APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 09, 2019

NO. S-1-SC-37579

REX E. STUCKEY,

Petitioner-Respondent,

v.

TAMRA L. LAMPRELL,

Respondent-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-502 NMRA, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Barbara J. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring, Justice Michael E. Vigil recusing;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED; and

IT IS FURTHER ORDERED that the Court of Appeals may proceed in *Stuckey v. Lamprell*, Ct. App. No. A-1-CA-35538 in accordance with the Rules of Appellate Procedure.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 9th day of April, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

By /s/ Madeline Garcia
Chief Deputy Clerk

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REX E. STUCKEY,

Petitioner-Appellee

v. **NO. A-1-CA-35538**

TAMRA L. LAMPRELL,

Respondent-Appellant.

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

Boyle Law Office
Gary W. Boyle
Santa Fe, NM

for Appellee

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

for Appellant

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 l-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.

s/ Michael E. Vigil

MICHAEL E. VIGIL, Judge

WE CONCUR:

s/ Julie J. Vargas
JULIE J. VARGAS, Judge

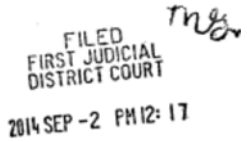
s/ Henry M. Bohnhoff
HENRY M. BOHNHOFF, Judge

APPENDIX C

[FILED UNDER SEAL]

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF RIO ARRIBA
FIRST JUDICIAL DISTRICT



CASE NO.: D-0117-DM-2010-00151

REX E. STUCKEY,

Petitioner,

vs.

TAMRA L. LAMPRELL,

Respondent.

ORDER DENYING MOTION FOR PROTECTION

THIS MATTER came before the Court on August 26, 2014 on the Motion for Protection. The Petitioner, Rex Stuckey, appeared in person and with his attorney Gary Boyle. The Respondent, Tamra Lamprell, appeared in person and with her attorney Julie Rivers. The Attorney General's Office appeared through Assistant Attorney General Rebecca Parish. Having heard the presentation of the parties, the Court FINDS and ORDERS:

1. The Court has subject matter and personal jurisdiction in this case.
2. Gary Lombardo of Family Court Services with the First Judicial District Court issued

Advisory Consultation Recommendations, which were adopted by the Court on an interim basis.

3. The Respondent issued two subpoenas in this matter. One subpoena was issued to Mr. Lombardo. The Second subpoena was issued to Dr. Warren Steinman. Both subpoenas request the production of documentation relating to the Recommendations made by Mr. Lombardo as part of the advisory consultation.
4. Dr. Steinman filed Objections to the subpoena that was issued to him.
5. In his Objections, Dr. Steinman states that the material requested in the subpoena may not be produced without an order from the Court.
6. On behalf of Mr. Lombardo, the Attorney General's Office filed a Motion for Protection. Dr. Steinman joined this Motion. The Motion requests that the Court quash the subpoenas or otherwise grant Mr. Lombardo and Dr. Steinman protection from the subpoenas.
7. The Advisory Consultation Recommendations submitted and adopted by the Court on an interim basis had a fundamental impact on this case that resulted in a reversal in the custody arrangement between the parties.
8. Without disclosure of the documentation obtained, used and generated as part of the advisory consultation, a party's ability to respond and object to the Advisory Consultation Recommendations is impaired.

9. Looking at the rules of discovery for guidance, the parties have the right to assess the reliability of the science and methodology that was used in the formulation of the Advisory Consultation Recommendations.
10. Due process requires disclosure.
11. Also, the documentation requested by the Respondent is not necessarily confidential. The documentation was obtained, used and generated as part of an advisory consultation and not as part of a mediation proceeding.
12. The Motion to quash the subpoenas is denied.
13. Mr. Lombardo and Dr. Steinman shall comply with the subpoenas within 10 business days from the filing date of this order.
14. The documentation and material generated in the response to the subpoenas shall be provided to attorney Julie Rivers and to attorney Gary Boyle.
15. The attorneys shall not disclose the contents of any of the documentation or material that they obtain as a result of the subpoenas to any other person, including their clients.
16. The documentation and material shall only be used in preparation for the upcoming hearing on objections to the Advisory Consultation Recommendations and Priority Consultation Recommendations.
17. Julie Rivers may provide a copy of the documentation and materials to her expert witness, Dr. Sam Roll.

18. If Mr. Boyle retains an expert (either a psychologist or psychiatrist), Mr. Boyle is permitted to supply a copy of the documents and materials to that expert only.
19. The experts to whom the documentation and material is provided pursuant to this order shall first sign a non-disclosure agreement in accordance with the terms of this order.
20. Failure to abide by the Court's order limiting disclosure may result in initiation of contempt proceedings.

SO ORDERED:

s/ Matthew Wilson
Matthew J. Wilson
District Court Judge

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that I mailed or hand delivered a copy of this document to all parties listed below on September 2, 2014.

Rex E. Stuckey
c/o Gary Boyles, Esq.
15 Spirit Court
Santa Fe, NM 87506

Tamra L. Lamprell
c/o Julie Rivers, Esq.
P.O. Box 2325
Santa Fe, NM 87504

Gary King
New Mexico Attorney General
c/o Scott Fuqua, Esq.
Assistant Attorney General
408 Galisteo St.
Santa Fe, NM 87501

s/ Hollie Tanabe
Hollie Tanabe, TCAA

APPENDIX E

[FILED UNDER SEAL]

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

REX E. STUCKEY,

Petitioner-Appellee,

vs.

TAMRA L. LAMPRELL,

Respondent-Appellant.

No. 33,295
Rio Arriba County
DM-1-151
D117 DM 2010 0015

ORDER

This Court has considered Tamra L. Lamprell's Rule 12-503 NMRA Petition for Writ of Error, as well as Rex. E. Stuckey's Response to the Petition.

THE COURT ORDERS that the petition is **DENIED** and that this matter is remanded to the District Court of Rio Arriba County for further proceedings.

We further **DENY** Lamprell's request for a stay, as well as Stuckey's request for attorney fees on appeal.

s/ Roderick T. Kennedy
RODERICK T. KENNEDY, Chief Judge

s/ Linda M. Vanzi, Judge
LINDA M. VANZI, Judge

APPENDIX G

[FILED UNDER SEAL]

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

May 06, 2019

NO. S-1-SC-37579

REX E. STUCKEY,

Petitioner-Respondent,

v.

TAMRA L. LAMPRELL,

Respondent-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and brief in support, and the Court having considered the foregoing and being sufficiently advised; Chief Justice Judith K. Nakamura, Justice Barbara J. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring, Justice Michael E. Vigil recusing;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing is DENIED.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 6th day of May, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

By /s/ Madeline Garcia
Chief Deputy Clerk

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

REX E. STUCKEY,

Petitioner-Appellee,

v.

TAMRA L. LAMPRELL,

Respondent-Appellant.

/

No. A-1-CA-35538
Rio Arriba County
D-117-DM-2010-00151

ORDER DENYING MOTION FOR REHEARING

This matter is before the Court on Appellant's motion for rehearing and the brief in support thereof. The motion has been considered by one of the original panel members and, pursuant to Rule 12-404(B)(2) NMRA, another judge has been designated to consider the motion.

THE COURT ORDERS THAT the motion is **DENIED.**

s/J. Miles Hanisee
J. MILES HANISEE, Judge

s/Julie J. Vargas
JULIE J. VARGAS, Judge

APPENDIX J

STATE OF NEW MEXICO
COUNTY OF RIO ARRIBA
FIRST JUDICIAL DISTRICT

Case No. D-0117-DM-2010-00151

REX E. STUCKEY,
Petitioner,
vs.

TAMRA L. LAMPRELL,
Respondent,

ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER FEBRUARY 13, 2015 FINAL ORDER

THIS MATTER having come before the Court for hearing on February 29, 2016, and the Petitioner appearing in person and through his counsel, Gary W. Boyle, and the Respondent appearing in person and through her counsel, Thomas C. Montoya, and the Court having reviewed the parties' filings and having heard the parties' arguments on the motion, and being fully advised in the premises;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over this proceeding.

2. The Court has not heard anything that would change the Court's ruling regarding sole custody in this case.

3. There is some value to sole custody when one parent cannot co-parent. The value lies in that the child will not be exposed to parental conflict. The Court cannot see the parents in this case functioning at all under a joint custody situation given the history and facts of this case.

4. Father will continue to have sole custody of the child which is in the child's best interests.

5. The Court has carefully considered Mother's argument that Mother's and the child's constitutional rights to due process of law were violated by the Court's September 27, 2013 order. The Court does not find that there was a due process violation or constitutional violation as to Mother or the child.

6. Based on the findings recited above, the Court concludes that Respondent's Motion to Reconsider the Court's Final Order issued February 13, 2015 should be and the same hereby is denied.

7. The Court finds and concludes further that it is in the best interests of the child to amend the Court's Final Order by providing Mother with unsupervised visitation in Santa Fe, New Mexico in addition to that provided for in the Final Order as follows:

a. Mother shall have a period of responsibility for the child on Mother's Day and on Mother's birthday each year from 9:00 a.m. until 5:00 p.m.

b. Mother shall have a period of responsibility for the child on Christmas Day in even numbered years

from 9:00 a.m. until 5:00 p.m. Father shall have responsibility for the child on Christmas Day in odd-numbered years.

c. Mother shall have a period of responsibility for the child on Thanksgiving Day in odd numbered years from 9:00 a.m. until 5:00 p.m.

d. Mother shall have a period of responsibility for the child on Easter Sunday in even numbered years from 9:00 a.m. until 5:00 p.m.

e. Mother shall have a period of responsibility for the child on Memorial Day in even numbered years from 9:00 a.m. until 5:00 p.m. Father shall have responsibility for the child on Memorial Day in odd numbered years.

f. Mother shall have a period of responsibility for the child on the Fourth of July in odd numbered years from 9:00 a.m. until 5:00 p.m. Father shall have responsibility for the child on the Fourth of July in even numbered years.

8. The minor child shall continue in counseling with Rhonda Albin at Lark's Nest Family Counseling for one hour each week.

9. Mother's request for additional weekend visitation with the child is denied.

10. All provisions of the Court's Final Order not altered by the terms of this Order shall remain in full force and effect.

SO ORDERED:

s/ Matthew Wilson
Matthew Wilson
District Court Judge

Submitted by:

Gary W. Boyle
Attorney at Law
15 Spirit Court
Santa Fe, NM 87506
(505) 989-5057

Attorney for Petitioner

s/ Gary W. Boyle

Approved as to form:

Electronically Approved 3/7/16
Thomas C. Montoya
Atkinson & Kelsey, P.A.
P.O. Box 3070
Albuquerque, NM 87190
(505) 883-3070
Attorney for Respondent

APPENDIX K

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. **S-1-SC-37579**

REX E. STUCKEY,

Petitioner-Respondent,

vs.

TAMRA L. LAMPRELL,

Respondent-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

Oral argument is respectfully requested.

Respectfully submitted,

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* * *

A. ***Grounds Invoking Supreme Court Jurisdiction***

N.M. Const. art. VI, §2 (appellate jurisdiction); §3 (certiorari jurisdiction); NMSA 1978 Sections 34-5-14(B)(l)-(4) (certiorari).

B. ***Date Of Decisions***

1. December 18, 2018.*Memorandum Opinion*, Exhibit 1, attached.

2. January 2, 2019 *Motion For Rehearing*, Exhibit 2, attached.

3. February 11, 2019 *Order Denying Motion For Rehearing*, Exhibit 3, attached.

C. ***Questions Presented For Review***

1. ***Issue 1.*** Whether the September 27, 2013 *Order* issued by the district court, which summarily removed joint and physical custody of the child from Mother, and granted sole legal and physical custody of the child to Father, with only a 2 hour supervised visit per week with Mother, is void, or without waiver, voidable, as a matter of law, as lacking due process under federal and state law, when the *Order* was issued without notice that a modification of child custody would be considered, when the court immediately and summarily adopted the First Judicial District Court Clinic Recommendations in a Report, without any witness testifying, without admitting the Report or Recommendations in evidence, when the Report and Recommendations were originally provided to the parties at the September 27, 2013 hearing, after the Court had already adopted the Recommendations in its *Order*,

when the parties had no opportunity to present evidence or examine witnesses, and when the court ordered the immediate custody modification from joint custody, and physical custody with Mother, to sole legal and physical custody with Father, in the first four (4) minutes of the hearing?

a. This issue was preserved. A-l-CA-35538; *Brief in Chief* pp. 28–41.

2. ***Issue 2***. Whether, lacking due process, the district court had authority, and thus jurisdiction, to enter the September 27, 2013 *Order*, rendering the *Order* void, or voidable?

a. This issue was preserved. A-1-CA-35538; *Brief in Chief* pp. 28–41. *Reply Brief*, pp. 17–18.

3. ***Issue 3.*** Whether, the void or voidable September 27, 2013 *Order* requires that the child's custody be restored to the status quo prior to entry of the void or voidable order, thereby voiding all subsequent orders, resulting in immediate custody of the child with Mother?

a. This issue was preserved. A-l-CA-35538; *Brief in Chief* pp. 41–44. *Reply Brief*, pp. 17–18.

4. ***Issue 4.*** Whether, and to what extent, a district court has authority to engage in ex parte communications with a witness, or independently investigate facts or consider as evidence matters outside of regular judicial proceedings, contrary to the Code of Judicial Conduct, and enter a valid order therefor?

a. This issue was preserved. A-1-CA-35538; *Brief in Chief* pp. 39–41; Motion For Rehearing, pp. 6–7.

D. ***Facts Material to Questions Presented***

The essential facts are undisputed, and are of record as provided below.

The parties were never married. RP 1. The child was born in Durango, Colorado in 2010. RP 297, ¶ 3. Mother resides in Pagosa Springs, Colorado. RP 819, ¶ 9. Father resides in Santa Fe, New Mexico. RP 819, ¶ 9.

On December 14, 2012, the district court entered a final custody *Order*. This *Order* granted the parties joint legal custody of the child, with physical custody with Mother in Colorado, subject to specified visitation with Father. RP 818, ¶4(a); RP 811.

On February 6, 2013, Father filed a motion to re-open the case, prior to the time the final *Order* permitted, which motion did not seek physical nor sole legal custody of the child, but unsupervised visitation. RP 827. Father alleged no change in circumstances which would justify custody modification of the December 14, 2012 final *Order*.

On August 21, 2013, Father filed a contempt motion for alleged unlawful withholding of the child by Mother. RP 1025–1033. On September 3, 2013, Mother filed contempt motion alleging unlawful withholding of the child by Father. RP 1064–1073. The court entered a September 6, 2013 order finding Mother in contempt for non-compliance with court ordered visits. The court ordered visits to resume, but supervised. RP 1074–1077, p. 3, ¶s 1 and 2. The court ordered Mother's September 3, 2013 *Motion* to be heard September 20, 2013, and stated, "This Court shall also, at that time, discuss the progress of the Advisory Consultation Recommendations and any

request of the Consultant for additional information." RP 1076, ¶4.

On September 18, 2013, the court reset hearing on Mother's September 3, 2013 *Motion* to September 27, 2013 at 9:00 a.m.. RP 1100–1101. In that *Order*, the court directed that the child be brought to the courthouse thirty minutes before the hearing to visit Father. *Id.*

On September 27, 2013, the court entered *Interim Order Adopting Advisory Consultation Recommendations*. RP 1105–1109. This *Order* was issued without notice that a custody modification would be considered. The *Order* stated ". . . the matter came before the Court on September 27, 2013 for a Status Hearing/Conference." RP 1105. The *Order* included the custody provisions contained in ***Issue 1*** above, pp. 1–2 of this *Petition*.

At the September 27, 2013 hearing, the court directed staff to hand out the *Advisory Consultation Report*, which the parties had not previously received. RP 3063, line 25 to RP 3064, line 4. The *Advisory Consultation Report* consists of 20 single spaced typewritten pages.

At the September 27, 2013 hearing, the *Advisory Consultation Report* was not received in evidence. RP 3061–3081. It appears that the court prepared the September 27, 2013 *Order* adopting the Recommendations prior to the hearing. The Court stated "The court order is being finalized now. It is being filed, and each of you will receive a copy of it." RP 3064, page 4, lines 19–21.

At the September 27, 2013 hearing, no witnesses testified, no testimony was elicited regarding the

Advisory Consultation Report and there was no direct nor cross-examination of the author thereof. RP 3061–3081.

During the September 27, 2013 hearing, the court ordered the child be immediately taken from the courthouse by Father, and granted Father immediate sole legal and physical custody of the child in Santa Fe, and allowed Mother supervised visitation for one time per week (effectively 1½ hours). The Court stated:

> "Because of the nature of the report and the — the concerns raised by Gary Lombardo regarding Mother, this Court is adopting the recommendations immediately. The recommendations are that Father have sole custody of this child effective immediately. The child is to be taken from the courthouse by Father." RP 3064 p. 4, lines 7–13.

The September 27, 2013 hearing commenced at 9:25:24 a.m. The order quoted above in the prior subparagraph occurred at 9:28:52 a.m., less than four minutes after the hearing commenced. Court Monitor Log of September 27, 2013 hearing. RP 3079.

At the September 27, 2013 hearing, Mother requested permission to say goodbye to the child. The court denied the request, stating "No, but Family Court Services is concerned about that interaction." RP 3071, lines 22–25. The *Advisory Consultation Report* states nothing about such a concern.

Prior to the September 27, 2013 hearing, the child had been in Mother's continuous care and custody since birth for over 3 years and 7 months.

Mother's September 3, 2013 *Motion*, which was the matter noticed to be heard on September 27, 2013, and for which Mother was prepared with law enforcement and Safe House witnesses to testify in support of her contempt motion, and which could have countered "safety concerns" allegations and raised "safety concerns" on Father's part, was not heard. RP 3062, lines 11–13; RP 3070, lines 17–20.

The Court set hearing on any objections to the Advisory Consultation Recommendations on December 10, 2013, 74 days after issuance of the *Order* adopting them. RP 1106, ¶5.

On October 9, 2013, Mother filed *Amended Objections to the Order Adopting Advisory Consultation Recommendations*. RP 1123–1158. The hearing on Mother's objections was postponed for a number of significant due process reasons, including substantial opposition from the Attorney General's office to Mother's discovery requests from Family Court Services regarding its *Report*, and objection to Mother's discovery of the Court Clinic's psychologist, Dr. Warren Steinman. September 2, 2014 *Order Denying Motion For Protection*. RP 1658–1661. In that *Order* the court found:

> "The Advisory Consultation Recommendations submitted and adopted by the Court on an interim basis *had a fundamental impact on this case that resulted in a reversal in the custody arrangement between the parties*," (Emphasis added.)

On June 30, 2014, following hearing, the court entered *Order Denying Rule 60B Motion*, RP 1542–1544. No evidence was admitted at the hearing. Court

Monitor Log of June 26, 2014 hearing, Exhibit E, attached to June 12, 2017 *Memorandum In Opposition To Second Notice Proposed Summary Disposition*. [6-26-14 Tr. 9:03:54 to 10:14:58.]

On February 13, 2015, the court entered *Final Order Resolving The Objections To The September 2013 Advisory Consultation, The July 2014 Priority Consultation And The Respondent's Motion Concerning An Expedited And Extended PC, To Expand Visitation And To Lift Supervision Requirements* ("February 13, 2015 *Final Order*"). RP 2008–2013.

The Court Clinic Report and Recommendations, which were the basis of the September 27, 2013 *Order*, were not received in evidence until the October 29, 2014 hearing on the merits. [Respondent's Exhibits, Volume I, Exhibit 6.]

The February 13, 2015 *Final Order* included in the findings, RP 2009–2010:

a. "The minor child is fragile and of tender years." p. 2, ¶3;

b. "*Neither party is a direct or imminent threat to the minor child*," p. 2, ¶4. (Emphasis added.)

c. "The child should not be subject to another major change in custody at this time." p. 3, ¶16.

At trial, the author of the Advisory Consultation Report, Gary Lombardo, a Licensed Professional Clinical Counselor, testified not as an expert, that Family Court Services doesn't ordinarily make diagnostic conclusions, and that he did not make such a diagnosis regarding Mother, and that neither did

Dr. Warren Steinman, referenced in the Report, make a diagnosis of a personality disorder for Mother. Instead, Dr. Steinman did not "rule out" a personality disorder for Mother. To the contrary, Mr. Lombardo testified that Dr. Leslie Pearlman, who had previously performed diagnostic evaluations for Family Court Services, stated that Mother had no personality disorder, which testimony was directly confirmed at trial by both Dr. Pearlman and Dr. Samuel Roll. Mr. Lombardo testified that his allegations regarding Mother's mental condition and safety concerns for the child were speculations and suppositions. [Testimony of Gary Lombardo, Family Court Services 10-29-14 Tr. 10:29; 11:29–11:37]

In the February 13, 2015 *Final Order*, which permitted unsupervised visitation of the child with Mother, the court made no finding regarding safety issues which would have justified the September 27, 2013 *Order* at the time it was issued, nor any other time.

E. *Basis For Granting The Writ*

1. ***Conflicts with Supreme Court Decisions***

a. *Heckathorn v. Heckathorn*, 1967-NMSC-017, ¶10–11, 77 N.M. 369, 423 P.2d 410 (S. Ct. 1967). The lack of power or authority to decide a case renders a judgment void.

b. *Phoenix Funding, LLC v. Aurora Loan Services, LLC*, 2017-NMSC-010, ¶s 26, 27 and 29, 390 P.3d 174: . . . a court's power or authority to decide the particular matter presented is not distinct from subject matter jurisdiction."

c. *Merrill v. Merrill*, 1971-NMSC-036, ¶10, ¶9, 82 N.M. 458, 483 P.2d 932:

"Judicial discretion and decision must be based on evidence introduced at the trial and since the record proper in the instant case does not support the trial court's decision, there was an abuse of discretion in entering the order changing custody of the minor children without evidentiary support."

"Trial courts have a wide discretion in custody matters. That discretion is "judicial" and must be based on evidence introduced in the case and is subject to review. (Citing *Martinez*, below)"

"Judicial discretion is a discretion which is not arbitrary, vague or fanciful, or controlled by humor or caprice, but is a discretion governed by principal and regular procedure for the accomplishment of the ends of right and justice. * * * (Citations omitted.)"

d. *Martinez v. Martinez*, 1946-NMSC-003, ¶¶ 9–12, 49 N.M. 405, 165 P.2d 125 (S. Ct. 1946):

"... it is certain that [the Guardian ad Litem's report] was the basis of [the trial court's] decision to appoint the parents of the defendant as custodians of the child, although it had not been introduced in evidence, filed in the case, or its contents disclosed to counsel. ..."

"... the witnesses should testify at a hearing before the court... conducted as the law directs."

"It was, obviously, error on the part of the trial court to determine the issues in this case upon a confidential report of his public welfare worker, based upon unsworn testimony, the contents of which were not evidence in the cause or disclosed to the parties."

e. *Oldfield v. Benavidez*, 1994-NMSC-006, ¶14, 116 N.M. 785, 867 P.2d 1167 (S. Ct. 1994). There is a clearly established right to familial integrity embodied in the Fourteenth Amendment.

f. *Tuttle v. Tuttle* 1959-NMSC-063, ¶s 9, 10–11, 66 N.M. 134, 343 P.2d 838 (S. Ct. 1959):

> "... due and orderly process demand ... that there shall be opportunity to bring before the court matters in rebuttal of such proof, if any there be. These rights were denied by the order made below. (Citing *Martinez* above) (citations omitted)."
>
> "... the statute [currently NMSA 1978 Section 40-4-7] does not mean that the court can act without a hearing, after notice to all necessary parties, and after giving them an opportunity to present evidence in connection therewith."
>
> "We do not wish to be understood as holding that in the event of an emergency, the court cannot make such orders for temporary care and custody as seem to be indicated, but we do hold that before any parent ... having legal custody is deprived of the same, or any change made therein, the usual and ordinary procedures must be adhered to. ... The principal guide to decision remains as always the welfare and best interests of the children. (Citations omitted). However, this shall be determined after a proper and orderly hearing of the issue of custody with all interested parties having a right and opportunity to be present and produce evidence."

g. *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶¶11–12, 91 N.M. 455, 575 P.2d 1340 (S. Ct. 1977). Because due process of law was violated, no subsequent act could correct the defect.

> "There is no discretion on the part of a district court to set aside a void judgment. Such a judgment may be attacked at any time in a direct or collateral action. (citation omitted.)"

h. A judgment outside the issues is not a mere irregularity, but is extrajudicial and invalid. *Walls v. Eruption Mining Co.*, 1931-NMSC-052, ¶18, 36 N.M. 15, 6 P.2d 1021 (S. Ct. 1931)

2. *Conflicts with Court of Appeals' Decisions*

a. *Classen v. Classen*, 1995-NMCA-022, ¶9–10, 119 N.M. 582, 893 P.2d 478 (Ct. App. 1995). A due process violation results in an invalid judgment which must be set aside.

Classen cited *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 314 (1950):

> "An elementary and fundamental requirement of due process in any proceeding [that] is to be accorded finality is 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." *Ibid*, at 10.

b. *Elder v. Park*, 1986-NMCA-034, ¶40, 104 N.M. 163, 717 P.2d 1132:

> "The relevant custody acts provide that reasonable notice and an opportunity to be heard shall be given to contestants before a decree or order is made. 28 U.S.C.A. § 1738A(e); [citation

to predecessor of NMSA 1978 Section 40-10A-205] (citation omitted)."

c. *In re Adoption Petition of Darla D. v. Grace R.*, 2016-NMCA-093, ¶64, 382 P.3d 1000:

> "Petitioners cite no case holding that inadmissible hearsay testimony is admissible simply because it is proffered by a GAL, let alone in a proceeding implicating a parent's fundamental due process rights. A GAL is not legally authorized to circumvent applicable rules of evidence by attaching inadmissible hearsay documents to a report. The district court should not have admitted the GAL's amended report or relied upon it in determining whether to grant the petition."

3. "It is clear that a judge, himself, could not go to visit the scene and thereby obtain extrajudicial information." *State v. Doe*, 1985-NMCA-065, ¶33, 103 N.M. 233, 704 P.2d 1109 (Ct. App. 1985)

4. *Conflicts with New Mexico and United States Constitutions*

a. U.S. Const. Amend. XIV, ¶1: "No State ... shall deprive any person of life, liberty, or property, without due process of law."

b. N.M. Const, art. II: "No person shall be deprived of life, liberty or property without due process of law."

c. *State v. Urban*, 2004-NMSC-007, ¶10, 135 N.M. 279, 87 P.3d 1061. This Court has certiorari jurisdiction to review a claim of violation of rights provided in federal or state constitutions.

5. ***Issues Of Substantial Public Interest***

a. ***Issues 1–3***. Given the facts of the case, this Court should determine the circumstances, if any, whereby the lack of a pre-deprivation hearing in a child custody case comports with due process and the consequence for failure to accord due process.

b. ***Issue 4***. This Court should determine whether a district court may engage in ex parte communications with a witness, or independently investigate facts or consider extrajudicial matters, contrary to the Code of Judicial Conduct.

Rule 21-209 NMRA of the Code of Judicial Conduct prohibits the ex parte communications and independent investigation and consideration of extrajudicial facts by the district court which occurred in this case.

This Court has certiorari jurisdiction to consider the application of rules of this Court. *Spencer v. Barber*, 2013-NMSC-010, ¶4, 299 P.3d 388; *Allen v. Lemaster*, 2012-NMSC--001, ¶¶1, 11, 267 P.3d 806

F. ***Argument***

Section E, above, is adopted.

Memorandum Opinion ¶16 references to "a determination" (line 4), and findings (lines 6, 11) regarding the child's "safety", "welfare" and "best interests", are *extrajudicial*, and invalid and don't exist. *Walls, State v. Doe*, above.

Memorandum Opinion citations, principally, *Yount v. Millington*, 1993-NMCA-143, 117 N.M. 95, 869 P.2d 283 and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), contain pre-deprivation due process procedures absent from this case. *Motion For*

Rehearing, pp. 7–18; 23–28. In none of the cases cited did the district court improperly set itself in motion to dispense with a pre-deprivation hearing. *Walls*, above, at ¶18.

G. *Prior Appeals*

1. *Lamprell v. The Honorable Sarah M. Singleton*, et al, No. S-l-SC 32788;

2. *Lamprell v. Stuckey*, No. 33,295, *Petition For Writ Of Error* in the Court of Appeals.

H. *Prayer For Relief*

The Supreme Court should accept certiorari, reverse the Court of Appeals and the District Court and grant custody of the child to Mother.

Respectfully submitted,

/s/ Thomas C. Montoya
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Appellate Counsel for
Tamra Lamprell

I certify that I have caused
a copy of the foregoing to be
served on opposing counsel
of record via the Court's E-file
and Serve system on March 13, 2019.

/s/ Thomas C, Montoya
Thomas C. Montoya

APPENDIX L

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REX E. STUCKEY,

Petitioner-Appellee,

v.

TAMRA L. LAMPRELL,

Respondent-Appellant.

NO. _____
(D-0117-DM-201000151)

First Judicial District Court
Rio Arriba County
The Honorable Sylvia LaMar

PETITION FOR WRIT OF ERROR

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I. INTRODUCTION

This is a domestic relations case in which a district judge entered a draconian order, implementing advisory consultation recommendations immediately upon their issuance and transferring primary physical custody of a three-year-old child (DOB 2/24/10) away from her Mother — with whom she has lived her entire life — to Father — who has not yet been able "to spend significant periods of time with his daughter" and who is currently the subject of an ongoing criminal investigation. [Interim Order; AC Report at 15].[1] Mother is now allowed only one supervised visit per week with her daughter. This transfer of custody occurred the day after the advisory consultant handed down his recommendations and within moments of the report being handed to the parties at a hearing that ostensibly had nothing to do with custody but was set to address a contempt motion against Father. The entire hearing lasted a matter of minutes and obviously did not address objections to the recommendations because none had yet been filed.

Perhaps the most troubling aspect of the immediate adoption and implementation of the recommendations without any notice and opportunity to be heard is that the advisory consultant relied on numerous hearsay statements from a report of an Archuleta County Sheriff's Department Detective who engaged in unscrupulous behavior during the course of her investigation. The district court's ruling is having profoundly detrimental effects on Child, who spends

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[1] The district court's interim order, filed September 27, 2013, is Attachment A; the advisory consultant's report, filed September 26, 2013, is Attachment B.

her weekly supervised visits with her Mother asking when she can go home.[2]

The district court's wholesale and immediate adoption of the recommendations permitting Child to be taken from her Mother — who was described as "a devoted parent" in the psychological evaluation upon which the advisory consultant relied — is shocking to the conscience. There is no provision in the Rules for immediate implementation of an advisory consultant's recommendations. On the contrary, the Rules contain procedural safeguards that are constitutional in magnitude. *See Buffington v. McGorty* 2004-NMCA-092, ¶ 30, 136 N.M. 226, 96 P.3d 787. The district court's order violates the Rules, and it violates Mother's constitutional rights.

As will be discussed, the interim order is not a final appealable order, yet it meets the elements of the collateral order doctrine, thus conferring appellate jurisdiction on this Court. Mother asks the Court to issue a writ of error pursuant to Rule 12-503, NMRA, assign this case to the summary calendar, and propose summary reversal of the district court's patently unlawful order. In the alternative, Mother asks the Court to issue the writ and assign the case to the general calendar for briefing on the merits and consideration of the full record.

II. SUMMARY OF PROCEEDINGS

A. Nature of the Case and Course of Proceedings

This is a high conflict case that has been heavily litigated for several years. For purposes of this

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[2] Mother was able to locate appellate counsel only last week.

petition, it will suffice to say that the case was initiated by Father, who filed a petition to determine parentage and custody in July 2010. In December of that year, the parties were referred to Family Court Services for mediation. Since that time, the parties have gone through several priority consultation and advisory consultation processes. Until the district court's interim order that is the subject of the instant petition, Mother has always had primary physical custody of Child, and Father has had very limited amounts of visitation. There has been no adjudication of paternity.

B. Facts Relevant to the Petition

The parties had a brief and volatile relationship and had separated by the time that Mother found out that she was pregnant with Child. They reunited briefly and split up for good a few months after Child's birth. During an early priority consultation, Mother expressed concerns that Father was abusing drugs and alcohol, that he did not have stable housing, and that he was incapable of meeting the developmental needs of a baby. Beginning in May 2011, Father began very limited supervised visitation.

After another priority consultation, in December 2012 Father began to have limited periods of unsupervised visitation. Shortly after that, Mother made a complaint to a Victim's Advocate based on her belief that Child had been sexually abused by Father. An investigation was initiated by the Archuleta County Sheriff's Department, and Detective Tonya Hamilton conducted a forensic interview of Child. As will be discussed, Detective Hamilton had a glaring conflict of interest in the investigation, thus tainting

her conclusions, yet the advisory consultant relied on her report.

Mother suspended Father's contact with Child based on a direction by Dr. Candace Kern. After more litigation, Father began unsupervised periods of responsibility two of every three Saturdays from 12:00 noon to 6:00 p.m. Child resided with Mother at all times that she was not visiting with Father.

After unsupervised visitation with Father resumed, Mother's concerns about Child being sexually abused by Father continued because Child disclosed two additional incidents of abuse. Mother filed a petition for an Order of Protection in July 2013. The parties agreed that Child should participate in a forensic interview at Solace Crisis Treatment Center. As a result of Child's disclosures about Father during the interview, the New Mexico State Police filed a report. That criminal investigation is ongoing.

C. Advisory Consultation Report and Recommendations

The advisory consultant's concerns about Mother are essentially two-fold: 1) that she has engaged in "parental gatekeeping" that has impeded Child from developing a relationship with Father; and 2) that the psychologist who performed Mother's psychological evaluation gave her the diagnosis of "Rule out (301.9) Personality Disorder NOS with Prominent Paranoid Features." [AC Report at 6; 9]. The advisory consultant acknowledged that "[t]he [phrase] 'rule out' refers to a psychologist's impression that the diagnosis may require more clinical information to ascribe it with certainty." [AC Report at 9]. The advisory consultant then proceeded to decide for himself that

Mother actually does have a personality disorder. [AC Report at 14]. This is highly improper, as the advisory consultant is an employee of the court; he is not the psychologist that was tasked with conducting Mother's psychological evaluation and did not perform any psychological testing on Mother.

The advisory consultant acknowledged that Father is also engaging in restrictive gatekeeping by harboring views about Mother that would render him unable to promote a relationship between her and Child. [AC Report at 7]. While the advisory consultant relied on Father's expressed concerns that Mother has coached and alienated Child, there is no evidence to support that allegation. [AC Report at 8]. In adopting the interim order, the district court failed to address evidence demonstrating that Father has engaged in coaching and alienating. A videotape of a visit with Father was introduced into evidence, showing that Father repeatedly told Child that her Mother is "mean," "bad," and "wrong" and that "she's not being a good mommy" and that Child "should not listen to mommy." [Resp. Amended Motion with Objections, at 5 (citing 3-hour compact disc admitted into evidence at Sept. 27 2013 hearing)].[3] If Father is willing to coach and alienate Child when he knows that he is being videotaped, it is not difficult to surmise the extent to which he will do so when not being videotaped. Remarkably, the hearing at issue was set to address these issues in a pending motion for contempt against Father, but rather than hearing that

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[3]"Respondent's Amended Motion with Objections to Advisory Consultation Recommendations, filed on October 9, 2013, is Attachment C.

motion, the district court immediately implemented the recommendations and asked Father to leave the courthouse with Child.

Mother believes that Detective Hamilton received a bribe from Father or his family, but she admitted that she has no way of proving her belief. In the view of the advisory consultant, "Mother's allegations of bribery in this context stretch the bounds of reason and appear to demonstrate an unhealthy degree of suspicion bordering on paranoia." [AC Report at 11]. There is, however, record evidence demonstrating that Mother's suspicions are well-founded.

A series of e-mail messages between Detective Hamilton, Father, and Father's trial counsel indicate that at the very least Detective Hamilton has engaged in unethical behavior and that her impartiality has been compromised. Detective Hamilton has stated that she "can't stand" Mother, and she has admitted that her goal is to build a case against Mother. [Resp. Amended Motion with Objections, at 7–8]. Detective Hamilton told Father that she "can no longer be objective." *Id.* at 7. She further told Father that she "will do whatever [she] can to cast doubt in the Court's eyes" about Mother. *Id.* She also allowed Father's trial attorney to edit her letter to an employee of Family Court Services. *Id.* at 8. These are just a few examples of the outrageous and unscrupulous interactions that led to the advisory consultant's recommendations. *See generally id.* at 7–8.

The advisory consultant believed that Mother is suspicious and that she externalizes blame. [AC Report at 10]. He also cited others' complaints that she is "highly demanding, difficult to work with and

manipulative." [AC Report at 10]. He cited evidence that Mother is consumed with the litigation and that it interferes with her ability to "spend time with [Child] and provide enriching activities." [AC Report at 11]. The advisory consultant cited research that indicates that "parents with personality disorders (PD) are more than three times as likely to engage in five or more problematic child-rearing behaviors, such as high parental possessiveness, inconsistent discipline, low parental affection, low praise/encouragement, low supervision, and low time spent with child." [AC Report at 14]. Aside from the fact that Mother has not been diagnosed with a personality disorder, none of these risk factors begin to approach a justification for removing Child from Mother's custody.

Perhaps more importantly, the case materials before the advisory consultant document Mother's high level of parenting skill, debunking the notion that her parenting style is characterized by a personality disorder. The counselor with whom Mother completed parenting classes, as well as the counselor who is Child's play therapist, reported that Mother freely praised Child, was affectionate, and was consistent with discipline. Mother's parenting class was set for 16 weeks, but she completed it in approximately ten sessions due to her high level of parenting skill. The advisory consultant had access to these reports but chose not to mention them. [AC Report at 1].

It is ironic that the advisory consultant focused on Mother's high level of intelligence and her logical and analytical mind, as if these traits were negative. [AC Report at 8–9]. It is also notable that Mother's clinical profile found that she is "relaxed," "secure,"

"comfortable with herself," "independent," and "self-confident." [AC Report at 8]. While Mother's psychological evaluation indicated that she was defensive, Father's psychological evaluation indicated that he was so "extremely defensive" that it may have clouded his test results. [AC Report at 7; 9]. It is interesting, that the advisory consultant minimized this trait in Father, finding that it was justified, while finding that the same trait in Mother was a major cause for concern. *Id.*

Mother does not profess to be without problems or difficulties. She is willingly participating in counseling to address her issues. The challenges that she has faced and her manner of responding to them do not come close to approaching parental unfitness. The district court made no concrete findings concerning parental unfitness or potential harm to Child. *See* Interim Order.

D. <u>Disposition Below</u>

At the beginning of the hearing, the judge stated that it was a "status" hearing, and Mother's trial counsel reminded her that she had set the hearing to address Mother's motion for contempt. [CD 9/27/13 at 0:49 to 1:03].[4] Mother and her trial counsel were present with witnesses and were ready to go forward with an evidentiary hearing on the issue of holding Father in contempt for violation of a court order. The judge then announced that the advisory consultant

[4] The disc of the hearing made available to Mother's counsel is not an FTR disc. Undersigned listened to the hearing using iTunes, and the transcript citations refer to time elapsed from the beginning of the hearing, as opposed to time of day, which would be the case with an FTR disc.

had completed his recommendations and report (which occurred the day before), and she asked a sheriff's deputy to come forward and give copies to each party. *Id.* at 2:34 to 2:48.

The district court stated: "because of the nature of the report and the concerns raised by [the advisory consultant], this court is adopting the recommendations immediately." *Id.* at 3:02 to 3:22. The court stated that Father is to have "sole custody of this Child effective immediately." *Id.* at 3:23 to 3:30. While court was in session, Child was in Family Court Services. The judge ordered that "[t]he child is to be taken from the courthouse by Father." *Id.* at 3:30 to 3:35. Thus, a three-year-old who has lived her entire life with Mother was not allowed to go home that day, and she has not been home since.

The court stated that the advisory consultant spent "untold hours" talking with "all of the professionals involved" in the case as well as with his staff. *Id.* at 4:28 to 4:40. The judge continued: "it is the concern of [the advisory consultant] and of this court that if such a drastic step is not made, then the child can be harmed." *Id.* at 4:45 to 4:53. The court made no findings regarding what harm would come to Child or what would cause the harm.

Twelve minutes into the hearing, the judge asked Father to leave and pick up Child. *Id.* at 12:11. She informed Mother that she would "need to stay in the courtroom" while Father got Child and left the courthouse. *Id.* Mother's trial counsel asked if Mother could say good-bye to her daughter. *Id.* at 13:39. The judge responded: "No, Family Court Services is concerned about that interaction." *Id.* at 13:41 to

13:46. As for the original purpose for the hearing, Mother's trial counsel asked if the court was going to hear the motion for contempt against Father. *Id.* at 12:20. The judge informed that "[w]e're not going to do that today." *Id.* at 2:24.

III. STATEMENT REGARDING COLLATERAL ORDER

Subject to certain exceptions, this Court has no jurisdiction to review an order or decision that is not final. One of these exceptions is the collateral order doctrine. *See Carrillo v. Rostro*, 114 N.M. 607, 845 P.2d 130 (1992). To fall within this exception, an order of the district court must satisfy three conditions. First, it must "'conclusively determine the disputed question.'" *Id.*, 114 N.M. at 613, 845 P.2d at 136 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). Second, the order must "'resolve an important issue completely separate from the merits of the action.'" *Id.* Third, the order must "'be effectively unreviewable on appeal from a final judgment.'" *Id.; see also* Rule 12-503(E)(2). The interim order from which Mother seeks review is not a final appealable order, yet it meets each of these elements.

A. <u>The District Court's Order Conclusively Determined the Disputed Question</u>.

As to the first element of the collateral order doctrine, the disputed question is whether the Rules of Civil Procedure and the Due Process Clauses of both the United States and New Mexico Constitutions permit a district judge to implement the recommendations of an advisory consultant immediately, without notice to the parties, and

without providing an opportunity to be heard. The district court's order conclusively determined that question. In the course of 12 minutes[5], without taking any evidence or testimony about Child's best interests, and without addressing the pending contempt motion against Father, the district court allowed the custody arrangement to be turned on its head.

Under our Rules of Civil Procedure, where a hearing officer hands down recommendations, "[i]f a party file[s] timely, specific objections to the recommendations, the court *shall* conduct a hearing appropriate and sufficient to resolve the objections." Rule 1-053.2(H)(1)(b), NMRA (emphasis added). The Rules further provide that "[t]he court *shall* make an independent determination of the objections." *Id.* at 1-053.2(H)(1)(c) (emphasis added). The Rule governing domestic relation mediation act programs, such as advisory consultations, likewise gives parties the opportunity to object to recommendations. *See* Rule 1-125(E), NMRA.

In *Buffington v. McGorty*, 2004-NMCA-092, ¶ 30, 136 N.M. 226, 96 P.3d 787, this Court held that a party must be given an opportunity to submit objections to a hearing officer's report and recommendations. In the Court's view,[+] his is fundamental to the due process

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[5] According to the CD, the entire hearing lasted for 19 minutes; however, at the 12-minute mark in the hearing, the judge dismissed Father to pick up Child and shortly after that, there were approximately five minutes of silence, while the judge required Mother to wait in the courtroom. Other than refusing Mother's request to say goodbye to her daughter, denying Mother's motion for a stay of enforcement, and allowing her witnesses for the scheduled hearing to be released, nothing else of consequence occurred after the first 12 minutes of the hearing.

concept of having an opportunity to be heard by a judicial officer." *ld.* This Court expressly stated that once a party files objections, the "district court *must* then hold a hearing on the merits of the issues before the court." *Id.* at ¶ 31 (emphasis added). This Court has indicated that the due process strictures announced in *Buffington* control a district court's adoption of advisory consultation recommendations. *See Rodriguez v. Ortega*, No. 28,947, 2009 WL 6677932 at *1–*2 (N.M. App. Apr. 24, 2009).

In an unpublished decision, this Court cited *Buffington* for the proposition that a district court "must demonstrate that it reviewed the objections and arrived at a reasoned basis for its decision." *Calhoun v. Snyder*, No. 29,410, 2010 WL 3997935 (N.M. App. Feb. 16, 2010). In the case at bar, the district court made an end-run around the Rules by adopting the advisory consultation recommendations months before the hearing on objections will take place. The court could not possibly have considered objections and arrived at a reasoned basis for its decision. The parties were presented with the advisory consultant's recommendations at the hearing literally seconds before the judge announced that she was adopting them.

Under *Buffington*, and under our Constitutions, Mother has been denied liberty without due process of law because she was given neither notice nor an opportunity to be heard before her Child was taken from her. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law.").

Mother has a fundamental liberty interest … in the care, custody, and management of [her] child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also State ex rel. CYFD v. Amanda M*, 2006-NMCA-133, ¶ 22, 140 N.M. 578, 144 P.3d 137.

Mother has not only a procedural due process right to have her case handled in accordance with the Rules, but she also has a substantive due process right to pursue her familial relationships. *See Lawrence v. Texas,* 539 U.S. 558, 573–74 (2003) (noting that the "substantive force of the liberty protected by the Due Process Clause" includes "personal decisions relating to … family relationships [and] child rearing"). It is manifest that the rights that are protected by the Due Process Clause may have nothing whatsoever to do with procedure. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3090 (2010) (Stevens, J., dissenting) ("The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature."). There reaches a certain level of oppressiveness or irrationality that our Constitutions simply will not tolerate no matter how much process is given. *See id.* ("no amount of process can legitimize some deprivations"). In the instant case, the district court's actions crossed that threshold.

It is also worth considering that Mother is not the only one whose fundamental liberty interest has been violated. A child who is the subject of a custody or visitation battle is a "person" for purposes of the Fourteenth Amendment. *See In the Matter of the Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 11, 145 N.M. 500, 201 P.3d 169 (2008) (Alarid, J., authoring single-judge lead opinion). Child has a

substantive due process right to maintain her familial bond with her Mother, and she has a procedural due process right not to be deprived of that relationship arbitrarily as happened in the instant case.

The "core judicial function" was not independently performed by a judge in the instant case but instead was essentially performed by an employee of Family Court Services. *Cf. Buffington*, 2004-NMCA-092, at ¶ 30, 136 N.M. 226, 96 P.3d 787 (procedure of notice and opportunity to have objections heard before court adopts recommendations assures parties that issues are decided by one who is vested with judicial power). One of the most basic precepts of our judicial system was sidestepped here. This should be of particular concern to the Court because the advisory consultant's report is extremely lopsided in its denigration of Mother without giving credence to the damaging and potentially abusive actions of Father.

It is noteworthy that the district court did not invoke the provisions of the Abuse and Neglect Act in removing Child from Mother's custody. *See* NMSA 1978,§ 32A-4-1 *et seq*. Indeed, the district court made no findings that Mother had abused or neglected child within the meaning of the Act. *See id.* at § 32A-4-2. The court stated only that it is concerned "that the child can be harmed." [CD 9/27/13 at 4:45 to 4:53]. The district court's interim order cites Mother's "diagnosis," but her psychological evaluation stated that a personality disorder is a diagnosis that needs to be ruled out. [AC Report at 9] . Even if Mother actually had been diagnosed with a personality disorder, there is no provision in New Mexico's custody statutes that permits a district court to divest a parent of child custody summarily.

The law in New Mexico is that a child custody determination made by a court of this state binds all persons who have submitted to the court's jurisdiction "and who have been given an opportunity to be heard." NMSA 1978, § 40-10A-106. Even in very high conflict cases or in cases dealing with families in crisis, a district judge is still bound by the dictates of the Due Process Clauses. Furthermore, it is the policy of New Mexico to support and promote a family's ability to raise its children, to strengthen families in crisis, and to keep them intact. NMSA 1978 § 40-15-3. The district court's order conclusively determined the disputed question, and it is insupportable.

B. 'The District Court's Order Resolved an Important Issue Completely Separate From the Merits.

As to the second element of the collateral order doctrine, the interim order resolves an important issue completely separate from the merits of the action. The merits of this case will determine custody and timesharing. The legal issue whether a district court has the authority to implement advisory consultation recommendations immediately without providing a parent notice and an opportunity to be heard is completely separate from the merits, i.e. the custody arrangement that will ultimately be adopted.

C. The District Court's Order is Effectively Unreviewable on Appeal from a Final Judgment.

As to the third element of the collateral order doctrine, the order is effectively unreviewable on appeal from a final judgment. On some unspecified date in the future the district court will decide the issues of custody and timesharing, but there is no

telling how much water will have passed under the bridge by then, how old Child may be at that point, or how much emotional harm will have been done by uprooting her from the secure life that she has known with Mother for her entire three-year life.

It should also be noted that as to the third element of the doctrine, our Rules of Appellate Procedure state that the order must be effectively unreviewable on appeal from a final judgment "because the remedy by way of an appeal would be inadequate." Rule 12-503 (E)(2)(c), NMRA. Precisely because Child's life has been so suddenly and so drastically changed without affording Mother notice and an opportunity to be heard and without any evidence or findings that giving Father sole custody under the circumstances of this case would be in Child's best interests, Mother's only adequate remedy is immediately seeking this Court's review under the collateral order doctrine by way of a writ of error.

IV. REQUEST CONCERNING STAY OF ENFORCEMENT

In open court, Mother moved for a stay of enforcement pending appeal, but the district court denied the motion. [CD 9/27/13 at 13:47 to 13:51]. If the Court elects not to grant this petition to address the issue on the merits, Mother nevertheless asks the Court to exercise jurisdiction for the purpose of allowing her to seek review of the district court's arbitrary and capricious denial of a stay of enforcement to hold the status quo for Child until such time as objections may be heard. The hearing on objections is currently set for late December 2013, but that hearing will likely have to be continued because

of ongoing litigation concerning Mother's efforts to discover the raw test scores and psychological evaluation upon which the advisory consultant based his recommendations, and which are currently being withheld from her. At present, then, there is no telling when the objections might be heard, and Child is thus caught in limbo, unable to go home.

In denying Mother's request for a stay, the district court failed to address or consider any of the factors relevant to deciding whether to stay an order affecting child custody. *See Alpers v. Alpers*, 111 N.M. 467, 470, 806 P.2d 1057, 1060 (Ct. App. 1990). Pursuant to Rule 12-503(J), NMRA, a party seeking a stay of the order that is the subject of a writ of error, or a stay of the proceedings as a whole, must wait until the writ issues. Thus, if the Court is inclined to deny this petition on the merits, Mother asks that the Court nevertheless grant it to address the district court's abuse of discretion in denying a stay.

V. PRAYER FOR RELIEF

Mother respectfully asks the Court to grant this petition and issue a writ of error to the district court. Due to the patently unlawful nature of the district court's interim order, this Court should assign the case to the summary calendar and propose summary reversal. In the alternative, Mother asks the Court to assign the case to the general calendar for briefing and consideration of the full record. If the Court is inclined to deny this petition, Mother nevertheless asks the Court to accept jurisdiction for the sole purpose of allowing her to seek review of the district court's denial of a stay of enforcement.

Respectfully submitted,

s/Caren I. Friedman

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2013, I caused to be delivered a true and correct copy of the foregoing on the following by first class U.S. mail, postage prepaid:

Gary W. Boyle, Esq.
15 Spirit Court
Santa Fe, New Mexico 87506

The Honorable Sylvia LaMar
First Judicial District Court
Post Office Box 2268
Santa Fe, New Mexico 87504-2268

s/Caren I. Friedman

APPENDIX M

[FILED UNDER SEAL]

APPENDIX N

[FILED UNDER SEAL]

APPENDIX O

[FILED UNDER SEAL]

APPENDIX P

[FILED UNDER SEAL]