PUBLISHED (2018)
Degraw v. Eighth Jud. Dist. Court, 134 Nev. ___, ___ P.3d ___(Adv. Opn. No. 43, May 31, 2018)

Child custody case that was stayed pending the completion of the legislative session under NRS 1.310 as attorney representing father was also a member of the legislature.

That statute was challenged as unconstitutional. The Court held that since the custody issue was resolved the issue was moot and declined to interpret the constitutionality of the statute. They held that since there was no way of knowing how many attorneys would be elected to the legislature, the chance of the problem being repeated was small and there was no reason to implicate the doctrine of "capable of repetition but evading review" by rendering an advisory opinion.

Bottom line – if you have a legislator as an opponent, your case might be delayed by months.

Bautista v. Picone, 134 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 44, May 31, 2018)

The parties agreed to share joint physical custody of their minor child. In the months following the parents' agreement, Bautista filed three motions with the district court to modify custody which were denied.

The district court appointed a parenting coordinator to help mediate and resolve "any disputes" concerning the minor child and permitted the parenting coordinator to make substantive changes to the parents' custody arrangement.

Bautista then filed ***another*** motion with the district court seeking to modify custody based on allegations that Picone was dating a minor. Without conducting an evidentiary hearing, the district court denied Bautista's request.

The Supreme Court found that any order empowering a parenting coordinator authority to make substantive changes to custody is an improper delegation of the district court's judicial authority.

It also held that the allegation that the other party was dating a minor was "adequate cause" for an evidentiary hearing on custody and remanded.

In the Matter of N.J., A Minor Child v. State of Nevada, 134 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 48, June 28, 2018)

Delinquency case. The district court concluded that the two uncharged acts provide a full account of the circumstances surrounding the commission of the battery and harassment.

Specifically, during an evidentiary hearing, N.J. objected to the admission of testimony that she had (1) challenged the victim to a fight earlier in the day at the park, and (2) spat on the victim after the battery and harassment.

With regard to the two uncharged acts, the district court overruled the objections based on the *res gestae* doctrine.

Court found that NRS 48.045 excludes the admission of evidence of uncharged acts for the purpose of proving character, while NRS 62D.420 is void of such exclusion, which is because one is for criminal safeguards of the defendant, and the other is to protect minors, and there is no jury.

The district court was allowed to receive any evidence that was competent, material, and relevant to N.J.'s underlying charges of battery and harassment.

Thus, the district court did not abuse its discretion in admitting the testimony regarding the two uncharged acts.

In the Matter of the Parental Rights as to S.L.; N.R.B.; H.R.B.; and W.C.B., 134 Nev. ___, ___P.3d ___ (Adv. Opn. No. 59 August 2, 2018)

Appellants' parental rights to all 4 kids were terminated because their oldest child was physically and mentally abused over a period of years while in appellants' home, the younger children witnessed the abuse and were instructed to lie about it, and appellants failed to address the abuse in therapy and continued to insist that the child's injuries were self-inflicted.

On appeal, appellants argued that termination of parental rights based on their refusal to admit to the abuse violated their Fifth Amendment rights against self-incrimination

The Curt distinguished In re Parental Rights as to A.D.L., 133 Nev., Adv. Op. 72, 402 P.3d 1280, 1285 (2017) by stating that in the prior case, they warned that a parent could be required to engage in meaningful therapy for family reunification and treatment of the problems that led to removal, which may be ineffective without an acknowledgment of the abuse and that a failure to reunify for that reason may not be protected under the Fifth Amendment.

Here, they distinguished one injury from multiple injuries in that evidence of abuse by dad was significantly more egregious and pervasive over several years, that the mom was aware of the abuse, and the children had been instructed to lie about it.

They noted the evaluation showing that both parties were at high risk to reoffend, and the district court finding that the parties did not "meaningfully address the abuse in therapy" and continued to insist that the injuries were self-inflicted

They disregarded the therapist's finding that they could reunify despite maintaining their denial of abuse because he had not spoken with the children or ***their*** therapists, he had not seen the injuries, he believed the abuse allegations were unsubstantiated, and his proposed safety plan was intended to protect ***mom and dad*** from future allegations of abuse.

They upheld the district court's termination based on the finding that they did not engage in meaningful therapy designed to ensure that the children could be safe if returned to appellants' home.

The actual holding is that a termination failure to undergo meaningful therapy is not a penalty imposed by the state but "is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent." And, therefore, finding parental fault did not violate the Fifth Amendment.

O'Connell v. Wynn Las Vegas, LLC, 134 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 67 Aug 30, 2018)

Plaintiff had made an offer of judgment which was rejected, and won a lot more than the offer.

Plaintiff asked for fees and the district court rejected the request, because the contingency-based attorney was not keeping time logs and therefore could not show the hours spent on the case.

The Court held that district courts cannot deny attorney fees because an attorney, who represents a client on a contingency fee basis, does not submit hourly billing records. Specifically, declining to assess the reasonableness of a request for attorney fees, based upon a contingency fee agreement, because the motion was not supported by hourly billing statements, is improper when analyzing whether to award fees under *Beattie* and how much to award under *Brunzell*.

Therefore, a court cannot determine that an attorney's fee award is unreasonable under a contingency fee agreement solely because there are no billing records to support the work done.

The Court must analyze the *Brunzell* factors when determining reasonableness of fees.

This case also included an offer of judgment so the analysis of the *Beattie* factors is necessary in determining a fee award. here, the offer was in good faith, and the other factors were satisfied as well.

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UNPUBLISHED (2018)

FROM LAST TIME:
Phung v. Doan, No. 69030, Order Affirming in Part, Reversing in Part, and Remanding (Unpublished Disposition May 10, 2018)

A 4 to 3 decision affirming a trial court determination that an agreement was reached, and after an evidentiary hearing, establishing the terms of the agreement. An

agreement was formed at the settlement conference and the submission of a Stip and Order the following day informing the trial court of a full settlement constituted a writing signed by the agents of the parties even though no signed writing reciting those terms was executed.

The $1,000 a day penalty was determined to be an abuse of discretion. Though on remand the District Court may impose reasonable sanctions if the Respondent refuses to pay the award.

As to attorney's fees, the Court must make findings in accordance with Brunzell or it is an abuse of discretion.

(Editor's Note: The majority opinion did not discuss the authority relied upon in the briefing (Resnick), excerpted below, while the dissent cited the case but somehow did not think it authorized the result reached:

> We are not saying that enforcement of the supposed agreement by counsel may not be accomplished in some appropriate fashion.[1] If suit on such an agreement was prosecuted, the court might consider such issues as the authority of counsel, the nature of communications between counsel and client and the existence of a meeting of minds by the parties; the court might then decide to award a judgment based on the contract of the parties. This is not the same as allowing judgment on a mere motion to enforce a settlement agreement supposedly reached by counsel during negotiations. Indeed, to allow motions of this kind to lead to judgment would result in trial by affidavit; and to enter judgment in summary proceedings on such a motion is a clear violation of District Court Rule 24.(Now DCR 16)

The Doan dissent's argument would essentially make any oral contract unenforceable as there is no writing or entry in court minutes on which to rely.

In the Matter of the Parental Rights As To L.C.N., No. 73503, Order of Reversal and Remand, (Unpublished Disposition May 15, 2018)

Parental rights were terminated via summery disposition.

Once appellant claimed to be the child's father, the district court had to determine his custodial rights, which likely would have begun with a paternity test to confirm that he ***was*** the child's father as respondents still contended that he was not.

Regardless, the district court erred by placing the burden of proving paternity on appellant. As appellant contested the petition to terminate his parental rights, there were some historical facts that were contested, and the district court improperly placed the burden to prove paternity on appellant, making summary judgment inappropriate.

Griffith v. Gonzales-Alpizar, No. 66954, Order of Affirmance (Unpublished Disposition Jun 22, 2018)

The district court did not abuse its discretion in concluding that portions of the Costa Rican child support order were enforceable under the doctrine of comity because there was inadequate evidence of fraud as grounds for ***not*** recognizing the foreign judgment.

Further, the district court did not abuse its discretion in according comity to the Costa Rican child support order because the order does not offend the public policy of Nevada.

The District Court did not abuse its discretion in not awarding attorneys fee under the premarital agreement as the Appellant waited too long before making the request.

In the Matter of Guardianship of T.T.H. and T.A.H., No. 73932, Order of Affirmance, (Unpublished Disposition Jun 22, 2018)

Landreth held "that the district court judge sitting in family court did not lack the power and authority to dispose of this case merely because it involved a subject matter outside the scope of NRS 3.223." Id. at 177, 251 P.3d at 165.

Here, while NRS 3.223 places guardianship matters within the exclusive jurisdiction of the family court division, in times of "judicial necessity and convenience," a district court judge sitting outside the family law division has authority to dispose of matters that fall under the exclusive jurisdiction of the family law division. Accordingly, we hold the district court had jurisdiction to hear the instant guardianship matter.

The court reaffirmed that "[t]he best interest of the child is usually served by awarding his custody to a fit parent." McGlone v. McGlone, 86 Nev. 14, 17, 464 P.2d 27, 29 (1970).

Here, the district court considered NRS 125C.0035(4)'s best interest factors and determined that termination of guardianship was in the best interest of the minor children, and the Court found adequate substantial evidence in support.

Parker v. Green, No. 73176, Order Vacating Judgment, Reversing, and Remanding (Unpublished Disposition Jun 25, 2018)

Upon the dissolution of a Domestic Partnership, a pre-partnership agreement between them required the man to pay the woman $2,500 for life or until remarriage of woman if the breakup was for infidelity.

It was, and it did.

The decree of termination said the payments were NOT alimony, and would continue even if the parties reconciled. They did that, too, and entered into another domestic partnership.

Two years later, the man tried to end the payments, saying they were really alimony. The district court refused.

The Supreme Court reversed in an unpublished order, and did NOT remand. It held that no-fault was important here and that there is no Nevada statute entitling anyone to damages for contracting a sexually transmitted disease, and that "punishment" was the intent of the original contract.

So the Court found the contract to be ambiguous, that construing the contract as one for tort damages would go against public policy, because "An agreement which regulates the details of a person's daily life in order to prevent infidelity, and then penalizes that infidelity with excessive "damages" stemming from causes of action not recognized within this state, is not an enforceable contract."

Since Nevada is a no-fault divorce state, infidelity or the passing on of a sexually transmitted disease is not a reason for divorce and is also not a reason for the awarding of alimony, so the court "declined to permit payments to continue because the record demonstrates here that they are punitive rather than need-based."

The Court said she could keep all the money already received, but would not get any more going forward.

In the Matter of Parental Rights as to T.M.B. and V.S.B., Minors, No. 72483, Order of Affirmance, (Unpublished Disposition Jul 3, 2018)

Substantial evidence was produced at trial that supported termination was in the children's best interest and that mother had not corrected the problems that led to the children being removed from her home.

In the Matter of Parental Rights as to D.S.S. and S.M.S, Minors, No. 73290, Order of Affirmance (Unpublished Disposition July 27, 2018)

While Ware presented evidence that she was steadily improving, and could potentially obtain a bed at a facility that allowed children, her care providers indicated that she would not be able to live independently for another year and had no current means of employment. This, when coupled with the psychologist's testimony that the children had developed a stable, bonded relationship with their foster parents and foster sibling, and would likely suffer further trauma upon reunification, supports the

conclusion that the district court did not abuse its discretion when it determined that Ware failed to rebut the NRS 128.109(2) presumption.

Pittman v. Pittman, No. 71662, Order of Affirmance (Unpublished Disposition Oct 2, 2018)

The parties had a bigamous marriage (W was still married to H1 when she married H2). They bought a house in Joint Tenancy and legitimately married after W's divorce from H1.

Years later, W & H2 divorced.

Two main holdings.

First, a house bought by the parties before marriage and held in joint tenancy is divisible on divorce with each party receiving their separate property share before division of any community property interest.

H was sanctioned and ordered to pay certain debts. He complained that the district court did not make specific finding under Young v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). That claim of error was rejected because the district court is only required to explicitly address those factors if the sanctions are case-concluding, and here, they were not.

Finally, because H did not submit evidence that alleged debts actually existed or were community debts, the district court order requiring H to pay all of them was affirmed.

Herzog v. Herzog, No. 73160, Order Affirming in Part, Reversing in Part and Remanding (Unpublished Disposition Oct 2, 2018)

This was a review of a COA opinion from last year.

Setup is that the divorce court ordered retroactive child support to a time H said he was still supporting the child and $100 per month per child although H was in prison and had no income at all. Both were affirmed because they were not challenged at the district court level.

District court also ordered H's work tools sold to pay child support arrearages, which he challenged based on the statutory exemption for work tools. That was affirmed, too, since the tools were community property and the only assets that the Appellant had to satisfy the same.

The district court limited visitation to one letter per month and forbade phone contact. In a footnote, the Court suggested that the district court might have relied on a document excluded from admission, which it criticized.

The Court reversed the visitation for the younger child as it was not correlated to the best interest standards, injured the parent-child relationship, and implied that the Court was delegating the authority to adjust child custody to the child's therapist which this Court held was impermissible in Bautista v. Picone, 134 Nev., Adv. Op. 44, 419 P.3d 157, 159-60 (2018) (holding that a district court's delegation of authority in custody and visitation cases "must be limited to nonsubstantive issues . . .and it cannot extend to modifying the underlying [visitation] arrangement").

Robinson v. Robinson, No. 73751, Order of Affirmance (Unpublished Disposition Oct 2, 2018)

Post-divorce, H lost his job; district court modified support, imputing to him $55,000 in annual income rather than the $125,000 he could have earned by moving out of state and away from his children. Additionally, the district court found ***her*** willfully underemployed imputed to her $16 per hour.

The Supreme Court affirmed.

The district court did not abuse its discretion by not imputing a higher income to father who could have made more if he moved out of state and away from the children. The Court cautioned against elevating the "financial well-being" of children over their "emotional well-being."

No abuse of discretion was found as to either finding as to Mom.

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