IN THE SUPREME COURT OF THE STATE OF NEVADA

KELLIE WEDDELL, Petitioner,

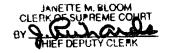
vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND THE HONORABLE NOEL E. MANOUKIAN, SENIOR JUDGE, Respondents,

and ROLLAND P. WEDDELL, Real Party in Interest. No. 44808

FILED

MAY 1 9 2005



ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order concerning visitation and an order of contempt.

A writ of mandamus is available to compel the performance of an act, which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.¹ This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court.² We have considered this

¹See NRS 34.160; <u>Round Hill Gen. Imp. Dist. v. Newman</u>, 97 Nev. 601, 637 P.2d 534 (1981).

²NRS 34.320.

petition, and we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time.³ Accordingly, we deny the petition.⁴

It is so ORDERED.5

Maupin

Parraguirre

J. Douglas

Douglas

J. Parraguirre

³See NRAP 21(b); Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991) (holding that extraordinary relief is within this court's discretion); Pan v. Dist. Ct., 120 Nev. 26, 88 P.3d 840 (2004) (providing that writ relief is not available to correct an untimely notice of appeal).

⁴We note that real party in interest has filed an appeal from the August 5, 2004 order terminating his guardianship of the minor child (In re: Guardianship of Weddell, Docket No. 43733). Generally "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." Rust v. Clark Cty. School District, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). A district court has jurisdiction, however, to rule on an issue that is entirely collateral to and independent from that part of the case taken up by appeal, and in no way affects the merits of the appeal. See Kantor v. Kantor, 116 Nev. 886, 895, 8 P.3d 825, Thus, the district court retains jurisdiction to resolve 830 (2000). petitioner's NRCP 60(b) motion to set aside the portion of the August 5, 2004 order concerning visitation and her motion for attorney fees. In addition, when disputed factual issues are critical to the proper resolution of a request for extraordinary relief, relief should be sought in the first instance in the district court, with appeal from an adverse judgment to this court. See Newman, 97 Nev. at 604, 637 P.2d at 536.

⁵In light of this order, we deny as moot petitioner's motion for stay.

cc: Hon. Noel E. Manoukian, Senior Judge Allison W. Joffee Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd. Carson City Clerk