

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELISSA M. WASHKO, N/K/A
MELISSA BELL,
Appellant,
vs.
FRANK J. WASHKO, JR.,
Respondent.

No. 37504

FILED

MAR 03 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order denying appellant's motion to relocate with the children to California. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

On February 15, 2002, after the notice of appeal was filed, but before the appeal was resolved, the district court entered an order changing primary custody from appellant to respondent. Appellant concedes that she failed to timely file an appeal from the February custody order.¹ Accordingly, we ordered appellant to show cause why this appeal should not be dismissed as moot.² Appellant filed a timely response.

"[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare

¹See NRAP 4(a)(1); NRAP 3A(b)(2).

²See NCAA v. University of Nevada, 97 Nev. 56, 624 P.2d 10 (1981) (noting that this court's duty is to decide actual controversies, not to give opinions on moot questions).

principles of law which cannot affect the matter in issue before it.”³ A controversy must be live through all stages of the proceeding.⁴ This court has long recognized that cases presenting live controversies at the time of their inception may become moot by the occurrence of subsequent events.⁵ “When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot.”⁶

With respect to the district court’s February 2002 order changing custody, a district court is generally without jurisdiction to alter a judgment or order once an appeal has been filed.⁷ However, we recognized in Bongiovi v. Bongiovi⁸ that a district court retains jurisdiction to enter orders on matters collateral to and independent from the appealed order. Although related, relocation decisions are different

³Id. at 57, 624 P.2d at 10.

⁴See Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997); Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78 (1990).

⁵Wedekind v. Bell, 26 Nev. 395, 413-15, 69 P. 612, 613-14 (1902).

⁶Sweeney v. Sweeney, 856 A.2d 997, 1002 (Conn. 2004) (internal quotation marks omitted); accord Pennington v. Pennington, 868 S.W.2d 460, 461 (Ark. 1994) (observing that “a case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy”).

⁷Rust v. Clark Cty. School District, 103 Nev. 686, 747 P.2d 1380 (1987) (recognizing that a timely notice of appeal divests the district court of jurisdiction over the order from which an appeal is taken).

⁸94 Nev. 321, 579 P.2d 1246 (1978).

from child custody determinations. Thus, the district court had jurisdiction to consider respondent's motion to change custody even while the appeal was pending. Once the district court entered its written order awarding respondent primary custody, appellant could have timely filed an appeal.⁹ Appellant contends that the custody order was temporary because the district court stated in the court minutes that if she prevailed on appeal the district court would "change everything again." The written order granting respondent's motion to modify custody does not discuss the district court's concerns regarding the pending appeal and does not suggest that the custody change is temporary, however. And, the district court's written order is, necessarily, what governs our consideration of mootness.¹⁰

Here, appellant only appealed from the district court order denying her motion to relocate with the children to California, and not from the February order changing custody. When the district court entered the custody order pending appeal, the order made it impossible for this court to grant appellant relief from the relocation order because she is no longer the children's primary physical custodian. Only the primary physical custodian may seek to relocate with the minor children.¹¹ And

⁹NRAP 4(a)(1); NRAP 3A(b)(2).

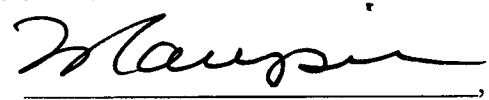
¹⁰See Rust, 103 Nev. at 688, 747 P.2d at 1382 (noting that until an order is reduced to writing and entered, the district court remains free to change its ruling on an issue).

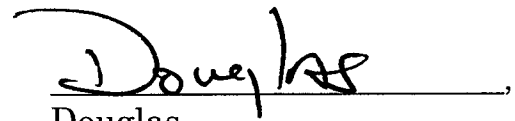
¹¹NRS 125C.200 (providing that a primary custodial parent may petition the district court for permission to relocate with a child when the noncustodial parent refuses to consent to the relocation).

although the February child custody order, entered during the pendency of the appeal, would not be properly before this court in resolving the instant appeal on the merits, it may be considered in determining whether the appeal has become moot.¹² As the issue regarding relocation no longer presents an actual controversy that, if resolved in appellant's favor, would result in her obtaining any practical relief, the appeal is moot.

Accordingly, we

ORDER this appeal DISMISSED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. William O. Voy, District Judge, Family Court Division
Clark County Legal Services Program, Inc
Bellon & Maningo, Ltd.
Clark County Clerk

¹²See Russo v. Gardner, 114 Nev. 283, 287, 956 P.2d 98, 100 (1998) (recognizing that this court will not consider matters outside the record on appeal); State ex rel. Nelson v. Russo, 729 N.E.2d 1181, 1182 (Ohio 2000) (stating that “an event that causes a case to be moot may be proved by extrinsic evidence outside the record”) (internal quotation marks omitted); see also Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 264-65, 71 P.3d 1258, 1260-61 (2003) (considering evidence outside the record to determine whether the appeal was moot).