IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHEL LELLOUCHE,
Appellant,
vs.
MICHELE PAM LELLOUCHE, A/K/A PAM LELLOUCHE,
Respondent.

No. 50179

FILED

NOV 19 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from district court orders concerning child custody, child support arrears, and attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Stefany Miley, Judge.

Jurisdiction

On appeal, appellant challenges (1) the March 21, 2005, order denying his motion for rehearing; (2) the March 31, 2005, order awarding attorney fees and costs to respondent;[1] and (3) the September 24, 2007, order modifying custody and awarding child support, medical expenses, attorney fees, and costs to respondent.

[1]Because the notice of entry of this order was filed on October 4, 2007, appellant timely filed his amended notice of appeal on October 18, 2007.

08-29505

This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule.[2] An appeal may be taken from a final judgment in an action or proceeding commenced in the court in which the judgment is rendered, or from an order that finally establishes or alters child custody.[3] However, orders denying rehearing are not appealable.[4] Accordingly, we lack jurisdiction to consider the March 21, 2005, order, and we confine our appellate review to the March 31, 2005, and September 24, 2007, orders.

Procedural background

The parties were divorced in 1997. They have two children from the marriage, ages 13 and 16. The record shows that since their divorce, the parties have engaged in an ongoing child custody battle, complicated by disagreements regarding past and present child support obligations, the parties' responsibility for the children's medical expenses, and appellant's court-ordered obligations to pay respondent's attorney fees and costs.

In 2002, the district court confirmed that, under the terms of the parties' divorce decree, the parties shared joint legal custody with respondent having primary physical custody and appellant having

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[2]See Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984).

[3]NRAP 3A(b)(1) and (2).

[4]Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983).

visitation.[5] Beginning in January 2007, the older child spent the majority of his time with appellant and refused to visit with respondent due to the child's strained relationship with respondent. During that time, the younger child lived with respondent and visited with appellant. Between January and September 2007, the relationship between the parties and the children became hostile and communications between the parties deteriorated. Mutual allegations of misconduct, manipulation, and abuse filled numerous pleadings filed in the district court. Although both children attended several counseling sessions, the parties disputed the other's choices for counselors, and as a result the children changed counselors frequently.

During the course of litigation, appellant allegedly fell behind of his child support obligation, his contributions to medical expenses for the children, and payment of court-ordered attorney fees to respondent. While appellant made some payments towards his past due obligations, the parties could not reconcile appellant's payments with the alleged arrears and the record on appeal does not provide a comprehensive accounting.

By September 2007, the older child, then 15, expressed his strong preference to live with appellant, while the younger child seemed

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[5]Appellant is a French citizen and a permanent legal resident of the United States. The parties' divorce decree conditioned appellant's joint legal custody upon his receipt of U.S. permanent legal residency. Although during the divorce proceedings respondent withdrew her support for appellant's permanent residency application, appellant overcame deportation proceedings and obtained a permanent legal residency in this country.

neutral to both parties, as long as they could get along. Around that time, both parties moved the district court for a change of custody. On September 24, 2007, following a hearing, the district court entered an order that awarded sole legal and physical custody of both children to respondent and barred appellant from entering the children's schools and being in proximity to respondent's and her parents' residences. The district court concluded, without specific findings, that appellant had alienated the older child from respondent and that the child was not ready to live with respondent, and because of the alleged alienation, the court ordered the older child to live with his maternal grandparents until the child was ready for reunification with respondent. The court further ordered appellant to pay for the child's counseling. The September order did not provide appellant any visitation with the children. Moreover, without explanation, the district court also awarded respondent a lump sum of $23,053.58 that included child support arrears, unreimbursed medical expense arrears, health care premiums, and attorney fees stemming from earlier proceedings. The court further declared appellant a vexatious litigant and ordered him to pay $15,000 in attorney fees and costs to respondent's counsel as a sanction. Appellant has filed this proper person appeal. As directed, respondent has filed a response.

On appeal, appellant argues that the district court abused its discretion when it awarded respondent sole legal and physical custody of the children, and when it awarded respondent child support arrears, unreimbursed medical expense arrears, health care premiums, and attorney fees. Respondent's response addresses, in a cursory manner,

appellant's arguments concerning the monetary award and does not address the child custody issues at all.[6]

Child custody

Matters of custody, including visitation, rest in the district court's sound discretion.[7] This court will not disturb the district court's custody decision absent a clear abuse of discretion.[8] Modification of a primary physical custody arrangement is only warranted when there has been a substantial change in the circumstances affecting the child's welfare and the modification is in the child's best interest.[9] NRS 125.480(4) requires the district court to consider and set forth specific findings supporting its custody determination. The district court's determinations will not be disturbed on appeal if they are supported by substantial evidence.[10] Substantial evidence is that which a sensible

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[6]On April 11, 2008, we issued an order to show cause why sanctions should not be imposed. Specifically, we directed attorneys Patricia Vaccarino and Robert Hempen to inform this court as to which attorney was representing respondent on appeal. In response to our show cause order, attorney Hempen filed a notice of appearance. Thereafter, Mr. Hempen filed a two-page response to appellant's civil proper person appeal statement. The response did not contain any citations to the 13-volume record on appeal and did not address the central issue of child custody. We admonish Mr. Hempen that in the future such conduct will result in the imposition of sanctions.

[7]Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

[8]Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993).

[9]Ellis v. Carucci, 123 Nev. ___, ___, 161 P.3d 239, 242 (2007).

[10]Shydler v. Shydler, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).

person may accept as adequate to sustain a judgment.[11] Finally, this court recognizes that "parents have a fundamental liberty interest in the care, custody, and management of their children."[12]

Having considered the parties' arguments on appeal and reviewing the record, we conclude that the district court abused its discretion when it awarded sole legal and physical custody to respondent. The district court's September 24, 2007, order is devoid of any specific factual findings supporting the court's custody conclusions and the appellate record does not contain substantial evidence supporting the district court's decision. Specifically, the September order fails to explain why it was in the children's best interests to live exclusively with respondent without any visitation with appellant. Moreover, the record demonstrates that the older child expressed his preference to remain in appellant's custody and the younger child stated that he wished to spend time with both parents.[13] The district court's order nevertheless placed the older child in the care of third parties, the maternal grandparents, without deference to parental placement as mandated by the United

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[11]Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

[12]See Kirkpatrick v. Dist. Ct., 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003) (relying on Santosky v. Kramer, 455 U.S. 745, 753 (1982)); see also Troxel v. Granville, 530 U.S. 57, 65 (2000) (stating that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

[13]See NRS 125.480(4)(a) (stating that when the district court determines custody, in light of the child's best interest, the court shall consider, among other things, "[t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference").

States Supreme Court.[14] Accordingly, we reverse the portion of the district court's September 24, 2007, order awarding sole legal and physical custody of the children to respondent and without any visitation with appellant, placing the oldest child with the maternal grandparents, and we remand this matter to the district court for further proceedings consistent with this order.

While we understand the district court's possible frustration with the parties in light of this prolonged and acrimonious litigation, we trust that the district court, on remand, will resolve this matter in an expeditious fashion.[15]

Child support arrears, unreimbursed medical expenses, health care premiums, and attorney fees

In its March 31, 2005, order, the district court awarded respondent $3,000 in attorney fees and costs, and in its September 24, 2007, order the court awarded respondent a lump sum of $23,053.58, which included child support arrears, unreimbursed medical expenses, health care premiums, and attorney fees and costs, without allocating any specific amount toward arrears, expenses, or fees. Additionally, the September order awarded respondent $15,000 in attorney fees and costs, apparently as a "vexatious litigant" sanction.

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[14]See Kirkpatrick, 119 Nev. at 71, 64 P.3d at 1059 (citing Santosky, 455 U.S. at 753); see also Troxel, 530 U.S. at 65.

[15]Based on the record, it appears that a psychological evaluation of the parties and children by a court-appointed mental health professional would assist the court in determining the children's best interests regarding custody.

This court reviews a district court's child support and attorney fees awards for an abuse of discretion.[16] We will affirm the district court's rulings that are supported by substantial evidence.[17] Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment.[18] Attorney fees may be awarded when authorized by a rule or a statute.[19] In family law cases, when the district court exercises its discretion to award attorney fees, the court is required to evaluate the factors set forth in Brunzell v. Golden Gate National Bank.[20] Further, as we have recognized in Wright v. Osburn,[21] when awarding attorney fees, the district court must consider the parties' income disparity.[22]

After considering the parties' contentions and reviewing the record, we conclude that the district court abused its discretion when it awarded, without specific findings, to respondent child support arrears, unreimbursed medical expenses, health care premiums, and attorney fees and costs. In particular, because the district court lumped together

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[16]See Edgington v. Edgington, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003) (child support); Miller v. Wilfong, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005) (attorney fees).

[17]Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

[18]Id.

[19]See NRS 125B.140(2)(c)(2); Miller, 121 Nev. at 623, 119 P.3d 730.

[20]85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

[21]114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).

[22]See also Miller, 121 Nev. at 625, 119 P.3d at 731.

appellant's alleged past due obligations for child support, health insurance premiums, past share of unreimbursed medical expenses, and attorney fees, we are unable to determine what specific amounts were awarded to respondent. Thus, we cannot address appellant's arguments on appeal regarding the allegedly improper awards.

Further, while the district court's September order states that the parties stipulated to appellant's combined liability of $23,053.58, the record is inconsistent as to whether a stipulation existed and the amount awarded cannot be reconciled with the evidence in the record. Specifically, concerning the alleged past due child support and combined medical expenses, the record does not contain any reconciled accounting of appellant's obligations and/or payments that have been made. It is also unclear whether the parties' support obligations were set according to NRS 125B.080, which contemplates the adjustment of the parties' responsibilities due to the many factors set forth in subsection 9, including but not limited to the amount of time each child spends with each parent and the age of each child.

As for the attorney fees, the district court's orders are not supported by substantial evidence and the court did not make findings under Brunzell and Wright. Thus, the district court abused its discretion when it awarded respondent $3,000 in the March 31, 2005, order and $23,053.58 in the September 24, 2007, order.

As regards the $15,000 attorney fees award, as a sanction, in the September order, it seems excessive and unwarranted under the

circumstances of this case.[23] In particular, the record shows that both parties filed numerous motions in the underlying district court proceedings, and absent specific findings by the district court it is unclear how appellant's pleadings justify such a large award of attorney fees as a sanction against him. Thus, we reverse that portion of the September order.

In light of the above discussion, we reverse the March 31, 2005, order awarding respondent $3,000 in attorney fees and reverse the September 24, 2007, order awarding respondent (1) sole legal and physical custody of the children; (2) a lump sum of $23,053.58 in past due child support arrears, medical expenses, attorney fees, and costs; and (3) the $15,000 in attorney fees as a sanction, and we remand this matter to the district court for further proceedings consistent with this order.

IT IS SO ORDERED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

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[23]Although the district court described appellant as a vexatious litigant, it did not impose any filing restrictions on appellant. Moreover, the district court's conclusion is not properly supported by the record and the district court's analysis as required by Jordan v. State, Department of Motor Vehicles, 121 Nev. 44, 110 P.3d 30 (2005), abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. ___, 181 P.3d 670 (2008).

cc: Hon. Stefany Miley, District Judge, Family Court Division
Michel Lellouche
Law Offices of Robert L. Hempen II
Eighth District Court Clerk