joffee
Douglas County Clerk