IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY GRINSELL,
Appellant,
vs.
KATHLEEN GRINSELL, N/K/A KATHLEEN RUSSO,
Respondent.

No. 35210

FILED

MAY 25 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order vacating a hearing regarding the district court's prior decision to deviate from the statutory child support formula under NRS 125B.080(9). Our preliminary review of the documents submitted to this court pursuant to NRAP 3(e) revealed a potential jurisdictional defect. Specifically, it appeared that this post-judgment order designated in the notice of appeal was not substantively appealable. See NRAP 3A(b). On March 30, 2000, this court entered an order to show cause why this appeal should not be dismissed for lack of jurisdiction. On April 28, 2000, appellant filed a response.

The following facts are taken from the district court's orders entered in the underlying litigation that were attached to appellant's docketing statement.

A decree of divorce was entered in 1992. In conjunction with the divorce, the parties entered into a marital settlement agreement (MSA). The parties have two minor children.

In January 1997, the parties appeared for a hearing before Judge Elliott, who ordered a change in child support, and ordered each party to pay one-half of the unreimbursed medical expenses for the children. Respondent raised the issue of extraordinary expenses, but Judge Elliott ruled that this issue was not before him. The order after hearing, prepared by appellant's counsel and entered March 3, 1997, however, stated that it was an "Order Modifying Decree of Divorce," and stated that "[a]ll other extraordinary expenses of the children shall

be divided equally between the parties." This provision differed from the MSA, which required that the parties give prior approval to payment of extraordinary expenses.

On January 21, 1999, the district court entered an order granting appellant's motion under NRCP 60(a) to correct the order of March 3, 1997, and ruled that the terms of the MSA would remain in force and unmodified regarding the issue of extraordinary expenses.

On June 14, 1999, the district court entered an order resolving numerous motions the parties had filed. In that order, conclusion of law number 10 stated that "[p]ursuant to NRS 125B.080(9), the Court uses its discretion to deviate from the statutory ceiling of $500 per child set out in NRS 125B.070," and noted that several of the factors listed in NRS 125B.080(9) permitted deviation in this case. Further, conclusion of law number 13 calculated appellant's child support obligation based on his income, the statutory formula, health insurance and educational costs, and offset his visitation travel expenses against the total child support obligation.

On June 24, 1999, appellant filed a motion to "set aside" the order of June 14, 1999, arguing that the district court erred in conclusion of law number 10 in ordering a deviation from the statutory child support obligation without holding an evidentiary hearing. (The district court, however, apparently scheduled a hearing for November 19, 1999, to address this issue.) Appellant also argued that the district court miscalculated the child support obligation in conclusion of law number 13, and also requested that the district court stay enforcement of the June 14 order.

On July 14, 1999, appellant filed a notice of appeal from the June 14 order, which this court assigned Docket No. 34529. The notice of appeal stated that it did not:

> include that portion of the District Court's Order of June 14, 1999 under Conclusion of Law No. 13 entitled 'Plaintiff's Child Support Obligation', as this issue is not a final appealable determination under Rule 3(a) and Rule 4, Nevada Rules of Appellate Procedure for the reason that a Motion under Rule 59, Nevada Rules of Civil Procedure, is still pending before the District Court.

On July 26, 1999, the district court entered an order correcting conclusion of law number 13 "to reflect an accurate calculation of [appellant's] child support obligation based upon the deviation from the statutory maximum," and denied appellant's request for a stay.

On October 20, 1999, the district court entered an order after concluding that only one outstanding issue was pending: appellant's request to set aside conclusion of law number 10 because the district court did not hold a hearing before entering its order. The district court noted that appellant had already appealed that determination in his prior appeal, and concluded that it lacked jurisdiction to revisit the issue while it was on appeal. Accordingly, the district court vacated the hearing scheduled for November 19, 1999.

On November 23, 1999, appellant filed a notice of appeal from the October 20 order, which this court assigned Docket No. 35210.

On December 13, 1999, this court dismissed the prior appeal, Docket No. 34529, after appellant failed to respond to an order to show cause why that appeal should not be dismissed for lack of jurisdiction.[1]

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[1]The order to show cause issued in Docket No. 34529 because appellant had stated in his notice of appeal that a motion under NRCP 59 was pending before the district court. It appears that he filed the motion under NRCP 59 after the June 14 order. A motion under either NRCP 59(a) or 59(e) is a

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We conclude that this court lacks jurisdiction over the instant appeal. As previously noted, the order appealed from was entered in the underlying proceedings after a decree of divorce had already been entered. Appellant's docketing statement and response are therefore incorrect when they assert that jurisdiction is proper as an appeal from a final judgment under NRAP 3A(b)(1), because a final judgment, namely, the decree of divorce, had already been entered. Hence, jurisdiction in this court does not lie under NRAP 3A(b)(1), and the order can only be appealable, if at all, as a post-judgment order.

Generally, a post-judgment order is only appealable if it is a special order after final judgment. See NRAP 3A(b)(2). A special order made after final judgment is one that affects the rights of the parties growing out of the final judgment. See Wilkinson v. Wilkinson, 73 Nev. 143, 311 P.2d 735 (1957). The exception to this rule is when an order denies a motion to modify the divorce decree based on changed factual and/or legal circumstances, and the motion does not challenge the decree itself. See Burton v. Burton, 99 Nev. 698, 669 P.2d 703 (1983).

Here, the order challenged did nothing more than vacate a hearing. The district court vacated the hearing because appellant had already appealed from a prior order, and the district court believed that it lacked jurisdiction while the matter was on appeal. The district court did not rule on the merits of appellant's challenge to conclusion of law number 10, because it believed that it had no jurisdiction to do so.

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tolling motion; a notice of appeal filed after such a motion is filed and before it is formally disposed of no effect. See NRAP 4(a)(2).

No statute or court rule permits a party to appeal from an order vacating a hearing. See NRAP 3A.

Further, we note that appellant's challenge to conclusion of law number 10 was apparently in the nature of a motion for reconsideration or rehearing, because it does not appear to have been based on circumstances that allegedly changed between June 14 (when the order was entered) and June 24 (when the motion was filed). Apparently, the motion merely argued that the district court had erred in its determinations regarding appellant's child support obligations. A motion for reconsideration or rehearing is not independently appealable. See Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983).

Accordingly, as this court lacks jurisdiction over the appeal, we

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Deborah Schumacher, District Judge,
Family Court Division
Marshall Hill Cassas & de Lipkau
Kathleen Russo
Washoe County Clerk