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10-30-2023

Kelley v. Kelley, 139 Nev. Adv. Op. 39 (Sep. 28, 2023)

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Kelley v. Kelley, 139 Nev. Adv. Op. 39 (Sep. 28, 2023)¹

DISPUTES OVER MEDICAL CARE WHEN PARENTS HAVE JOINT CUSTODY REQUIRE
A CIRCUMSTANTIAL ANALYSIS UNDER THE BEST-INTEREST-OF-THE-CHILD
STANDARD.

Summary

The Nevada Supreme Court ruled that when it comes to disputes over medical treatment for children of parents with joint legal custody, the most appropriate standard is the best-interest-of-the-child standard. To determine the best interests of a child, the Court recommended a factor test to weigh the treatment’s potential harm, whether the child’s doctor recommends the treatment, the treatment’s potential risks, and the child’s preferences, depending on their age. Here, the Court applied that test and ruled that a doctor’s recommendation, judicial notice of findings from the CDC, and the potential risks of contracting COVID-19 were sufficient for a parent to establish that vaccination was in the child’s best interest, even if the other parent disagreed.

Background

Two divorced parents, Brooke and Scott Kelley, had joint legal custody of their 11 year-old and 3 year-old children. Part of that custody agreement included the provision that each parent would have to agree on the children’s medical care. Although one child was old enough to receive the COVID-19 vaccine, Brooke disagreed due to concerns about the vaccine’s safety and reliability.

Scott asked the district court to compel Brooke to agree to the vaccination. Notably, he argued that the vaccine would be in the child’s best interests based on their pediatrician’s recommendation, the known risks of contracting COVID-19, citing the CDC, and his desire to travel internationally with his children. Brooke expressed her disagreements before the court, repeating her concerns about the vaccine and adding that her children were already healthy, that the vaccine failed to protect her from illness, and that the lifted mask and vaccine mandates meant that the pandemic was effectively over.

The district court ruled that the vaccine was in the child’s best interest and awarded Scott “sole legal custody to act singularly” to vaccinate the child.² Brooke appealed, arguing that (1) the court should have applied a “medically necessary” standard instead of a “best-interest-of-the-child” standard, and (2) even by the best interest standard, the court’s analysis of the issues was improper.

Discussion

The best-interest-of-the-child standard applies

What standard should courts apply when parents with joint legal custody disagree on medical care for their child?

¹ By Alisha Meschkow.

² *Kelley v. Kelley*, 139 Nev. Adv. Op. 39, 4 (Sep. 28, 2023).

In her appeal, Brooke argued that the district court should have applied the medically necessary standard described by state law rather than the best-interest standard.³ The Court rejected these arguments, stating that the best interest standard had applied to educational disputes within Nevada⁴ and medical disputes in other jurisdictions.⁵ Moreover, NRS 695G.055 defined “medically necessary” in an insurance context to prevent healthcare providers from offering medically insufficient services,⁶ not family law. The Court found no justifiable reason to override a doctor’s advice, yet alluded to other factors that might influence judicial determinations in the future.

Factors to consider in determining the best interest of the child

How should courts apply the best-interest-of-the-child standard to medical decisions made on that child’s behalf?

Brooke argued that the lower court abused its discretion in its analysis of the child’s best interest according to statute and should not have “simply accepted” the pediatrician’s recommendation.⁷ The Court disagreed, finding that the factors listed in NRS 125C.0035(4) were unhelpful in this context. Therefore, the Court found it necessary to adopt California’s factor test to determine a child’s best interest in future, similar cases.⁸ The nonexhaustive, slightly modified factors include: (1) the severity or substantial likelihood of harm; (2) a medical doctor’s recommendation or opinion; (3) the risks of treatment; and (4) the child’s preferences, if old enough to express.⁹

These factors should be weighed among others that a court might find relevant, depending on the circumstances. Here, the medical recommendations, the apparent risks of illness, and the facilitation of international travel all supported the Court’s finding that vaccination was in the child’s best interest. Furthermore, no evidence on the record supported Brooke’s concerns regarding the vaccine’s safety or effectiveness. A parent’s mere preferences are not enough to establish the child’s best interest.

Conclusion

The Nevada Supreme Court affirmed the district court’s ruling, holding that the best-interest-of-the-child standard applies to medical decisions for children of parents with joint custody.

³ NEV. REV. STAT. 695G.055 (2003).

⁴ *Arcella v. Arcella*, 133 Nev. 868, 870, 407 P.3d 341, 344 (2017).

⁵ *A.R. v. J.A.*, No. CK14-01551, 2022 WL 11121330, at *3 (Del. Fam. Ct. 2022); *Nieber v. Nieber*, No. A20-0616, 2021 WL 1.525184, at *2 (Minn. Ct. App. 2021); *J.F. v. D.F.*, 160 N.Y.S.3d 551, 556-57 (N.Y. Sup. Ct. 2021); *L.L.B. v. T.R.B.*, 283 A.3d 859, 864 (Pa. Super. Ct. 2022); *In re A.J.E.*, 372 S.W.3d 696, 699 (Tex. App. 2012).

⁶ NEV. REV. STAT. 422.27179(1)(a)(2) & (3)(a); NEV. REV. STAT. 687B.740.

⁷ NEV. REV. STAT. 125C.0035(4).

⁸ *In re Eric B.*, 235 Cal. Rptr. 22 (Ct. App. 1987).

⁹ *Id.* at 27.