

**GARAY V. CALABRO**

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

**JENNIFER GARAY,**  
Petitioner-Appellant,  
v.  
**RICHARD CALABRO,**  
Respondent-Appellee.

No. 32,432

COURT OF APPEALS OF NEW MEXICO

December 19, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Gerald J.  
Lavelle, District Judge

**COUNSEL**

Jennifer Garay, Albuquerque, NM, Pro se Appellant

Kelley Family Law, P.C., Patrick T. Kelley, Albuquerque, NM, L. Helen Bennett, P.C., L. Helen Bennett, Albuquerque, NM, for Appellee

**JUDGES**

TIMOTHY L. GARCIA, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge,  
JONATHAN B. SUTIN, Judge

**AUTHOR:** TIMOTHY L. GARCIA

**MEMORANDUM OPINION**

**GARCIA, Judge.**

{1} Mother appeals the district court's child custody determination granting primary physical custody of her children to their Father. The district court relied on the custody recommendations provided by an appointed Rule 11-706 NMRA expert, whom Mother

was unable to depose prior to the first of two evidentiary hearings on the expert's recommendations. On appeal, Mother argues that the district court erred in denying her request for a continuance. We affirm because Mother had ample time to depose the expert in between the first and second evidentiary hearings and apparently elected not to do so. The district court did not abuse its discretion under the circumstances presented in this case.

## **FACTS**

{2} The parties entered into a marital settlement agreement (MSA) which resolved all issues except those of custody and time-sharing of their two children. The MSA provided that both parties agreed to the appointment of Dr. Jan Griffin as a Rule 11-706 expert to make recommendations for ongoing custody and time-sharing. Dr. Griffin recommended that Father have primary physical custody of the two children with periods of time-sharing for Mother. Following Dr. Griffin's recommendations, Father filed a motion to adopt her recommendations. The matter was set for a hearing.

{3} At the hearing on Father's motion, Mother filed objections to Dr. Griffin's expert report and recommendations. The district court scheduled a full evidentiary hearing to fully address Mother's objections and whether it should adopt Dr. Griffin's recommendations for child custody and time-sharing. The parties were given over two-and-a-half months to prepare for the evidentiary hearing. In her preparation, Mother subpoenaed Dr. Griffin's entire file, including testing data used in the evaluation process. Pursuant to New Mexico's Administrative Code, Dr. Griffin sought a protective order to protect the privacy of the testing data from Mother, but offered to disclose the test materials to another licensed psychologist. 16.22.2.16(B) NMAC (11/15/2006). Mother then requested that Dr. Griffin release the contested documents to Dr. Zervopoulos, a licensed psychologist from Texas. The district court ordered Dr. Griffin to release the raw testing data to Dr. Zervopoulos upon payment for Dr. Griffin's services.

{4} After Dr. Griffin filed her motion for a protective order, Mother attempted to schedule her attendance for a deposition. Shortly after the hearing on her motion for a protective order, however, Dr. Griffin left for vacation. Dr. Griffin did not return from vacation until the date of the July evidentiary hearing addressing her expert recommendations. Accordingly, Mother filed a motion for continuance so that she could have the opportunity to depose Dr. Griffin. Father responded that it was unreasonable for Mother to subpoena Dr. Griffin's files and request her presence at a deposition when Mother had stipulated to Dr. Griffin's appointment and was not prepared to compensate Dr. Griffin at the time of the subpoena. Father also noted that Mother had not objected until she disliked the recommendations reflected in Dr. Griffin's final report.

{5} The July hearing took place as scheduled. At the hearing, Mother did not repeat her request for a continuance or call any witnesses. Dr. Griffin testified and Mother's counsel cross-examined Dr. Griffin's testimony for over two hours. However, the time scheduled for the hearing was insufficient and the hearing was again continued until late August, over a month later. At the rescheduled August hearing, Mother did not allege

any prejudice as the result of the denial of her motion for a previous continuance in July and did not indicate at any time that her preparation for the August hearing had been impaired. Mother never requested that Dr. Zervopoulos or any other person be allowed to testify on her behalf. The parties were the only remaining witnesses and both presented their testimony at the August hearing.

{6} Ultimately, the district court heard all the evidence and issued a written decision adopting Dr. Griffin's report and recommendations. The written decision contained numerous findings of fact and conclusions of law regarding Mother's objections to Dr. Griffin's report. The district court noted that Father had failed to provide Mother with two exhibits that he had provided to Dr. Griffin, but otherwise found that "Dr. Griffin conducted a thorough and complete evaluation which met professional standards for such an evaluation[.]" The district court found Dr. Griffin's recommendations were in the best interest of the children. Mother timely filed a simultaneous motion for reconsideration with the district court and a notice of appeal with this Court. The district court denied Mother's motion for reconsideration.

## DISCUSSION

{7} Mother argues on appeal that the district court erred in denying her motion for a continuance of the July hearing in order to depose Dr. Griffin and prepare Dr. Zervopoulos to testify. We review the denial of a motion for continuance for an abuse of discretion. *Rubin v. Rubin*, 1995-NMCA-107, ¶ 11, 120 N.M. 592, 904 P.2d 41. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. When reasons both supporting and detracting from a decision exist, there is no abuse of discretion. *Talley v. Talley*, 1993-NMCA-003, ¶ 12, 115 N.M. 89, 847 P.2d 323. The burden of establishing an abuse of discretion rests with the movant. *State v. Torres*, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

{8} There are a number of factors the district court should consider when evaluating a motion for continuance. *Id.* These factors include: (1) the length of the requested delay, (2) the likelihood that a delay would accomplish the movant's objectives, (3) the existence of previous continuances in the same matter, (4) the degree of inconvenience to the parties and the court, (5) the legitimacy of the motives in requesting the delay, (6) the fault of the movant in causing a need for the delay, and (7) the prejudice to the movant in denying the motion. *Id.* Although we do not discuss each factor in depth, substantial evidence in the record indicates that Mother has failed to demonstrate that the district court abused its discretion when her request for a continuance was denied.

{9} In the present case, the district court implicitly denied Mother's requested continuance by proceeding with the July hearing as scheduled. However, due to time constraints and the volume of the evidence that remained to be presented, the July hearing was then continued until late August, approximately six weeks later. Mother has conceded on appeal that she only needed a continuance of three weeks or less to depose Dr. Griffin. Thus, although Mother's previous motion for a continuance was not

granted, the subsequent continuance until late August actually provided Mother with the additional time she had requested. Despite this extra six weeks, Mother has not provided this Court with any explanation or other reference to the record that would demonstrate why Mother failed to use this time for the purposes she had requested in her motion for a continuance. On the contrary, it appears as though Mother did not attempt to pursue the stated purposes for her continuance or otherwise seek additional assistance from the court. Nothing in the record suggests that Mother suffered any prejudice once the additional six-week continuance occurred after the July hearing.

{10} Mother plainly states that “Dr. Griffin did not present any insurmountable obstacle to Mother’s attempt to take her deposition. Rather[,] the obstacles Mother encountered . . . simply consumed slightly more time than the court allowed.” Yet nothing in the record indicates that Mother attempted to depose Dr. Griffin when the additional six weeks became available. The record does not support Mother’s arguments or any assertion that she was prejudiced as a result of the July or August hearings. The motivation for a continuance appears to have vanished once the additional six weeks actually became available because the original July hearing was continued and set for a second hearing in August. We hold that the district court did not abuse its discretion in refusing to grant Mother’s motion for a continuance.

#### **CONCLUSION**

{11} For the reasons stated herein, we affirm the district court.

{12} **IT IS SO ORDERED.**

**TIMOTHY L. GARCIA, Judge**

**WE CONCUR:**

**RODERICK T. KENNEDY, Chief Judge**

**JONATHAN B. SUTIN, Judge**