

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

Filed 12/18/2018 9:00 AM



Mark Reynolds

NO. A-1-CA-35538

5 | TAMRA L. LAMPRELL,

6 Respondent-Appellant.

7 | APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY

8 | Matthew J. Wilson, District Judge

9 | Boyle Law Office

10 | Gary W. Boyle

11| Santa Fe, NM

12 for Appellee

13 Atkinson & Kelsey, PA

14 Thomas C. Montoya

15 Albuquerque, NM

16 for Appellant

MEMORANDUM OPINION

18 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

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

6 **BACKGROUND**

7 {2} In July 2010, Father filed a petition to establish paternity, determine custody
8 and time-sharing, and to assess child support with regard to Child. The district court,
9 on its own motion, ordered that the case be referred to Family Court Services for
10 mediation, early neutral evaluation, priority consultation or advisory consultation as
11 deemed appropriate by Family Court Services. Priority consultation
12 recommendations concerning custody and time-sharing were filed on October 11,
13 2012, recommending, in pertinent part, that Father be given unsupervised visitation.
14 Mother filed objections to these recommendations.

15 {3} After an evidentiary hearing, the district court entered a final order on
16 December 14, 2012, in which the court adopted the priority consultation
17 recommendations and awarded Father unsupervised visitation. Updated priority
18 consultation recommendations were filed on April 9, 2013, recommending, in
19 pertinent part, that Father continue to have unsupervised visitation with Child and
20 that advisory consultation should be conducted through Family Court Services to

1 further address custody, time-sharing, and other parenting issues. The district court
2 filed its order adopting these recommendations on May 20, 2013.

3 {4} In an order filed on September 6, 2013, the district court granted Father's
4 motion to hold Mother in contempt for refusing to turn Child over to him for
5 scheduled unsupervised visitation, and the district court also set a hearing for
6 September 20, 2013 to "discuss the progress of the Advisory Consultation
7 Recommendations and any request by the Consultant for additional information[,]"
8 which was continued to September 27, 2013.

9 {5} At the September 27, 2013 hearing, the district court announced that Family
10 Court Services had completed the advisory consultation report and because of the
11 nature of the report and the concerns raised therein regarding Mother, the court was
12 adopting Family Court Service's recommendations immediately. The district court
13 explained to the parties in open court that "if such a drastic step is not made, then
14 the child can be harmed." The September 27, 2013 written order adopting the
15 advisory consultant's recommendations, the Interim Order, states that the advisory
16 consultation report

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

- 19 a. The results of Mother's psychological testing and
20 diagnosis.
- 21 b. Concerns regarding [Child's] safety while with Mother.
- 22 c. That Mother 'is so highly consumed with this case that it
23 interferes with her ability to spend time with [Child] to provide

1 enriching activities. The investment of time and energy that Mother is
2 making to analyze and interpret this case appears unhealthy and
3 confirms the psychologist's assessment that her 'analytic skills can be
4 detrimental when they are paired with suspiciousness, defensiveness,
5 and self-protection.'

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

11 {6} Mother filed objections to the Interim Order and a Rule 1-060(B) NMRA
12 motion for reconsideration on October 9, 2013. However, there was significant delay
13 in the hearing on Mother's objections to the Interim Order. This delay was the result
14 of the following events: (1) the district court's order granting Mother's December 6,
15 2013 motion to postpone the hearing until at least late January 2014 based on the
16 anticipated withdrawal of her attorney; (2) Mother's motion seeking the judge's
17 recusal for a conflict of interest, which was granted and left the case without a judge
18 until February 5, 2014; (3) litigation of Mother's Rule 1-060(B) motion for relief
19 from the Interim Order, which was denied on June 30, 2014; motions practice
20 following Family Court Services' July 2, 2014 filing of updated priority consultation
21 recommendations, recommending that the Interim Order remain in place; (5)
22 Mother's litigation with the Office of the Attorney General seeking to obtain from

1 Family Court Services the records relied upon in forming the advisory and priority
2 consultation recommendations, which resulted in the district court's September 2,
3 2014 order compelling production of the requested records to Mother; and (6) delay
4 caused by the parties' joint motion to vacate the scheduled September 11, 2014
5 hearing on Mother's objections to the Interim Order, which the district court granted
6 and reset for October 28 and 29, 2014.

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

14 {8} Applying NMSA 1978, Section 40-4-9 (1977), the district court concluded
15 that it was in the best interest of Child that Father maintain sole legal custody, that
16 Mother have periods of unsupervised visitation, and that to the extent that Mother's
17 objections to the Interim Order or advisory and priority consultation
18 recommendations conflicted with the court's findings and conclusions, such
19 objections were overruled. In pertinent part, the district court found that: "Father is
20 capable of supporting a relationship between [C]hild and Mother. Mother's ability

1 to support a relationship between the child and Father is questionable at best.”

2 [C]hild should not be subject to another major change in custody at this time.”

3 “[C]hild is currently doing well.”

4 {9} Over eight months after entry of the Final Order, on October 22, 2015, Mother
5 filed a motion for a bonding study to determine the best interest of Child with regard
6 to custody and visitation. On March 7, 2016, the district court denied the motion.
7 The district court found that Mother’s motion was an untimely discovery motion and
8 that “[p]rior to the trial on the merits, the parties had an extensive period in which to
9 conduct discovery. [Mother] had an opportunity to participate in discovery and the
10 Court issued orders at [Mother’s] request requiring additional disclosure of
11 information from Family Court Services and Las Cumbres Community Services.”

12 {10} Mother appeals.

13 **DISCUSSION**

14 **I. Due Process in Entry of the Interim Order**

15 {11} Mother argues that the Interim Order was entered in violation of procedural
16 due process and is therefore void. Mother asserts that the due process violation stems
17 from the district court’s failure, prior to adopting Family Court Services’ advisory
18 consultation recommendations, to give her prior notice that a change in custody
19 matter would be heard and opportunity to object to the advisory consultation
20 recommendations and to examine witnesses. Mother further contends that the

1 advisory consultation recommendations “were based on a report which was not
2 received in evidence, which report was based on a non-expert’s reliance on hearsay”
3 and was adopted as a result of ex parte communications between the district court
4 and Family Court Services.

5 {12} Father responds that “Mother received appropriate due process[.]” Father
6 asserts that “a post-deprivation hearing [held] within a reasonable period does not
7 violate [a] parent’s minimum federal due process rights” and that a district court is
8 empowered to take whatever interim actions are needed to protect the best interest
9 of a child even prior to being given an opportunity to be heard. Further, “[b]ecause
10 the [Interim Order] was an interim order only and because the [post-deprivation]
11 hearing afforded to Mother was reasonably scheduled,” Father contends, Mother’s
12 due process rights were not violated. We agree.

13 {13} “The Fourteenth Amendment to the U.S. Constitution guarantees
14 citizens . . . procedural due process in state proceedings.” *Bd. of Educ. of Carlsbad*
15 *Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶ 21, 118 N.M. 470, 882 P.2d 511. Our
16 review is de novo. *See State ex rel. Children, Youth & Families Dep’t v. Christopher*
17 *L.*, 2003-NMCA-068, ¶ 14, 133 N.M. 653, 68 P.3d 199 (“In passing upon claims
18 that the procedure utilized below resulted in a denial of procedural due process, we
19 review such issues de novo.” (alteration, internal quotation marks, and citation
20 omitted)).

1 {14} Procedural due process requires “notice, reasonably calculated, under all the
2 circumstances, to apprise interested parties of the pendency of the action and afford
3 them an opportunity to present their objections.” *State of N.M. ex rel. Children,*
4 *Youth & Families Dep’t v. William M.*, 2007-NMCA-055, ¶ 37, 141 N.M. 765, 161
5 P.3d 262; *see In re Laurie R.*, 1988-NMCA-055, ¶ 22, 107 N.M. 529, 760 P.2d 1295
6 (“Procedural due process requires notice to each of the parties of the issues to be
7 determined and opportunity to prepare and present a case on the material issues.”)
8 However, “due process requires flexibility and . . . in extraordinary situations, the
9 requirement of notice and opportunity to be heard can be postponed until after the
10 deprivation of a constitutionally protected interest.” *Yount v. Millington*, 1993-
11 NMCA-143, ¶ 25, 117 N.M. 95, 869 P.2d 283; *see In re Ronald A.*, 1990-NMSC-
12 071, ¶ 3, 110 N.M. 454, 797 P.2d 243 (“A parent’s right in custody is constitutionally
13 protected[.]”).

14 {15} Our Supreme Court has recognized, and we have held, that a district court
15 may modify a custody order on an interim basis without a hearing where the court
16 determines that the modification is in accordance with the safety, welfare, and best
17 interests of the child. *See Tuttle v. Tuttle*, 1959-NMSC-063, ¶ 11, 66 N.M. 134, 343
18 P.2d 838 (stating that in an emergency, a district court may issue an order that
19 temporarily modifies custody of children without a hearing, where the order is
20 guided by the “welfare and best interests of the children”); *Yount*, 1993-NMCA-143,

1 ¶ 25 (stating that the district court may enter an interim order modifying custody
2 without a hearing “when a child’s safety is threatened”).

3 {16} Here, the district court’s Interim Order, which was entered without prior
4 notice or a pre-deprivation hearing, was based on the court’s determination that if
5 such a drastic step was not taken, then the safety and welfare of Child may be at risk.
6 Specifically, the district court found, in light of the advisory consultation
7 recommendations, there were “significant concerns regarding Mother’s ability to
8 parent, and [Child’s] safety while with Mother including: . . . [t]he results of
9 Mother’s psychological testing and diagnosis[,]” which showed that “Mother is so
10 highly consumed with this case that it interferes with her ability to spend time with
11 [Child] to provide enriching activities.” The district court further found that “[t]he
12 investment of time and energy Mother is making to analyze and interpret this case
13 appears unhealthy and confirms the psychologist’s assessment that her analytic skills
14 can be detrimental when they are paired with suspiciousness, defensiveness, and
15 self-protection.” Under these circumstances, we conclude the district court acted
16 reasonably and in accordance with the safety, welfare, and best interest of Child in
17 immediately adopting the advisory consultation recommendations, and as a result,
18 ordering sole legal custody of Child be transferred to Father on an interim basis. *See*
19 *Yount*, 1993-NMCA-143, ¶¶ 4-5, 24-26 (determining that the mother’s procedural
20 due process rights were not violated, where the district court entered an ex parte

1 order giving custody of her child to the Children, Youth and Families Department
2 on an interim basis, and without a pre-deprivation hearing, based on a determination
3 that the child's safety and welfare may be at risk with the mother); *see also In re*
4 *Guardianship of Ashleigh R.*, 2002-NMCA-103, ¶ 34, 132 N.M. 772, 55 P.3d 984
5 ("In child custody matters, even when the court must protect the rights of the parent,
6 the court has equitable power to fashion a remedy that protects the best interest of
7 the children as well.").

8 {17} Mother was afforded due process after the entry of the Interim Order through
9 the post-deprivation proceedings on her objections to the Interim Order. Due
10 process, in the context before us, requires consideration of the *Mathews v. Eldridge*,
11 424 U.S. 319, 335 (1976) factors, described as: "(1) a parent's significant interest
12 affected by the proceeding[;] (2) the value of additional safeguards and the risk of
13 an erroneous deprivation unless alternative arrangements are made[;] and (3) the
14 State's vital interest in protecting the welfare of children." *State ex rel. Children,*
15 *Youth & Families Dep't v. Christopher L.*, 2003-NMCA-068, ¶ 15, 133 N.M. 653,
16 68 P.3d 199. In this case, as in *Christopher L.*, "in balancing the parent's rights and
17 interest and the State's rights and interest, the determinative factor is the second
18 prong of the *Mathews* test, balancing the risk of error with the value of additional
19 safeguards." *See Christopher L.*, 2003-NMCA-068, ¶ 15 (omission, alteration,

1 internal quotation marks, and citation omitted). Under this prong, New Mexico
2 appellate courts consider whether the complaining party was given:

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

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

12 {18} Regarding the first *Harrell* factor, although neither Mother nor Father were
13 given notice prior to the September 27, 2013 hearing that the advisory consultation
14 recommendations were complete and that the district court intended to immediately
15 adopt them by order, the district court gave the parties copies of the advisory
16 consultation recommendations and immediately set a hearing to address the parties'
17 objections—which was originally set to occur on December 10, 2013. The district
18 court also stated in the Interim Order that the parties would be given an opportunity
19 to object, consistent with Rule 1-125(E) (stating that “[i]f a party does not agree with
20 the recommendations, within eleven (11) days of the filing of the advisory
21 consultation recommendations, the party shall file a motion specifically describing
22 the reasons for a party's objections to the recommendations”), to the advisory
23 consultation recommendations.

1 {19} Regarding the second through sixth *Harrell* factors, the record shows that
2 Mother was afforded, after substantial discovery and drawn out litigation, an
3 opportunity to make an oral presentation of her objections to the advisory
4 consultation recommendations and Interim Order, to present evidence, and to
5 examine witnesses and confront witnesses against her in a post-deprivation hearing
6 with her attorney present. Specifically, following the September 27, 2013 hearing,
7 Mother filed objections and her Rule 1-060(B) motion for relief from the Interim
8 Order on October 9, 2013. After filing her objections to the advisory consultation
9 recommendations and Interim Order, as we have already noted, there was a
10 significant delay in the hearing on Mother's objections for the reasons stated.

11 {20} Mother was then afforded a full evidentiary hearing to address her objections
12 to the advisory consultation recommendations and Interim Order, which occurred
13 over three days on October 28 and 29, 2014 and February 2, 2015. At this hearing,
14 Mother called witnesses on her behalf, cross-examined witnesses against her, and
15 argued the merits of her objections. After this hearing, and in satisfaction of the
16 seventh *Harrell* factor, the district court filed the Final Order, in which it applied
17 Section 40-4-9 and determined that based on the record before it, Father should be
18 awarded permanent sole legal custody of Child.

19 {21} We conclude that the Interim Order is not void as entered in violation or
20 Mother's right to procedural due process. In so concluding, we need not address

1 Mother's related argument that a determination that the Interim Order is void
2 requires that sole legal custody of Child be returned to her and that all subsequent
3 orders of the district court on the issue of custody and visitation should also be
4 deemed void.

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

6 {22} Mother also argues that the district court erred in denying her motion for a
7 bonding study.

8 {23} "We review a district court's discovery orders for an abuse of discretion."
9 *Vanderlugt v. Vanderlugt*, 2018-NMCA-073, ¶ 30, 429P.3d 1269. "An abuse of
10 discretion occurs when the ruling is clearly against the logic and effect of the facts
11 and circumstances of the case." *Chavez v. Lovelace Sandia Health Sys., Inc.*, 2008-
12 NMCA-104, ¶ 25, 144 N.M. 578, 189 P.3d 711 (internal quotation marks and
13 citation omitted).

14 {24} In its order denying Mother's motion for a bonding study, the district court
15 found that Mother's motion was an untimely discovery motion, which was not filed
16 until more than eight months after the district court's entry of the Final Order. The
17 district court further found that "[p]rior to the trial on the merits, the parties had an
18 extensive period in which to conduct discovery. [Mother] had an opportunity to
19 participate in discovery and the Court issued orders at [Mother's] request requiring
20 additional disclosure of information from Family Court Services and Las Cumbres

1 Community Services.” We agree; and under these circumstances, we cannot say that
2 the district court’s denial of Mother’s motion was clearly against the logic and effect
3 of the fact and circumstances of the case. We therefore conclude that the district
4 court did not abuse its discretion in denying Mother’s motion for a bonding study.

5 **III. Father’s Request for Fees on Appeal**

6 {25} Finally, because Father is the prevailing party in this appeal, we address his
7 request for an award of attorney fees incurred as a result of this appeal. Father
8 correctly asserts that NMSA 1978, Section, 40-4-7 (1997) and Rule 1-127 NMRA
9 provide that attorney fees may be awarded to the prevailing party on appeal in
10 custody cases, *see Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 49, 111 N.M. 319, 805
11 P.2d 88; *Hester v. Hester*, 1984-NMCA-002, ¶ 26, 100 N.M. 773, 676 P.2d 1338
12 (same), and we hold that Father is entitled to file a motion pursuant to the foregoing
13 authority for such attorney fees. However, because the determination of an award of
14 attorney fees in a domestic relations case “requires consideration of the disparity of
15 the parties’ resources, prior settlement offers, the total amount of fees and costs
16 expended by each party and success on the merits[,]” we remand to the district court
17 for findings of fact and conclusions of law on the issue of attorney fees. *See Jury v.*
18 *Jury*, 2017-NMCA-036, ¶¶ 59-60, 392 P.3d 242 (internal quotation marks and
19 citation omitted). Costs should be awarded by the clerk.

20 **CONCLUSION**

1 {26} The district court's Interim Order and order denying Mother's motion for a
2 bonding study are affirmed. We remand to the district court for further proceedings
3 in accordance with this opinion.

4 {27} **IT IS SO ORDERED.**

5 
6 MICHAEL E. VIGIL, Judge

7 WE CONCUR:

8 
9 JULIE J. VARGAS, Judge

10 
11 HENRY M. BOHNHOFF, Judge