

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMIE ARMSTRONG,
Appellant,
vs.
DUANE BALL,
Respondent.

No. 85718-COA

FILED

OCT 05 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Jamie Armstrong appeals from a district court order establishing child custody, parenting time, and child support. Second Judicial District Court, Washoe County; Dixie Grossman, Judge.

Jamie and respondent Duane Ball were never married but have one minor child together, N.B., born in June 2019. Duane filed a petition to establish custody in October 2021, requesting sole legal and physical custody of N.B. The litigation proceeded through various hearings where the district court set temporary custody orders. Jamie was represented by an attorney throughout the proceedings until her counsel withdrew in April 2022, after which she proceeded pro se. On July 11, Duane's counsel filed an application for trial setting, which stated that a trial regarding custody would begin on September 26. The record, however, demonstrates there is no certificate of service attached to this filing, and the application for setting did not specifically indicate that the trial setting was endorsed by the district court as required.

Nevertheless, a two-day trial to establish custody, parenting time, and child support began on September 26. At trial, Jamie repeatedly represented that she had been unaware that trial was scheduled for September 26 until a few days before. Although the district court noted on

the record that trial had been set for months, the court made no findings as to whether Jamie had in fact received timely notice and allowed for the trial to proceed.

According to Jamie, as a result of her lack of notice, she was unable to timely submit trial exhibits, and only some of her exhibits were admitted into evidence. The court heard testimony from Duane, Duane's mother, and Jamie. Specifically, Duane and his mother testified to allegations that Jamie removed N.B. from Nevada in October 2021. Jamie testified that Duane was aware that N.B. was with Jamie's mother in California during that time. In addition, Duane proffered social media evidence and text messages regarding Jamie's apparent history of substance abuse and evidence of N.B. missing medical appointments while in Jamie's care. On the first day of trial, Jamie sought to bring witnesses to testify on her own behalf on the second day of trial, but the district court denied Jamie's request because she had failed to timely disclose her witnesses.

Following the two-day trial, the district court entered a written order establishing custody, parenting time, and child support in October 2022, awarding the parties joint legal custody and Duane primary physical custody. The court found that Jamie removed and concealed N.B. from Duane from September 30, 2021, until November 8, 2021. The court further determined that this conduct triggered NRS 125C.0035(7)'s rebuttable presumption against Jamie having primary or joint custody as well as any form of unsupervised parenting time. *See* NRS 125C.0035(7) (establishing a rebuttable presumption that sole or joint physical custody or unsupervised parenting time is not in the best interest of the child where the district court has found by clear and convincing evidence that a parent has committed "any act of abduction against the child").

But the district court further found, based upon Jamie's compliance with the court's temporary orders and Duane's own request that Jamie have unsupervised parenting time, that the presumption that Jamie's parenting time should be supervised did not apply. However, the court nonetheless went on to find that, because of Jamie's act of abduction as well as her substance related issues, erratic behavior, and inability or unwillingness to coparent with Duane, the presumption against Jamie having primary or joint physical custody remained in effect. The court set a graduated schedule of supervised parenting time for Jamie that would increase to unsupervised parenting time with regular negative drug tests and exercise of the time awarded. The district court also divided holidays between Duane and Jamie and ordered Jamie to pay Duane child support.

On appeal, Jamie—now represented by counsel—argues that the district court erroneously applied the custody presumption against her for abduction when determining physical custody of N.B. Moreover, she asserts that she did not have notice of the trial date, as the only filing that mentions a trial date was the application for setting, which did not contain a certificate of service, indicating it was not properly served upon her. There were no other pleadings or orders that contained the trial date until Duane filed his notice of trial statement on September 19, 2023, a week before trial. The application also does not show that it was endorsed by the district court. Because this document did not give her actual notice of the official trial date, Jamie contends that she was unable to adequately prepare for trial. Conversely, Duane argues that the evidence presented at trial supports that Jamie improperly removed N.B. from the state of Nevada and contends that the district court's custody determination was proper. Duane further argues that Jamie was, in fact, notified of the trial date and failed to comply with her pre-trial obligations.

This court reviews a district court's determinations regarding child custody and child support for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 438, 216 P.3d 213, 226, 232 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022). Procedural due process requires reasonable notice *and* an opportunity to be heard, and this court reviews issues regarding procedural due process de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

With respect to the abduction presumption, NRS 125C.0035(7) creates a rebuttable presumption against awarding sole or joint physical custody or unsupervised parenting time to the perpetrator of an abduction. Here, in resolving the underlying custody and parenting time issues, the district court failed to properly apply the abduction presumption set forth in NRS 125C.0035(7) by making findings to invoke the presumption by clear and convincing evidence. Additionally, despite finding that Jamie rebutted the presumption against being awarded unsupervised parenting time, the court nonetheless applied this presumption against Jamie in making its physical custody determination without the necessary findings and determined that supervised parenting time was initially appropriate even though the parties apparently agreed to unsupervised parenting time. Thus, the district court's failure to properly apply the abduction presumption is reversible error as it affected Jamie's substantial rights regarding her parenting time. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (concluding that an error is prejudicial, and thus reversible, when it affects the party's substantial rights).

Further, the district court's error in misapplying the abduction presumption was likely compounded by Jamie's lack of notice of the trial date and her resulting inability to prepare for trial, all of which impacted Jamie's procedural due process rights. As pertinent here, WDCR 4(9) sets forth the requirements for an application for setting, which is a specific form


that provides a date and time for a matter to be set on the court's calendar. Specifically, the applicant—in this case, Duane—is responsible for producing for the court “one original and the necessary copies of the ‘Application for Setting’ form on which the court department shall endorse the date and time of such setting.” WDCR 4(9). The rule further states that the applicant “shall file the original and serve a copy upon counsel for each party.” *Id.* Here, the application for setting contained within the record, while electronically filed, does not specify that it was served on Jamie, as there is no certificate of service attached to this document or anywhere else in the record.¹ Additionally, it does not appear that the application for setting filed in this case had been endorsed by the district court as required by WDCR 4(9) thereby confirming the trial date. The district court did not make any findings on the record or in its order as to whether Jamie received the application for setting or otherwise received notice of the official trial date, and not merely the date requested by counsel.

Consequently, Jamie had but a few days to prepare for the trial itself, represented herself, and was unable to call witnesses during that time. Under these circumstances, the failure to provide proper notice of the official trial date violated Jamie's due process rights, *see Callie*, 123 Nev. at 183, 160 P.3d at 879, and affected her ability to present evidence pertaining to child custody. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, ___ P.3d ___, ___

¹We note that the district court register of actions contained within the notice of appeal does list an entry for “proof of electronic service” filed shortly after the application for setting was filed. However, this “proof of electronic service” is not contained in the record, and it is unclear what this document says. Although the existence of this document suggests that Jamie may have received notice of the application for setting, this does not remedy the fact that the application for setting was not endorsed by the district court, and therefore, she did not receive confirmation of the official trial date.

(Ct. App. July 27, 2023) (stating that “[t]he parent-child relationship is a fundamental liberty interest.”). Because the district court failed to properly apply the abduction presumption, we necessarily reverse the district court’s order establishing child custody, parenting time, and child support, and remand this matter for further proceedings to ensure that both parties have adequate time to prepare for trial and present their respective cases.

It is so ORDERED.²

 _____, C.J.
Gibbons

 _____, J.
Bulla

 _____, J.
Westbrook

²Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

Pending further proceedings on remand, we leave in place the custody arrangement set forth in the district court’s October 17, 2022, custody and parenting time order, subject to modification by the district court to comport with the current circumstances. *See Davis v. Ewalefo*, 131 Nev 445, 452, 352 P.3d 1139, 1146 (2015) (leaving certain provisions of a custody order in place pending further proceedings on remand). We also note that the district court may need to enter a new discovery order on remand. *See, e.g., DeChambeau v. Balkenbush*, 134 Nev. 625, 630, 431 P.3d 359, 363 (Ct. App. 2018) (recognizing that district courts have the discretion to issue new scheduling orders on remand).

cc: Hon. Dixie Grossman, District Judge
Shawn B. Meador, Settlement Judge
Bittner & Widdis Law
Duane Ball
Washoe District Court Clerk