IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NEDKA ILIEVA-KLIMAS,
Appellant,
vs.
RAYMOND ESTUPINIAN,
Respondent.

No. 75279-COA

ORDER OF REVERSAL AND REMAND

Nedka Ilieva-Klimas appeals from a district court order modifying child custody. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.

Ilieva-Klimas and Raymond Estupinian originally maintained joint legal and physical custody of their minor child, but they later began competing for sole custody.[1] After years of litigation and a pending investigation by child protective services, they agreed to Estupinian having temporary primary physical custody. The district court issued an order on January 24, 2017, and amended orders, reflecting that agreement. However, the parents could not agree on a parenting time schedule, so the district court ordered a custody evaluation for Ilieva-Klimas. At a status check hearing, Ilieva-Klimas stated that she was unable to do the evaluation because she could not afford the evaluator's fee. Subsequently, the district court issued an order on August 16, 2017, setting a default parenting time schedule and allowing Ilieva-Klimas to file an application for a new evaluator.

Months later, Ilieva-Klimas filed a motion requesting joint physical custody and make-up visitations. Without holding a hearing, the

[1]We do not recount the facts except as necessary to our disposition.

district court issued an order on February 1, 2018, denying Ilieva-Klimas' motion. The district court concluded that Ilieva-Klimas failed to meet her burden to show that the court should modify custody, but provided no analysis for that conclusion. The district court also referred to its August 2017 order as being the "final" order in the case. The district court never explicitly described its August 2017 order as having awarded Estupinian permanent physical custody, but it implied as much. Specifically, the district court stated that "[r]egardless of whether Dad was awarded temporary physical custody at the January 9, 2017 hearing, it has no bearing on the fact that Dad was awarded primary physical custody at the June 15, 2017 hearing and it was confirmed per Order filed August 16, 2017." The district court then stated that if Ilieva-Klimas filed another motion, it would hold a hearing to determine whether she should be declared vexatious.

On appeal, Ilieva-Klimas argues that the district court abused its discretion when it: violated her due process rights by denying her motion and awarding permanent physical custody to Estupinian sua sponte without an evidentiary hearing and without the proper analysis, considered evidence predating prior orders, failed to award her make-up visitations, and concluded that her motion was largely frivolous.

As a preliminary matter, we note that the Supreme Court of Nevada issued an order to show cause as to why this appeal should not be dismissed for lack of jurisdiction. Because the supreme court ultimately allowed this appeal to proceed while leaving open the question of whether this court has jurisdiction to consider the appeal, we first address that issue. This court reviews questions of subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Here, the February

2018 order is the first time that the district court suggested that Estupinian had permanent physical custody. The district court's August 2017 order, which it identified as a final order, did not alter the parties' temporary custody stipulation or grant Estupinian permanent physical custody, but rather merely set a default parenting time schedule until Ilieva-Klimas obtained a custody evaluation. Moreover, the August 2017 order was not triggered by either party moving for a custody determination; instead, it was based on a status check hearing regarding the custody evaluation. Because the February 2018 order is the first time that the district court suggested that Estupinian had permanent physical custody of the child, we conclude that it, not the August 2017 order, finally established or altered custody of the minor child. Therefore, we have jurisdiction to review the order under NRAP 3A(b)(7) (allowing parties to appeal from orders "finally establish[ing] or alter[ing] the custody of minor children").

We now turn to the merits of Ilieva-Klimas' appeal and first consider whether the district court violated Ilieva-Klimas' due process rights by altering custody sua sponte in its February 2018 order. "[P]arents have a fundamental liberty interest in the care, custody, and control of their children." *In re Parental Rights as to A.G.*, 129 Nev. 125, 135, 295 P.3d 589, 595 (2013). And due process requires notice and a hearing before this right is affected. *See Gordon v. Geiger*, 133 Nev. 542, 546, 402 P.3d 671, 674 (2017). For this reason, orders that alter custody sua sponte generally violate due process. *See id.* at 546, 402 P.3d at 674-75 (holding that a district court's sua sponte order modifying visitation without providing notice and a hearing violated due process); *Micone v. Micone*, 132 Nev. 156, 159, 368 P.3d 1195, 1197 (2016) (holding that a district court's surprise

order awarding primary physical custody to nonparty grandparents violated due process where the parents were not provided notice).

Here, Ilieva-Klimas moved for the district court to award joint physical custody; however, Estupinian never moved for the district court to award him permanent physical custody. So, Ilieva-Klimas was never given notice that Estupinian might be awarded permanent physical custody as a result of her motion. Further, the district court failed to hold a hearing prior to issuing its February 2018 order. Ilieva-Klimas' motion was originally set for a hearing, but the district court removed it from the calendar and simply issued its order. Thus, the district court violated Ilieva-Klimas' due process rights when it awarded Estupinian permanent physical custody sua sponte without providing her notice and a hearing.[2]

Additionally, apart from the due process issue, the district court also failed to provide the analysis required for it to alter custody. Importantly, the district court made no findings regarding the best interest of the child, which is the paramount consideration when determining custody.[3] *See* NRS 125C.0035(1) ("In any action for determining physical

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[2]Also, Estupinian argues that Ilieva-Klimas waived her right to an evidentiary hearing prior to the district court issuing its February 1, 2018 order because she waived her right to such a hearing before the parties entered into the temporary stipulation reflected in the district court's January 24, 2017 order. However, the fact that Ilieva-Klimas may have waived the right to such a hearing prior to the temporary stipulation does not mean that she waived her right to have a hearing in the future if she were to move for a custody determination. But regardless of whether or not Ilieva-Klimas waived her right to an evidentiary hearing, the district court was still tasked with making proper findings, which we note it failed to do.

[3]The district court's August 2017 order also failed to provide any specific findings regarding the best interest of the child.

custody of a minor child, the sole consideration of the court is the best interest of the child."); *see also Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (stating that the district court's decision "must tie the child's best interest, as informed by specific, relevant findings respecting the [best-interest factors] and any other relevant factors, to the custody determination made"). Accordingly, the district court also abused its discretion when it awarded Estupinian permanent physical custody without making specific findings as to the best interest of the child. We therefore reverse the portion of the district court's order that granted Estupinian permanent primary physical custody, and remand this matter to the district court for the required custody hearing and analysis.

Next, we consider whether the district court abused its discretion when it did not award Ilieva-Klimas make-up visitations. NRS 125C.020(1) provides the district court with discretion to order additional visits if it finds that the noncustodial parent was wrongfully deprived of visits. The statute states that the district court "may" award additional visits; it is not mandatory for the district court to do so. *See State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) ("In construing statutes, . . . 'may' is construed as permissive unless legislative intent demands another construction."). However, here, the district court failed to make specific findings to support why it was denying Ilieva-Klimas' request. In light of our disposition, the district court should reconsider this issue on remand and make specific findings as to whether or not Ilieva-Klimas should be awarded make-up visitations.[4]

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[4]We also note that Ilieva-Klimas' argument that the district court abused its discretion by considering evidence predating prior orders is

Finally, we consider whether the district court erred when it found that Ilieva-Klimas' motion was frivolous and stated that it might hold a hearing in the future to determine whether she is vexatious. Only "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order." NRAP 3A(a). To be considered an aggrieved party, "either a personal right or right of property must be adversely and substantially affected by a district court's ruling." *In re Parental Rights as to T.L.*, 133 Nev. 790, 792, 406 P.3d 494, 496 (2017) (alterations omitted) (internal quotation marks omitted). Here, the district court did not declare Ilieva-Klimas vexatious nor did it go through the requisite analysis to do so. Ilieva-Klimas essentially asks this court to preemptively bar the district court from declaring her vexatious on remand. However, Ilieva-Klimas' rights have not been affected by the district court's ruling at this point, and therefore, she is not aggrieved by an appealable order. Accordingly, we decline to consider this issue on appeal.[5]

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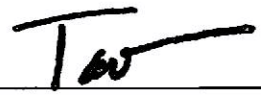
without merit. *See Nance v. Ferraro*, 134 Nev. ___, ___, 418 P.3d 679, 685 (2018) (stating that "it may at times be necessary for the district court to review the evidence that underpinned its previous rulings to determine whether modification of the existing arrangement is warranted"). Moreover, the parties themselves agreed that *McMonigle v. McMonigle*, 110 Nev. 1407, 1408-09, 887 P.2d 742, 743-44 (1994), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004), which provides that events predating a custody order that the parties are moving to alter cannot be used to show a change of circumstances, would not apply except as to the February 2016 order. The district court noted as much in its November 16, 2017 order.

[5]Another basis for not reaching this issue is that it is not ripe. In determining ripeness this court considers two factors: 1) the hardship to the parties of withholding judicial review, and 2) the suitability of the issue for review. *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003). Here, the

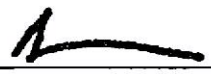
Based on the foregoing, we

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

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Bryce Duckworth, Presiding Judge, Family Court Division
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Eighth District Court Clerk

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district court did not declare Ilieva-Klimas vexatious, so she faces no hardship. Also, because the district court made no factual findings regarding whether Ilieva-Klimas was vexatious, the issue is not yet suitable for review.