

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SIMONE WCIORKA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF

CLARK; AND THE HONORABLE LISA
M. BROWN, DISTRICT JUDGE,

Respondents,

and

CESAR MALAGA,

Real Party in Interest.

No. 76824

FILED

SEP 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION*

This original, emergency petition for a writ of mandamus or prohibition challenges an August 28, 2018, order determining, in the absence of the parents' agreement, that the best interest of the parties' minor child required that real party in interest Cesar Malaga be given sole legal custody over vaccination decisions, choice of pediatrician, and whether the child see a chiropractor.

A writ of mandamus is available to compel the performance of a legal duty or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition, on the other hand, may issue to control a district court's extra-jurisdiction acts. NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). The petitioner bears the burden of demonstrating that

extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).¹

Here, petitioner Simone Wciorka asserts that the district court violated her First Amendment right to the free exercise of religion, failed to address statutory religious exemptions from vaccination requirements, and failed to recognize that as specific statutes, the exemption provisions prevail over general statutes such as those imposing child's best interest standards.²

In *Arcella v. Arcella*, the Nevada Supreme Court addressed the district court's consideration of a parent's religious beliefs when resolving a dispute between parents on making education choices for their minor child. 133 Nev., Adv. Op. 104, 407 P.3d 341 (2017). Although the court recognized that parents have a fundamental right to the upbringing and care of their children upon which the government generally may not interfere, it also recognized that, where the parents are unable to agree and the matter is brought before the district court for resolution, that court must determine what is in the child's best interest. *Id.* at 344-45. In so doing, the district court must remain neutral and cannot treat "one parent's religious objection

¹Generally, the right to appeal precludes writ relief. See NRS 34.170; NRS 34.330; *Pan*, 120 Nev. at 224, 88 P.3d at 841. The district court's order modifies custody and thus is appealable. NRAP 3A(b)(7). Nevertheless, given the timing constraints alleged by Wciorka, we consider her petition.

²Wciorka's argument that Malaga cannot act without a written order is moot, as a written order has been entered, see *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004), and her argument that the order cannot be acted upon before the NRCP 62(a) automatic 10-day stay of judgment has expired is unavailing, as this order modifying child custody is not a judgment to which NRCP 62's automatic stay provision applies.

as dispositive.” *Id.* at 345. Instead, “the focus of the court’s inquiry must remain on the child’s best interest and not the religious preferences of the parent[].” *Id.* at 343.

Here, when the parties shared joint legal custody over their child, they could not agree over certain medical practices and asked the district court to resolve their dispute. The district court considered the evidence, including conflicting medical opinions and Wciorka’s objection, and made a determination based on the best interest of the child, which determination Wciorka’s petition does not directly challenge. Thus, here, where both parents are unable to concurrently exercise their authority over the medical care of the child, the district court did not violate Wciorka’s First Amendment or statutory rights by granting sole legal custody to Malaga for certain medical decisions. *Cf. In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339 (Ct. App. 1996) (explaining, in a case where the parties quarreled over the upbringing of their child as to religious activities and discussions, that in such cases both parents have authority in the religious upbringing of their child, which may be altered only upon a showing of substantial harm). Accordingly, we decline to intervene and

ORDER the petition DENIED.³




C.J.

Silver



J.

Tao



J.

Gibbons

³In light of this order, Wciorka’s emergency motion for stay is denied as moot.

cc: Hon. Lisa M. Brown, District Judge, Family Court Division
Nehme-Tomalka & Associates
McFarling Law Group
Eighth District Court Clerk