

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NATALINO CHRISTOPHER MATT,
Appellant,
vs.
NICOLE DILLWITH,
Respondent.

No. 72211

FILED

SEP 20 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Natalino Christopher (“Chris”) Matt appeals from an order awarding Nicole Dillwith sole legal custody, modifying visitation, and holding Chris in contempt. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.

The parties have one minor child together. Prior to 2016, the couple shared joint legal custody of their child and Nicole had de facto primary physical custody. In February 2016, Nicole moved to modify custody to restrict Chris’ parenting time to daytime visits. She also asked the district court to officially recognize that she had primary physical custody of the child. Nicole further argued that Chris should be held in contempt of court for 1) failing to make scheduled child support and arrears payments, 2) failing to notify her of his changes of address or telephone number, 3) refusing to provide her with information about his new girlfriend, and 4) failing to register his vehicle.¹ Following an evidentiary

¹Chris opposed the motion and made a countermotion to modify custody, visitation, and child support, for resolution of parent-child issues, for attorney fees and costs, and for other relief. In granting Nicole’s motion, the district court denied Chris’s countermotion.

hearing, the district court concluded Nicole had primary physical custody under the timeshare, *sua sponte* awarded Nicole sole legal custody, and modified Chris' parenting time to supervised visitation. The district court also found Chris in contempt of court.²

Chris appeals, arguing multitudinous errors regarding modification of custody and parenting time, the sufficiency of the evidence, the court's findings on the best interest factors, and the contempt orders. We agree the record is replete with errors, and we reverse.

We first consider the district court's decision to award sole legal custody to Nicole. A district court has "broad discretion in child custody matters," *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d213, 226 (2009), and may "[a]t any time modify" custody "as appears in [the child's] best interest." NRS 125C.0045(1)(a)-(b). However, the Nevada Supreme Court has held that a district court errs when it modifies custody "without prior specific notice" to the parties that custody may be modified. *Dagher v. Dagher*, 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987); *see also Micone v. Micone*, 132 Nev. ___, ___, 368 P.3d 1195, 1197 (2016) (holding the court's "surprise" unilateral award of primary physical custody to the grandparents violated due process where the parents were unaware the court was considering that option); *Matthews v. Second Judicial Dist. Court*, 91 Nev. 96, 97-98, 531 P.2d 852, 853 (1975) (holding the lower court "manifestly acted without notice where notice was required" by *sua sponte* awarding custody to the father when the mother failed to timely submit a psychiatric report, thereby depriving the mother of her opportunity to be heard).

²We do not recount the facts except as necessary to our disposition.

Our review of the record revealed that Nicole never requested nor argued for modification of legal custody. We therefore conclude that Chris had no prior specific notice that legal custody could be modified as a result of Nicole's motion. And, because Chris had no prior specific notice that legal custody might be modified, we conclude that the district court erred in awarding sole legal custody to Nicole and reverse that decision. See *Dagher*, 103 Nev. at 28, 731 P.2d at 1330.

We next turn to the district court's decision to modify parenting time.³ The district court focused on whether modification was in the child's best interest in making its decision. However, when a party seeks to modify a judicially-approved parenting time and custody arrangement, the party must show both that modification is in the child's best interest and that there has been a substantial change in circumstances affecting the welfare of the child. See *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007); cf. *Rennels v. Rennels*, 127 Nev. 564, 573-74, 257 P.3d 396, 402 (2011); see also *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) ("A court decision regarding visitation is a 'custody determination'."). Because the district court did not address whether there has been a substantial change in circumstances affecting the child's welfare since the

³Chris argues the district court's decision violated due process, but we conclude this argument is unpersuasive as Nicole moved to modify parenting time and raised supervised visitation as a possibility prior to the evidentiary hearing.

last custody order was entered,⁴ we reverse the decision to modify parenting time.⁵

Although we conclude the district court's custody determinations must be reversed and we therefore need not address Chris's remaining arguments regarding that portion of the order, we mention the district court's transparent frustration with Chris's subpoena of his child's therapy notes as we are concerned that this frustration drove the district court's custody decisions. Nevada law is clear that a court may not modify custody to sanction perceived parental misconduct. *See Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016). Although the court voiced many reasons for its conclusion that modification was in the child's best interest, the court also repeatedly and at length criticized Chris's actions regarding the therapy notes. Notably, the court addressed this point immediately before finding that modification was in the child's best interest and awarding Nicole sole legal custody. These facts strongly suggest that the district court improperly sanctioned Chris for the perceived misconduct by

⁴We note that pursuant to *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) and *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), the court may not use evidence known to the parties or the court when the last custody order was entered in determining whether there has been a substantial change in circumstances. This rule extends to evidence of domestic violence unless additional domestic violence has occurred in the interim that necessitates review of the prior acts. *Castle*, 120 Nev. at 106, 86 P.3d at 1048.

⁵We caution the court to carefully consider and make specific findings on all the pertinent best interest factors upon remand, particularly regarding how modification would impact the child's ability to maintain a relationship with her siblings.

modifying custody. Under *Lewis*, this is an abuse of discretion that would provide further grounds for reversal. *Id.*

We are further troubled by the district court's use of Chris's dismissed and sealed petit larceny charge in this instance. Even assuming the evidence as applied here was relevant and not overly prejudicial, see NRS 48.015, NRS 48.025, we note the general rule against using evidence of prior bad acts to prove a party's criminal character. *Cf.* NRS 48.045(2); *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012). Yet in this case the district court improperly used the evidence of the charges to find Chris has a *propensity for criminal thinking and conduct*.⁶

Having concluded that the district court abused its discretion by modifying custody and parenting time, we next turn to the district court's contempt orders. The district court's labeling of the contempt orders as civil is problematic in light of the excessive sanctions and the court's failure to include purge clauses. See NRS 22.100 (limiting punishment for civil contempt); *Lewis*, 132 Nev. at ___, 373 P.3d at 880-81 (explaining that civil contempt orders must include purge clauses). But, given the punitive nature of these contempt orders, we conclude the district court in this instance held Chris in criminal contempt. *Cf. id.* at ___, 373 P.3d at 881

⁶We are also concerned that under slightly different circumstances, the district court's decision to *sua sponte* obtain and rely on Child Protective Services' records without providing the party an opportunity to defend against those allegations would offend due process. Here, however, Chris either waived or otherwise forfeited his appellate arguments by failing to object or act to protect his interests below, and by stipulating to admit the CPS records into evidence. See *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

(concluding a contempt order that did not contain a purge clause was criminal in nature).

We further conclude the district court abused its discretion by holding Chris in contempt for violations not raised in Nicole's motion. The district court may summarily punish a party for bad behavior committed during district court proceedings and in the district court's immediate presence, or for violations committed outside of the district court's presence if supported by affidavits detailing the pertinent facts. NRS 22.010, NRS 22.030(2), NRS 199.340. Here, however, the district court held Chris in contempt for violations not raised by Nicole, not committed during district court proceedings, and not supported by affidavits. Neither did the court issue an order to show cause or hold a hearing on these five violations. *Cf. Int'l Union Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 832 (1994) (providing that if the court delays punishing direct contempt until trial is completed, due process requires notice and a hearing).


We therefore reverse the contempt orders holding Chris in contempt for twice violating the behavioral order, filing a fraudulent financial disclosure form, failing to provide proof of continuous health insurance, and failing to provide Nicole and the court with updated contact information.⁷

Accordingly, we

⁷In light of our disposition, we do not address the parties' remaining arguments.

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.⁸


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Jennifer Elliott, District Judge, Family Court Division
Nevada Family Law Group
The Abrams & Mayo Law Firm
Eighth District Court Clerk

⁸The Honorable Jerome T. Tao, Judge, voluntarily recused himself
from participation in the decision of this matter.