

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS BOZZANO,
Appellant,
vs.
APOLONIA RICCI,
Respondent.

No. 42740

FILED

JUL 11 2005

ORDER OF REVERSAL AND REMAND

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

This is an appeal from a district court order establishing child custody. Eighth Judicial District Court, Family Court Division, Clark County; Steven E. Jones, Judge.

A trial court has broad discretionary powers in determinations of child custody. This court reviews those determinations for abuse of discretion.¹ In child custody cases, “a presumption exists that the trial court properly exercised its discretion in deciding what constitutes a child’s best interest.”² When a trial court has exercised its discretion in a child custody case “after a full hearing and based upon substantial evidence, its determination shall not be disturbed on appeal.”³

This case involves the determination of custody of a minor child born out of wedlock. Appellant Thomas Bozzano argues that any evaluation of custody requires a trier of fact to determine the best interests of the child through evidence and testimony. Bozzano points out that he was the moving party in this litigation, and as such had the

¹Primm v. Lopes, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993).

²Id. (citing Culbertson v. Culbertson, 91 Nev. 230, 533 P.2d 768 (1975)).

³Norris v. Graville, 95 Nev. 71, 73, 589 P.2d 1024, 1025 (1979).

burden of proving the contentions set forth in his complaint; he then contends he was denied the right to do so in an evidentiary setting. Next, Bozzano claims that the court's final custody determination was not based on substantial evidence as required by Nevada law. Bozzano points out that in the few months of litigation prior to the final custody determination, there was no discovery taken, no joint case conference, no evidence or testimony presented by either party, and that the final custody decision was based entirely on a six-minute hearing.

Respondent Apolonia Ricci cites Rooney v. Rooney,⁴ and contends that the district court did not abuse its discretion in finding lack of adequate cause for an evidentiary hearing. Further, Ricci argues that she, herself, only requested an evidentiary hearing to examine issues raised at a hearing by Bozzano, and that those issues were dealt with at that hearing, thus negating the need for an evidentiary hearing.

The record reflects that the original moving party for an evidentiary hearing was Ricci, but eventually Bozzano also made a motion for an evidentiary hearing at the hearing on Bozzano's motion for reconsideration.

NRS 125.480(1) mandates that when determining custody of a child in a divorce action, "the sole consideration of the court is the best interest of the child." NRS 126.031 refers to a situation such as here, where the parents of the child are not married. NRS 126.031 provides in pertinent part:

⁴109 Nev. 540, 542, 853 P.2d 123, 124 (1993) (holding that a district court may modify custody without a hearing unless the moving party demonstrates adequate cause for a hearing).

(2) Except as otherwise provided in a court order for the custody of a child:

...

(b) The father of a child born out of wedlock has primary physical custody of the child if:

(1) The mother has abandoned the child to the custody of the father; and

(2) The father has provided sole care and custody of the child in her absence.

(3) For the purposes of this section, "abandoned" means failed, for a continuous period of not less than 6 weeks, to provide substantial personal and economic support.

This court has held that it was error for a district court to reject the findings of a referee as to custody and award custody "without conducting a proper evidentiary hearing concerning the fact or facts in issue."⁵ This court held that:

[I]itigants in a custody battle have the right to a full and fair hearing concerning the ultimate disposition of a child. At a minimum, observance of this right requires that before a parent loses custody of a child, the elements that serve as a precondition to a change of custody award must be supported by factual evidence. Furthermore, the party threatened with the loss of parental rights must be given the opportunity to disprove the evidence presented.⁶

⁵Moser v. Moser, 108 Nev. 572, 577, 836 P.2d 63, 66-67 (1992).

⁶Id. at 576-77, 836 P.2d at 66 (internal citation omitted).

In Dagher v. Dagher, a case involving an order modifying custody,⁷ this court held that “the judicial policy favoring decision on the merits is heightened in domestic relations cases where, as here, the interests of nonlitigants are affected.”⁸

In Rooney, this court defined “adequate cause” for an evidentiary hearing thusly:

“Adequate cause” arises where the moving party presents a prima facie case for modification. To constitute a prima facie case it must be shown that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching.⁹

Finally, in Wiese v. Granata, this court considered a change in custody that resulted from a hearing on a non-custodial mother’s motion to extend a temporary order of protection and modify visitation.¹⁰ The motion did not request a change of custody, and the father was advised by counsel he did not have to attend the hearing.¹¹ The court issued an order

⁷103 Nev. 26, 28, 731 P.2d 1329, 1329 (1987) (A divorced mother did not appear at a hearing on the father’s motion for custody modification, since the notice did not inform her the hearing might involve a change of custody. This court held that “If there is to be a change of custody, [the mother] is first entitled to a proper hearing on that issue.”).

⁸Id. at 28, 731 P.2d at 1329.

⁹Rooney, 109 Nev. at 543, 853 P.2d at 125 (citing Roorda v. Roorda, 611 P.2d 794, 796 (Wash. Ct. App. 1980)).

¹⁰110 Nev. 1410, 887 P.2d 744 (mother had obtained a temporary order for protection from the father, claiming past abuse and a current feeling of being threatened).

¹¹Id. at 1411, 887 P.2d at 745.

after the hearing, granting the mother physical custody of the child; the father requested an emergency stay of that order.¹² At a hearing on the stay request, the father was not allowed to present any witnesses, and because the mother presented no evidence, the father had no chance to “disprove the evidence presented.”¹³ This court held that the hearing “cannot be construed as having provided [the father] with due process of law.”¹⁴

Here, it is unclear if either party was advised that final custody determinations were to be made at either of the hearings held after Bozzano’s original complaint. Bozzano’s counsel raised issues at the first hearing regarding the living arrangements for the child at Ricci’s house, as well as medical concerns, which were never addressed by the district court. In his complaint, Bozzano also raised allegations of abandonment of the child by Ricci, which were never addressed by the district court. It is apparent from the transcript of the hearing that both parties agreed to, and anticipated, an evidentiary hearing at which such issues were to be addressed. Additionally, before filing his complaint, Bozzano arguably had primary, if not sole, physical custody of the child, and as such, Bozzano’s custodial rights to his son were substantially affected by the district court’s order of joint legal and physical custody.

Based on the allegations of abandonment and the request for sole physical custody in Bozzano’s complaint, along with the issues of

¹²Id.

¹³Id. at 1413, 887 P.2d at 746 (quoting Moser, 108 Nev. at 576-77, 836 P.2d at 66).

¹⁴Id. at 1412, 887 P.2d at 746.

living arrangements and medical concerns voiced by counsel for Bozzano at the hearing where Ricci's motion for an evidentiary hearing was originally brought, we conclude that there was sufficient "adequate cause" for the district court to grant an evidentiary hearing. Bozzano's verified complaint is certainly analogous to the affidavits used to request custody modification in Rooney; and issues raised therein are relevant to a final custody determination.

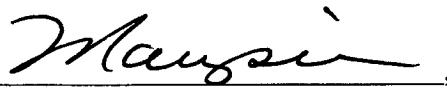
This court has made it clear that when making such an important determination as child custody, the district court needs to be sure that both parties had a full opportunity to present evidence and testimony to support their respective positions.¹⁵ We conclude that there were insufficient factual determinations in that the district court did not address Bozzano's statutory claim of entitlement to primary physical custody based on abandonment, nor his claims about unsatisfactory living arrangements and medical care provided by Ricci. The facts adduced at the scant hearings held here simply do not support a finding of a final grant of custody in the face of the several serious allegations made by Bozzano.

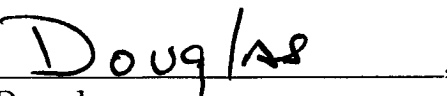
Finally, we conclude that due process requires an evidentiary hearing here, where important issues bearing on a "best interests of the child" analysis for a final custody determination may not have been fully evaluated by the court, and where Bozzano was not provided with an opportunity to present evidence relevant to that determination. Thus, we

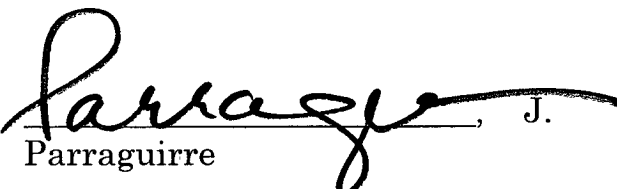
¹⁵Dagher, 103 Nev. at 27-28, 731 P.2d at 1329; Moser, 108 Nev. at 576-77, 836 P.2d at 66-67.

conclude the district court abused its discretion in making a final custody determination without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Steven E. Jones, District Judge, Family Court Division
Minicozzi & Associates, Ltd.
Frank J. Toti
Clark County Clerk