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Summary of Castle v. Simmons, 120 Nev. Adv. Rep. 15

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FAMILY LAW - CHILD CUSTODY

Summary

Appeal of an order modifying custody of parties' children.

Disposition/Outcome

Affirmed. A party seeking to modify custody of children may introduce evidence of domestic violence if either of the parties or the district court was unaware of the existence or extent of the conduct when the prior custody order was entered.

Factual and Procedural History

Mr. Simmons and Ms. Castle, husband and wife respectively, were married on June 22, 1979, and divorced August 13, 1998. While married, they had six children. The divorce decree awarded "full legal and physical" custody to Ms. Castle, while giving Mr. Simmons "reasonable" visitation.

After the parties were divorced, Mr. Simmons's two oldest sons told him that Ms. Castle had physically abused them as well as their younger siblings before and after the original decree and award of custody. On that basis, Mr. Simmons attempted to modify the custody arrangement. The district court granted Mr. Simmons's ex parte application for temporary custody, and the parties stipulated to share custody of the three remaining children pending a final ruling on the motion to modify.

At the hearing, the children were represented by independent counsel. More than twenty witnesses offered conflicting testimony. The district court found that clear and convincing evidence existed that supported the claims of physical abuse of the children by Ms. Castle. The court found that a change in custody was warranted, based NRS 125C.230(1), which creates a presumption that when a parent engages in domestic violence, that parent's sole or joint custody of the children is not in the children's best interest. The district court proceeded to order that custody of the minor children be changed in favor of Mr. Simmons.

Ms. Castle appealed, primarily basing her appeal on the district court's abuse of discretion in (1) considering pre-decree misconduct (2) finding that the instances of abuse were shown by clear and convincing evidence (3) failing to find that any showing of abuse was rebutted (4) finding that Mr. Simmons satisfactorily established a change in circumstances between the entry of the divorce decree in 1998 and the ex parte application to change custody in 2001 and (5) concluding that modification was in the children's best interest.

¹ By Mike Feliciano

Discussion

The supreme court affirmed, holding that clear and convincing evidence did exist for the district court to conclude that acts of domestic violence had been committed against the children. The district court relied on the testimony of three of the children and Mr. Simmons to make its ruling. This testimony included accounts of domestic violence committed by Ms. Castle. While Ms. Castle raised numerous claims against the credibility of Mr. Simmons witnesses, the supreme court declined to reassess the witnesses' testimony because that was the function of the district court.

Ms. Castle raised a claim that the district court erred in determining that Mr. Simmons satisfied the test for custody modification established in *Murphy v. Murphy*.² In rejecting this argument, the court established that res judicata should not be used to preclude parties from introducing evidence of domestic violence that was not known to the party at the time the court rendered a decision on child custody. Further, the court overruled two cases to the extent that they differ with *Castle* with respect to allowing introduction of evidence of previously unknown abuse.³

Ms. Castle also raised three other issues that the court quickly dismissed. First, the court rejected her argument that the district court did not take into account other issues concerning the children's best interest. The supreme court rejected this argument because the district court took into account Mr. Simmons employment prospects, the financial status of Mr. Simmon's current spouse and the relative residential situations of both of the parties when it determined the custody modification. Second, the court rejected Ms. Castle's argument that the child advocate appointed by the court was not qualified.⁴ Finally, the court rejected the argument that Mr. Simmons violated a local district court rule by setting the motion to modify before the wrong judge.⁵ The court rejected this argument because Ms. Castle never attempted to disqualify the judge and because no substantial violation of the rules occurred.

Conclusion

The supreme court will not reverse a child custody ruling unless there is a clear abuse of discretion. In child custody cases, *Castle* provides more protection against children in cases of domestic violence because the supreme court will give the district court deference with respect to finding of fact. Moreover, the abolishment of res judicata in cases where evidence of domestic violence is discovered after the custody determination is made will further protect the interests of children.

² 447 P.2d 664 (Nev. 1968). The *Murphy* test is a two-pronged test for custody changes that applies only when one parent has primary physical custody allowing change in physical custody only when (1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change. *Id.* at 665.

³ See *Hopper v. Hopper*, 946 P.2d 171 (Nev. 1997); *McMonigle v. McMonigle*, 887 P.2d 742 (Nev. 1994).

⁴ While the child advocate did not meet the technical definition of a child advocate under NRS 433.209, the supreme court held that his qualifications were in substantial compliance with the statute.

⁵ See 4JDCR 2(5).