IN THE SUPREME COURT OF THE STATE OF NEVADA

ALAN HALL,
Appellant,
vs.
LINDSAY VELIANOFF,
Respondent.

No. 65267

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a fast track child custody appeal from two post-paternity petition district court orders involving legal custody and attorney fees. Second Judicial District Court, Family Court Division, Washoe County; Bridget Robb Peck, Judge.

Appellant first argues that the district court abused its discretion when it denied his request to modify the school designation for the parties' minor child. In the district court, appellant sought to change the child's school designation because the child had been accepted into the Washoe County School District's "School Within a School" (SWAS) program, which was not offered at the child's current school. In child custody matters, such as a dispute as to a child's school designation, the sole consideration of the court is the best interest of the child. NRS 125.480; NRS 125.510(1)(a); *Mack v. Ashlock*, 112 Nev. 1062, 1065, 921 P.2d 1258, 1260-61 (1996). This court reviews district court factual findings for an abuse of discretion and will not set those findings aside if they are supported by substantial evidence in the record. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). We conclude that substantial evidence supports the district court's determination that the

child's best interest would be served by not changing the child's school designation. Specifically, the testimony presented at the evidentiary hearing indicated that without changing schools the child will be able to enroll in the Washoe County School District's Advanced Academic Programing, which shares the same educational philosophy as the SWAS program and would be less disruptive for the child. Thus, we conclude that the court did not abuse its discretion when it denied appellant's request.

Appellant next argues that the district court abused its discretion when it limited his legal custody rights regarding the child's educational and extracurricular activities. We disagree. Substantial evidence supports the district court's determination that, under the factors set forth in NRS 125.480(4), the child's best interest would be served by granting respondent sole legal custody over the child's educational and extracurricular activities. *See Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Thus, the district court did not abuse its discretion in this regard.[1]

Finally, appellant argues that the district court lacked jurisdiction to hold him in contempt and award attorney fees to

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[1]Appellant also argues that the district court improperly considered circumstances that occurred before the previous custodial orders in contravention of *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994). Although the district court's August 2010 and September 2012 orders resolved disputes between the parties regarding their exercise of joint custody, these orders did not address a change in the parties' legal custody rights, and thus, do not trigger *McMonigle*'s limitation.

respondent.[2] We agree. Under NRS 22.030(2), when contemptuous conduct is not committed in the immediate presence of the court, an affidavit of the facts constituting contempt must be presented to the judge. When such an affidavit is required but not provided, the district court lacks jurisdiction to hold the party in contempt. *Awad v. Wright*, 106 Nev. 407, 409, 794 P.2d 713, 714-15 (1990), *abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 5 P.3d 569 (2000); *see Pengilly*, 116 Nev. at 650, 5 P.3d at 571-72 (noting that a district court clearly exceeds its jurisdiction when a finding of indirect contempt is not based upon a proper affidavit). Respondent admits on appeal that no affidavit stating the factual grounds for contempt was provided to the district court. Although respondent maintains that no affidavit was required under *McCormick v. Sixth Judicial District Court*, 67 Nev. 318, 325-26, 218 P.2d 939, 942 (1950), we decline to follow *McCormick*'s fact-specific holding here. Thus, the district court lacked jurisdiction to hold appellant in contempt. *See Awad*, 106 Nev. at 409, 794 P.2d at 714. Further, because the district court based its order granting attorney fees on NRS 22.100(3), which authorizes a court to impose fees as a punishment for contempt, the attorney fees order was improper. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (noting that "it is well established in Nevada that attorney's fees are not recoverable unless allowed by express or implied agreement or when authorized by

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[2]Although appellant did not raise this argument in the district court, it is not waived on appeal because the matter goes to the jurisdiction of the trial court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

statute or rule" (internal quotation marks omitted)). Thus, we reverse the district court's order as to contempt and attorney fees.

For the reasons discussed above, we

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

Parraguirre, J.

Douglas, J.

Cherry, J.

cc: Hon. Bridget Robb Peck, District Judge, Family Court Division
Richard F. Cornell
Sandra A. Unsworth
Washoe District Court Clerk