STUCKEY V. LAMPRELL

REX E. STUCKEY,
Petitioner-Appellee,
v.
TAMRA L. LAMPRELL,
Respondent-Appellant.

NO. A-1-CA-35538

COURT OF APPEALS OF NEW MEXICO

December 18, 2018

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY, Matthew J. Wilson, District Judge

COUNSEL

Boyle Law Office, Gary W. Boyle, Santa Fe, NM, for Appellee

Atkinson & Kelsey, PA, Thomas C. Montoya, Albuquerque, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: JULIE J. VARGAS, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Mother makes three arguments on appeal: (1) the procedure by which the district court adopted the September 27, 2013 interim order changing sole legal custody of Child from Mother to Father (the Interim Order) violated her right to due process, rendering the Interim Order void; (2) assuming the Interim Order is void, such a

determination requires that sole legal custody of Child be returned to Mother and that all subsequent orders of the district court on the issue of custody be deemed void; and (3) the district court erred in denying her postjudgment motion for a bonding study. We affirm. Because this is a memorandum opinion and the parties are familiar with the facts and procedural posture of the case, we set forth only such facts and law as are necessary to decide the merits.

BACKGROUND

{2} In July 2010, Father filed a petition to establish paternity, determine custody and time-sharing, and to assess child support with regard to Child. The district court, on its own motion, ordered that the case be referred to Family Court Services for mediation, early neutral evaluation, priority consultation or advisory consultation as deemed appropriate by Family Court Services. Priority consultation recommendations concerning custody and time-sharing were filed on October 11, 2012, recommending, in pertinent part, that Father be given unsupervised visitation. Mother filed objections to these recommendations.

{3} After an evidentiary hearing, the district court entered a final order on December 14, 2012, in which the court adopted the priority consultation recommendations and awarded Father unsupervised visitation. Updated priority consultation recommendations were filed on April 9, 2013, recommending, in pertinent part, that Father continue to have unsupervised visitation with Child and that advisory consultation should be conducted through Family Court Services to further address custody, time-sharing, and other parenting issues. The district court filed its order adopting these recommendations on May 20, 2013.

{4} In an order filed on September 6, 2013, the district court granted Father's motion to hold Mother in contempt for refusing to turn Child over to him for scheduled unsupervised visitation, and the district court also set a hearing for September 20, 2013 to "discuss the progress of the Advisory Consultation Recommendations and any request by the Consultant for additional information[,]" which was continued to September 27, 2013.

{5} At the September 27, 2013 hearing, the district court announced that Family Court Services had completed the advisory consultation report and because of the nature of the report and the concerns raised therein regarding Mother, the court was adopting Family Court Service's recommendations immediately. The district court explained to the parties in open court that "if such a drastic step is not made, then the child can be harmed." The September 27, 2013 written order adopting the advisory consultant's recommendations, the Interim Order, states that the advisory consultation report

> raises significant concerns regarding Mother's ability to parent, and [Child's] safety while with Mother including:

a. The results of Mother's psychological testing and diagnosis.

b. Concerns regarding [Child's] safety while with Mother.

c. That Mother 'is so highly consumed with this case that it interferes with her ability to spend time with [Child] to provide enriching activities. The investment of time and energy that Mother is making to analyze and interpret this case appears unhealthy and confirms the psychologist's assessment that her 'analytic skills can be detrimental when they are paired with suspiciousness, defensiveness, and self-protection.'

The district court therefore ordered, in pertinent part, that custody of Child be immediately transferred to Father on an interim basis. The parties were given copies of the advisory consultation report at the September 27, 2013 hearing and were informed that a hearing on any objections to the advisory consultation recommendations would be held on December 10, 2013.

{6} Mother filed objections to the Interim Order and a Rule 1-060(B) NMRA motion for reconsideration on October 9, 2013. However, there was significant delay in the hearing on Mother's objections to the Interim Order. This delay was the result of the following events: (1) the district court's order granting Mother's December 6, 2013 motion to postpone the hearing until at least late January 2014 based on the anticipated withdrawal of her attorney; (2) Mother's motion seeking the judge's recusal for a conflict of interest, which was granted and left the case without a judge until February 5, 2014; (3) litigation of Mother's Rule 1-060(B) motion for relief from the Interim Order, which was denied on June 30, 2014; motions practice following Family Court Services' July 2, 2014 filing of updated priority consultation recommendations, recommending that the Interim Order remain in place; (5) Mother's litigation with the Office of the Attorney General seeking to obtain from Family Court Services the records relied upon in forming the advisory and priority consultation recommendations, which resulted in the district court's September 2, 2014 order compelling production of the requested records to Mother; and (6) delay caused by the parties' joint motion to vacate the scheduled September 11, 2014 hearing on Mother's objections to the Interim Order, which the district court granted and reset for October 28 and 29, 2014.

{7} On February 13, 2015, after a three-day evidentiary hearing on October 28 and 29, 2014 and February 2, 2015, the district court entered a final order (Final Order) resolving Mother's objections to the Interim Order and certain other motions filed by Mother seeking to expand her visitation with Child. Over the course of this three-day hearing, Mother called witnesses on her behalf, cross-examined witnesses against her, and argued the merits of her objections to the Interim Order and advisory consultation recommendations.

{8} Applying NMSA 1978, Section 40-4-9 (1977), the district court concluded that it was in the best interest of Child that Father maintain sole legal custody, that Mother have periods of unsupervised visitation, and that to the extent that Mother's objections

to the Interim Order or advisory and priority consultation recommendations conflicted with the court's findings and conclusions, such objections were overruled. In pertinent part, the district court found that: "Father is capable of supporting a relationship between [C]hild and Mother. Mother's ability to support a relationship between the child and Father is questionable at best." [C]hild should not be subject to another major change in custody at this time." "[C]hild is currently doing well."

{9} Over eight months after entry of the Final Order, on October 22, 2015, Mother filed a motion for a bonding study to determine the best interest of Child with regard to custody and visitation. On March 7, 2016, the district court denied the motion. The district court found that Mother's motion was an untimely discovery motion and that "[p]rior to the trial on the merits, the parties had an extensive period in which to conduct discovery. [Mother] had an opportunity to participate in discovery and the Court issued orders at [Mother's] request requiring additional disclosure of information from Family Court Services and Las Cumbres Community Services."

{10} Mother appeals.

DISCUSSION

I. Due Process in Entry of the Interim Order

{11} Mother argues that the Interim Order was entered in violation of procedural due process and is therefore void. Mother asserts that the due process violation stems from the district court's failure, prior to adopting Family Court Services' advisory consultation recommendations, to give her prior notice that a change in custody matter would be heard and opportunity to object to the advisory consultation recommendations and to examine witnesses. Mother further contends that the advisory consultation recommendations "were based on a report which was not received in evidence, which report was based on a non-expert's reliance on hearsay" and was adopted as a result of ex parte communications between the district court and Family Court Services.

{12} Father responds that "Mother received appropriate due process[.]" Father asserts that "a post-deprivation hearing [held] within a reasonable period does not violate [a] parent's minimum federal due process rights" and that a district court is empowered to take whatever interim actions are needed to protect the best interest of a child even prior to being given an opportunity to be heard. Further, "[b]ecause the [Interim Order] was an interim order only and because the [post-deprivation] hearing afforded to Mother was reasonably scheduled," Father contends, Mother's due process rights were not violated. We agree.

{13} "The Fourteenth Amendment to the U.S. Constitution guarantees citizens . . . procedural due process in state proceedings." *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶ 21, 118 N.M. 470, 882 P.2d 511. Our review is de novo. *See State ex rel. Children, Youth & Families Dep't v. Christopher L.*, 2003-NMCA-068, ¶ 14, 133 N.M. 653, 68 P.3d 199 ("In passing upon claims that the

procedure utilized below resulted in a denial of procedural due process, we review such issues de novo." (alteration, internal quotation marks, and citation omitted)).

{14} Procedural due process requires "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *State of N.M. ex rel. Children, Youth & Families Dep't v. William M.*, 2007-NMCA-055, ¶ 37, 141 N.M. 765, 161 P.3d 262; *see In re Laurie R.*, 1988-NMCA-055, ¶ 22, 107 N.M. 529, 760 P.2d 1295 ("Procedural due process requires notice to each of the parties of the issues to be determined and opportunity to prepare and present a case on the material issues.") However, "due process requires flexibility and . . . in extraordinary situations, the requirement of notice and opportunity to be heard can be postponed until after the deprivation of a constitutionally protected interest." *Yount v. Millington*, 1993-NMCA-143, ¶ 25, 117 N.M. 95, 869 P.2d 283; *see In re Ronald A.*, 1990-NMSC-071, ¶ 3, 110 N.M. 454, 797 P.2d 243 ("A parent's right in custody is constitutionally protected[.]").

{15} Our Supreme Court has recognized, and we have held, that a district court may modify a custody order on an interim basis without a hearing where the court determines that the modification is in accordance with the safety, welfare, and best interests of the child. *See Tuttle v. Tuttle*, 1959-NMSC-063, ¶ 11, 66 N.M. 134, 343 P.2d 838 (stating that in an emergency, a district court may issue an order that temporarily modifies custody of children without a hearing, where the order is guided by the "welfare and best interests of the children"); *Yount*, 1993-NMCA-143, ¶ 25 (stating that the district court may enter an interim order modifying custody without a hearing "when a child's safety is threatened").

{16} Here, the district court's Interim Order, which was entered without prior notice or a pre-deprivation hearing, was based on the court's determination that if such a drastic step was not taken, then the safety and welfare of Child may be at risk. Specifically, the district court found, in light of the advisory consultation recommendations, there were "significant concerns regarding Mother's ability to parent, and [Child's] safety while with Mother including: . . . [t]he results of Mother's psychological testing and diagnosis[,]" which showed that "Mother is so highly consumed with this case that it interferes with her ability to spend time with [Child] to provide enriching activities." The district court further found that "[t]he investment of time and energy Mother is making to analyze and interpret this case appears unhealthy and confirms the psychologist's assessment that her analytic skills can be detrimental when they are paired with suspiciousness, defensiveness, and self-protection." Under these circumstances, we conclude the district court acted reasonably and in accordance with the safety, welfare, and best interest of Child in immediately adopting the advisory consultation recommendations, and as a result, ordering sole legal custody of Child be transferred to Father on an interim basis. *See Yount*, 1993-NMCA-143, ¶¶ 4-5, 24-26 (determining that the mother's procedural due process rights were not violated, where the district court entered an ex parte order giving custody of her child to the Children, Youth and Families Department on an interim basis, and without a pre-deprivation hearing, based on a determination that the child's safety and welfare may be at risk with the mother); *see also In re*

Guardianship of Ashleigh R., 2002-NMCA-103, ¶ 34, 132 N.M. 772, 55 P.3d 984 ("In child custody matters, even when the court must protect the rights of the parent, the court has equitable power to fashion a remedy that protects the best interest of the children as well.").

{17} Mother was afforded due process after the entry of the Interim Order through the post-deprivation proceedings on her objections to the Interim Order. Due process, in the context before us, requires consideration of the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) factors, described as: "(1) a parent's significant interest affected by the proceeding[;] (2) the value of additional safeguards and the risk of an erroneous deprivation unless alternative arrangements are made[;] and (3) the State's vital interest in protecting the welfare of children." *State ex rel. Children, Youth & Families Dep't v. Christopher L.*, 2003-NMCA-068, ¶ 15, 133 N.M. 653, 68 P.3d 199. In this case, as in *Christopher L.*, "in balancing the parent's rights and interest and the State's rights and interest, the determinative factor is the second prong of the *Mathews* test, balancing the risk of error with the value of additional safeguards." *See Christopher L.*, 2003-NMCA-068, ¶ 15 (omission, alteration, internal quotation marks, and citation omitted). Under this prong, New Mexico appellate courts consider whether the complaining party was given:

> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.

See Harrell, 1994-NMSC-096, ¶ 25 (internal quotation marks and citation omitted).

{18} Regarding the first *Harrell* factor, although neither Mother nor Father were given notice prior to the September 27, 2013 hearing that the advisory consultation recommendations were complete and that the district court intended to immediately adopt them by order, the district court gave the parties copies of the advisory consultation recommendations and immediately set a hearing to address the parties' objections—which was originally set to occur on December 10, 2013. The district court also stated in the Interim Order that the parties would be given an opportunity to object, consistent with Rule 1-125(E) (stating that "[i]f a party does not agree with the recommendations, within eleven (11) days of the filing of the advisory consultation recommendations, the party shall file a motion specifically describing the reasons for a party's objections to the recommendations"), to the advisory consultation recommendations.

{19} Regarding the second through sixth *Harrell* factors, the record shows that Mother was afforded, after substantial discovery and drawn out litigation, an opportunity to make an oral presentation of her objections to the advisory consultation

recommendations and Interim Order, to present evidence, and to examine witnesses and confront witnesses against her in a post-deprivation hearing with her attorney present. Specifically, following the September 27, 2013 hearing, Mother filed objections and her Rule 1-060(B) motion for relief from the Interim Order on October 9, 2013. After filing her objections to the advisory consultation recommendations and Interim Order, as we have already noted, there was a significant delay in the hearing on Mother's objections for the reasons stated.

{20} Mother was then afforded a full evidentiary hearing to address her objections to the advisory consultation recommendations and Interim Order, which occurred over three days on October 28 and 29, 2014 and February 2, 2015. At this hearing, Mother called witnesses on her behalf, cross-examined witnesses against her, and argued the merits of her objections. After this hearing, and in satisfaction of the seventh *Harrell* factor, the district court filed the Final Order, in which it applied Section 40-4-9 and determined that based on the record before it, Father should be awarded permanent sole legal custody of Child.

{21} We conclude that the Interim Order is not void as entered in violation or Mother's right to procedural due process. In so concluding, we need not address Mother's related argument that a determination that the Interim Order is void requires that sole legal custody of Child be returned to her and that all subsequent orders of the district court on the issue of custody and visitation should also be deemed void.

II. Denial of Mother's Motion for a Bonding Study

{22} Mother also argues that the district court erred in denying her motion for a bonding study.

{23} "We review a district court's discovery orders for an abuse of discretion." *Vanderlugt v. Vanderlugt*, 2018-NMCA-073, ¶ 30, 429P.3d 1269. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Chavez v. Lovelace Sandia Health Sys., Inc.*, 2008-NMCA-104, ¶ 25, 144 N.M. 578, 189 P.3d 711 (internal quotation marks and citation omitted).

{24} In its order denying Mother's motion for a bonding study, the district court found that Mother's motion was an untimely discovery motion, which was not filed until more than eight months after the district court's entry of the Final Order. The district court further found that "[p]rior to the trial on the merits, the parties had an extensive period in which to conduct discovery. [Mother] had an opportunity to participate in discovery and the Court issued orders at [Mother's] request requiring additional disclosure of information from Family Court Services and Las Cumbres Community Services." We agree; and under these circumstances, we cannot say that the district court's denial of Mother's motion was clearly against the logic and effect of the fact and circumstances of the case. We therefore conclude that the district court did not abuse its discretion in denying Mother's motion for a bonding study.

III. Father's Request for Fees on Appeal

{25} Finally, because Father is the prevailing party in this appeal, we address his request for an award of attorney fees incurred as a result of this appeal. Father correctly asserts that NMSA 1978, Section, 40-4-7 (1997) and Rule 1-127 NMRA provide that attorney fees may be awarded to the prevailing party on appeal in custody cases, *see Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 49, 111 N.M. 319, 805 P.2d 88; *Hester v. Hester*, 1984-NMCA-002, ¶ 26, 100 N.M. 773, 676 P.2d 1338 (same), and we hold that Father is entitled to file a motion pursuant to the foregoing authority for such attorney fees. However, because the determination of an award of attorney fees in a domestic relations case "requires consideration of the disparity of the parties' resources, prior settlement offers, the total amount of fees and costs expended by each party and success on the merits[,]" we remand to the district court for findings of fact and conclusions of law on the issue of attorney fees. *See Jury v. Jury*, 2017-NMCA-036, ¶¶ 59-60, 392 P.3d 242 (internal quotation marks and citation omitted). Costs should be awarded by the clerk.

CONCLUSION

{26} The district court's Interim Order and order denying Mother's motion for a bonding study are affirmed. We remand to the district court for further proceedings in accordance with this opinion.

{27} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

HENRY M. BOHNHOFF, Judge