

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY L. BABIN,
Appellant,
vs.
SONJA L. BABIN,
Respondent.

No. 35623

FILED

SEP 20 2002

ORDER DISMISSING APPEAL

J. Richard
CLERK

This is a proper person appeal from a district court order denying a request for an evidentiary hearing on a motion to modify child custody.¹

The parties were divorced in Nevada in July 1995. Appellant was awarded primary physical custody of the parties' minor child, with respondent having liberal visitation. In 1997, with respondent's consent, appellant and the child moved to New Jersey. Apparently, by this time, respondent had relocated to Arizona.

In 1998, a dispute arose regarding visitation. Appellant moved the New Jersey court to change respondent's visitation. Thereafter, respondent moved the Nevada district court to find appellant in contempt for not complying with the custody arrangement and to confirm that Nevada had jurisdiction over the child custody arrangement. On August 7, 1998, a telephone conference was conducted between the Nevada and New Jersey courts to determine the issue of jurisdiction. The courts agreed that Nevada was the "more appropriate forum" to consider

¹We note that on April 17, 2002, after briefing was completed, appellant's counsel of record withdrew.

the matter. The Nevada district court scheduled a hearing on respondent's motion for September 21, 1998.

On August 21, 1998, respondent moved the district court for an order shortening time for the hearing. The district court granted her motion, and the hearing was rescheduled for August 26, 1998. The order changing the hearing date was served on appellant's attorney in New Jersey two days before the hearing. According to appellant, his attorney was on vacation at the time, and thus, appellant did not learn of the new hearing date until after the hearing was conducted. Thus, appellant was not present at the August 26, 1998 hearing. On September 4, 1998, the district court entered a written order that changed custody and awarded respondent sole legal and physical custody. The record establishes that notice of the order's entry was served by mail on September 8, 1998. Appellant did not appeal from the order.

Before the September 4, 1998 order was entered, appellant, through Nevada counsel, moved the district court to set the order aside on the basis that appellant had not timely received notice of the August hearing. In late November 1998, following a hearing, the district court entered a written order that denied appellant's motion to set aside the order changing custody of the child. The record does not contain a notice of entry for this order, nor does the record disclose when or if written notice of the order's entry was served. Nevertheless, appellant did not appeal from the November 1998 order.

On March 26, 1999, proceeding in proper person, appellant moved the Nevada district court to change custody. Appellant alleged, based on a photograph of the child, that respondent was physically abusing the child. Moreover, appellant contended that he could provide

the child with a better living environment and better educational opportunities than respondent could provide in Arizona. Respondent opposed the motion. A hearing was scheduled for April 26, 1999. Again, appellant retained Nevada counsel. Thereafter, the hearing was reset for June 2, 1999. Apparently, appellant's counsel failed to appear at the hearing, because he thought the hearing was scheduled for 1:00 p.m. instead of 10:00 a.m. During the ten o'clock hearing, the district court orally denied appellant's motion to change custody and suspended appellant's visitation. When appellant's counsel appeared before the district court later that day, counsel explained his absence from the morning hearing to the court, and requested a child custody evaluation investigation and an evidentiary hearing. On June 2, 1999, the district court denied appellant's motion to change custody, but ordered a child custody evaluation investigation. The record indicates that notice of entry of the order was served by mail on June 10, 1999. Appellant did not appeal from the June 2 order.

On July 8, 1999, appellant, through Nevada counsel, filed a motion for temporary visitation pending the child custody evaluation investigation. Again appellant requested an evidentiary hearing. On September 23, 1999, the district court denied appellant's request for an evidentiary hearing, awarded appellant specified visitation, and ordered him to pay child support in the amount of \$356.00, which represents 18% of his gross monthly income. Notice of entry of the order was served by mail on September 30, 1999.

On October 4, 1999, appellant timely filed an NRCP 59(e) motion to alter or amend the September 23 order. Appellant based his motion, in part, on the fact that throughout the proceedings he requested

an evidentiary hearing, which was denied. Moreover, he contended that the September 1998 order that changed custody violated his due process rights since he did not receive proper notice of the August 1998 hearing. On January 7, 2000, the district court denied appellant's motion. Appellant timely filed the present appeal from the September 23, 1999 order.

Our preliminary review of the documents submitted to this court revealed a potential jurisdictional defect. Specifically, it appeared that the September 23, 1999 order was not substantively appealable.² Accordingly, we issued an order to show cause why this court has jurisdiction over this appeal.

In his response, appellant asserted that the September 23, 1999 order is a "special order after final judgment, because it represents the final disposition of [appellant's] Motion to Change Custody, filed March 26, 1999." Moreover, appellant contends that the March 1999 motion was based on changed circumstances. In addition, appellant asserts that the district court lacked subject matter jurisdiction in the first instance to enter the September 1998 order that changed custody.

In the interim, briefing was completed in this case. In the opening brief, appellant advances two issues on appeal. First, he contends that the district court lacked subject matter jurisdiction in 1998 to order the change in custody. Second, in the alternative, appellant contends that if this court concludes that the district court had subject matter jurisdiction to change the child custody arrangement in 1998, then the district court abused its discretion by failing to conduct an evidentiary

²See NRAP 3A(b).

hearing in 1998 before changing custody. Thus, it appears that appellant seeks to challenge the district court's September 1998 order changing custody. This court cannot reach the merits of this appeal if we lack jurisdiction over this order.

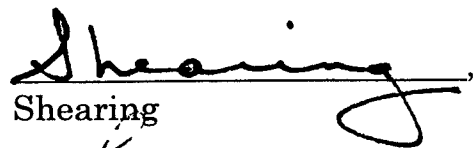
To vest jurisdiction in this court, a notice of appeal must be filed within thirty days after written notice of an order's entry is served.³ The record establishes that the notice of entry of the September 4, 1998 order that changed custody was served by mail on September 8, 1998. Appellant did not timely appeal from the order. As for the November 1998 order that denied his motion to set aside the September 4, 1998 order, the record does not disclose when or if a written notice of the order's entry was served. Nevertheless, appellant did not appeal from that order. Finally, the record shows that the notice of entry of the June 10, 1999 order that denied appellant's motion to change custody, but granted his motion for a child custody evaluation, was served by mail on June 10, 1999. Appellant did not appeal from that order. Thus, it appears that appellant is barred from appealing from the September 1998, November 1998 and June 1999 orders.

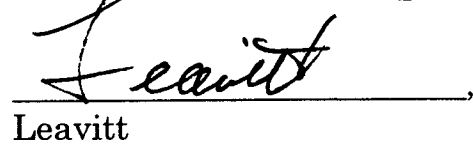
Appellant timely appealed from the September 23, 1999 order; however, the order does not concern the issue of subject matter jurisdiction or the request for an evidentiary hearing in 1998. The September 23 order denied appellant's request for an evidentiary hearing on his motion for temporary visitation. The order awarded him specified visitation and ordered him to pay child support. As set forth above, it appears that appellant does not intend to raise issues with respect to this

³See NRAP 4(a)(1).

order. Additionally, because appellant sought temporary visitation and was awarded visitation on certain holidays and the summer months, it appears that appellant lacks standing to appeal from the district court's September 23, 1999 order to the extent that he challenges visitation.⁴ Here, since appellant was awarded more than temporary visitation with the child, it appears that he is not aggrieved by the district court's September 23 order.

Accordingly, as we lack jurisdiction to consider this appeal, we ORDER this appeal DISMISSED.

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. Steven E. Jones, District Judge, Family Court Division
Janice J. Brown, Settlement Judge
Douglas C. Crawford
Gary L. Babin
Clark County Clerk

⁴See NRAP 3A(a) (providing that only an aggrieved party can appeal); Estate of Hughes v. First Nat'l Bank, 96 Nev. 178, 605 P. 2d 1149 (1980) (noting that a party is aggrieved if a personal right or right of property is adversely and substantially affected by a district court's ruling).