

IN THE SUPREME COURT OF THE STATE OF NEVADA

KARY MACLEOD-COLVIN,
Appellant,
vs.
KATHRYN BENNETT,
Respondent.

No. 40977

FILED

MAY 05 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
DEPUTY CLERK

This is an appeal from a district court order granting respondent Kathryn Bennett's motion to change custody of the parties' minor children.

In July 1998, Kary MacLeod-Colvin and Kathryn Bennett¹ were married and living in Texas. They had two children. About a year after their marriage, the couple began having problems. In September 1999, Kathryn obtained a protective order and filed for divorce. Kathryn also filed an assault charge, alleging that Kary had grabbed her and injured her wrist. In December 1999, Kathryn, allegedly fearing for her own and her children's safety, relocated to Oregon with the children. After Kary discovered Kathryn's whereabouts, Kathryn obtained a restraining order from an Oregon circuit court. In May 2000, a Texas district court granted the divorce and granted primary physical custody of the children to Kathryn and joint legal custody to the parents.

In April 2000, Kary successfully moved the Texas district court to dismiss the assault charge and to dissolve the protective order.

¹The record includes respondent's name as both "Kathleen" and "Kathryn." Although several documents in the record indicate that respondent signs her name as "Kathleen," the civil docketing statement lists respondent's name as "Kathryn."

He then filed a motion to amend the Oregon restraining order to conform to the provisions of the Texas divorce and custody decree. The motion was subsequently granted, and Kary was permitted visitation with the children. Sometime after Kary exercised his visitation rights, Kathryn fled with the children to Alaska.

On January 19, 2001, the Oregon circuit court held a hearing concerning the custody of the children. Kathryn did not receive notice of this proceeding and was not present. The Oregon court granted Kary's motion for change of custody on the basis that Kathryn had failed to notify the court of her change of address, failed to appear at trial or respond to Kary's request for modification of custody, interfered with Kary's visitation rights and violated the Texas custody decree. On May 8, 2001, Kathryn was arrested in Alaska pursuant to a warrant issued in Oregon. Kary arrived in Alaska several days later, took physical custody of the children and returned to his home in Reno.

On June 18, 2002, Kathryn filed a motion in the Nevada district court, requesting modification of the Oregon custody decree. After an evidentiary hearing, the district court awarded Kathryn primary physical custody of the children and referred the parties to mediation to establish a visitation plan for Kary.

Kary appeals the district court's order granting Kathryn primary custody, arguing that the district court abused its discretion when it found that changed circumstances existed and that a change of custody was in the children's best interests. Additionally, Kary asserts that the district court abused its discretion when it considered evidence of events occurring prior to the most recent custody order. We conclude that Kary's

arguments are without merit. Accordingly, we affirm the district court's decision.

The trial court enjoys broad discretionary powers in determining child custody issues.² This court will not disturb the trial court's judgment absent a clear abuse of discretion.³ In Murphy v. Murphy, we held that a trial court may properly change primary physical custody when "(1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change."⁴ In Hopper v. Hopper, we clarified this test, holding that the moving party must demonstrate that the circumstances of the parents "'have substantially changed since the most recent custodial order. . . . Events that took place before the proceeding [are] inadmissible to establish a change of circumstances.'"⁵

Kary asserts that the district court improperly considered evidence of events occurring prior to the most recent custody order. The district court heard evidence of Kary's prior felony convictions, and his concealment of those "felonies to gain entrance to the armed forces." The district court noted that, "when [Kary] was 'found out', he either initiated or connived in a ridiculous scheme whereby he and his family attempted to convince the Army that the criminal was not [Kary], but his twin brother."

²Hayes v. Gallacher, 115 Nev. 1, 4, 972 P.2d 1138, 1140 (1999).

³Id.

⁴84 Nev. 710, 711, 447 P.2d 664, 665 (1968).

⁵113 Nev. 1138, 1143, 946 P.2d 171, 174 (1997) (quoting McMonigle v. McMonigle, 110 Nev. 1407, 1408, 887 P.2d 742, 743 (1994) (quoting Stevens and Stevens, 810 P.2d 1334, 1336 (Or. Ct. App. 1991))).

The district court made clear that it considered these items, not in its analysis of changed circumstances, but in its determination of Kary's credibility as a witness and the truthfulness of his testimony.

The district court also heard testimony concerning the prior domestic violence allegations against Kary. In this court's recent opinion in Castle v. Simmons, we held that even previously litigated acts of domestic violence may need to be reviewed if additional acts occur.⁶ In this case, there was evidence of recent domestic violence which would justify placing it in the context of the prior violence. Furthermore, the district court made clear that its determination that there were changed circumstances was not based on Kary's prior domestic violence. We conclude that the district court did not abuse its discretion in admitting the evidence of Kary's conduct prior to the last custody order.

We conclude that substantial evidence supports the district court's determination that changed circumstances exist as to both Kary and Kathryn justifying a reconsideration of the custody of the children. Kathryn's circumstances had improved significantly: (1) she had stopped fleeing from Kary; (2) she had created a stable home with her new husband; (3) she was able to be a stay-at-home mother because of her new husband's steady employment; and (4) she had learned her lesson that she could not interfere with the children's relationship with their father. In contrast, since the most recent custody decree, Kary's circumstances had proved unstable, including (1) Kary's series of intimate relationships, roommates, and housing situations, creating an unstable environment for

⁶120 Nev. ___, ___ P.3d ___ (Adv. Op. No. 15, April 1, 2004), overruling in part Hopper, 113 Nev. at 1143, 946 P.2d at 174, and McMonigle, 110 Nev. at 1408, 887 P.2d at 743.

the children; (2) Kary's relationship with his current girlfriend, who had domestic violence issues with her child's father;⁷ (3) Kary's inappropriate discipline of the children; (4) Kary's failure to require the children to wear their prescription eyeglasses; (5) Kary's attempts to intimidate Kathryn when she called to speak with the children, thereby interfering with the children's relationship with their mother; and (6) the children's use of profanity, suggesting that they were exposed to the same in their present environment. Considering the improvements in Kathryn's life and Kary's deteriorating stability since the most recent custody order, substantial evidence supports the district court's finding of changed circumstances.

The two-part Murphy test also requires that the district court determine whether a change in custody would substantially enhance the children's welfare.⁸ The district court properly considered Kathryn's stable environment, ability to care for the children full time and the fact that she had ceased interfering with the children's relationship with their father. The district court also properly considered Kary's proven instability, his current living arrangement, his recent behavior in disciplining and caring for the children, and his interference with the children's relationship with their mother. The district court noted that Kary was subject to an active, extraditable warrant for his arrest and that, at the hearing, Kary failed to articulate a plan to care for the children should he be arrested.

⁷Washoe County Child Protective Services had visited Kary's home due to an incident involving his girlfriend and her ex-boyfriend.


⁸84 Nev. at 711, 447 P.2d at 665.

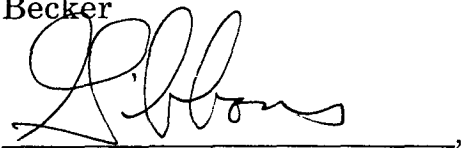
The district court also properly considered psychologist Dr. Joan Behrman-Lippert's recommendation that Kathryn's ability to remain in the home would benefit the children, both of whom were experiencing developmental delays. Dr. Lippert further testified that there were serious questions regarding Kary's ability to form and maintain long-term, healthy relationships, and that the quality of care the children received often depended on Kary's choice of girlfriends.

We conclude that the district court did not abuse its discretion in determining that granting Kathryn primary physical custody of the children would substantially enhance their welfare and that it would be in their best interests. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Shearing


_____, J.
Becker


_____, J.
Gibbons

cc: Hon. Deborah Schumacher, District Judge
Family Court Division
David R. Ford
Sinai Schroeder Mooney Boetsch Bradley & Pace
Washoe District Court Clerk