IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHLEY HALL, II,
Appellant,
vs.
MARIANA ELISA HALL, N/K/A
MARIANA ELISA JACQUART,
Respondent.

No. 76444-COA

FILED

MAR 14 2019

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

ORDER OF AFFIRMANCE

Ashley Hall, II appeals a district court order denying a motion for relief from judgment and to modify custody. Eighth Judicial District Court, Family Court Division, Clark County; Rena G. Hughes, Judge.

Ashley and respondent Mariana Hall were divorced by way of a stipulated decree of divorce entered in March 2016. Pursuant to the terms of the stipulated decree, Mariana was awarded sole legal and physical custody of the parties' four minor children, and Ashley was required to complete a number of therapy sessions, anger management classes, and parenting classes. Until such time that Ashley completed the requirements, he was permitted limited text or email communication with the children, which he was required to send to Mariana so she could screen the messages to ensure they were appropriate, forward it to the children if so, and then send the children's reply back to Ashley.

In October 2016, after Ashley completed the requirements in the decree, the district court modified custody, awarding Ashley parenting

time on the second and fourth weekends of each month and alternating holidays. In November 2016, Mariana moved for an order to show cause why Ashley should not be held in contempt for, as relevant here, having violated the decree of divorce when he texted with the children numerous times between the time the decree was entered and the order modifying custody was entered without using the communication procedure outlined above. The district court held an evidentiary hearing in March 2017 and entered its written order in May 2017, finding that after the decree was entered, Ashley texted the children directly, without going through Mariana, over 100 times and made inappropriate comments to the children in those messages. Accordingly, the court found Ashley in contempt of court and sanctioned him $50 for each of the first 100 occurrences, for a total sanction of $5000, plus attorney fees.

Approximately one year later, in May 2018, Ashley filed a motion seeking to set aside the custody provision in the decree of divorce, the order finding him in contempt and sanctioning him, and the order awarding Mariana attorney fees. He also sought to modify the custody arrangement. Specifically, Ashley argued that the custody provision in the decree was ambiguous, violated his constitutional right to parent his children, and did not include any best interest findings. Ashley also argued that he was not provided due process prior to the contempt proceedings being initiated; therefore, the decree and all subsequent orders were void and should be set aside pursuant to NRCP 60(b)(4). Following a hearing, the district court denied Ashley's motion and this appeal followed.

On appeal, Ashley contends that the district court applied the incorrect legal standard when deciding that his NRCP 60(b)(4) motion was untimely because the motion should have been construed as an independent action seeking equitable relief, which is not subject to the six month time frame provided for in NRCP 60(b). The district court has broad discretion in deciding whether to grant or deny an NRCP 60(b) motion for relief from judgment, and this court will not disturb that decision absent an abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996).

NRCP 60(b) provides for relief from judgments for a variety of reasons. The rule requires that a motion for relief from judgment be brought within a reasonable amount of time, but if based on mistake, newly discovered evidence, or fraud, not more than six months after the order is entered. NRCP 60(b); *Bonnell v. Lawrence*, 128 Nev. 394, 398, 282 P.3d 712, 714-15 (2012). The rule also allows parties to seek relief from judgments by way of independent actions as described in a savings clause, which states that NRCP 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." NRCP 60(b); *Bonnell*, 128 Nev. at 399, 282 P.3d 712, 715.

Here, Ashley filed his motion for relief from judgment pursuant to NRCP 60(b)(4), arguing that the underlying orders were void for the reasons described above. However, at the hearing on the motion, Ashley argued that the motion should be construed as an independent action seeking equitable relief, pursuant to NRCP 60(b)'s savings clause. Following the hearing, the district court concluded that Ashley could have

sought clarification of the decree or modification, but did not, and that he admitted in his testimony during the show cause hearing that he understood the terms of the decree, such that the terms were not ambiguous, and that he willfully violated the decree. Additionally, the district court found that Ashley had received proper notice of the contempt proceedings and, therefore, that he received due process prior to being found in contempt. Moreover, the court found that Ashley could have filed any number of motions to seek relief from the contempt order far sooner than he had, but he failed to file anything for a year after the contempt order was entered. Based on our review of the record, substantial evidence supports these findings, which in turn supports the conclusion that the motion was not brought in a reasonable amount of time, and we cannot conclude the district court abused its discretion in denying the motion to set aside on this basis.[1] *Cook*, 112 Nev. at 181-82, 912 P.2d at 265.

As to Ashley's argument that his motion should have been construed as an independent action seeking equitable relief, and therefore not subject to the six month time limit pursuant to NRCP 60(b), we likewise

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[1]Although it appears that the district court also concluded, incorrectly, that it lacked jurisdiction to grant a motion to set aside filed outside the six month time limit if it was not based on fraud upon the court, this error does not warrant reversal in light of the district court's remaining findings supporting the conclusion that the motion was not brought in a reasonable amount of time. *See* NRCP 60(b) (requiring motions for relief from a void judgment to be brought within a reasonable amount of time); *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

find this argument unavailing. An independent action for relief from judgment pursuant to NRCP 60(b) is only available "to prevent a grave miscarriage of justice." *Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 501-02 (2014).

Here, Ashley had legal remedies available that he neglected. *See Bonnell*, 128 Nev. at 403, 282 P.3d at 718 (providing that a party seeking to bring an independent action for equitable relief must "show that [he] did not have an adequate remedy at law and that the judgment ought not, in equity and good conscience, to be enforced." (internal quotations omitted)). Ashley stipulated to the terms of the decree of divorce and after the stipulated decree was entered, he did not seek clarification of the terms or appeal that decision. After he completed the classes and therapy required by the decree, Ashley moved to modify custody, and the court modified the custody arrangement, awarding him parenting time two weekends per month. Ashley did not seek clarification of that order, or appeal that decision. Similarly, once the district court found Ashley in contempt for violating the decree's provisions relating to communication, Ashley then waited one year before seeking to set aside or modify the decree's terms, alleging for the first time in this motion that the decree was ambiguous. And it was in his NRCP 60(b) motion that Ashley asserted for the first time that he did not receive proper notice of the order to show cause. Indeed, Ashley appeared at the hearing on the order to show cause and was represented by counsel, but did not assert that he did not receive proper notice or was not informed of the allegations against him before proceeding with the show cause hearing. Based on the foregoing, we cannot conclude

that Ashley's allegations that the custody provisions in the decree were ambiguous, that he did not receive proper notice of the order to show cause, and that his due process rights were violated, meet the "demanding standard of a grave miscarriage of justice" to support an independent action for relief from judgment. *Id.* at 403, 282 P.3d at 717 (internal quotations omitted).

Ashley also contends on appeal that the district court abused its discretion in denying his motion to modify custody because the custody order does not contain any findings of fact and, therefore, Ashley cannot demonstrate a change in circumstances.[2] This court reviews a child custody decision for an abuse of discretion, and we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004). In making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Moreover, the district court's order "must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis*, 131 Nev. at 451, 352 P.3d at 1143.

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[2]We note that Ashley's brief asserts he is contesting the custody provision in the decree of divorce, but because the decree was no longer the controlling custody order, we construe his argument as pertaining to the custody order entered on October 18, 2016, as that was the order in effect at the time of his motion.

Here, the district court determined that Ashley failed to make a prima facie showing of a substantial change in circumstances, such that he failed to prove he was entitled to a hearing on his motion to modify custody, citing *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993). Pursuant to *Rooney*, a district court may deny a motion to modify custody without holding a hearing if the moving party fails to demonstrate a prima facie case for modification. 109 Nev. at 542-43, 853 P.2d at 124-25. To constitute a prima facie case, the moving party must show "that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.* at 543, 853 P2d at 125.

While Ashley is correct that the underlying custody order fails to include any findings of fact, the district court nonetheless properly determined that Ashley failed to demonstrate a prima facie case for modification. Notably, based on our review of the record, Ashley failed provided an affidavit to support his motion to modify. Moreover, based on our review of Ashley's motion, his allegations to support a custody modification all relate to conduct that occurred prior to or that has been ongoing since the entry of the divorce decree. Thus, even if supported by an affidavit and presumed true, such events would not rise to the level of a prima facie showing, entitling him to a hearing. *See id.*; *Nance v. Ferraro*, 134 Nev. ___, ___, 418 P.3d 679, 684 (Ct. App. 2018) (explaining that the substantial change in circumstances warranting the modification of a primary physical custody arrangement, must have occurred since the entry of the last custody order). Thus, under the particular facts of this case, we

cannot conclude that the district court abused its discretion in denying Ashley's motion to modify custody.[3] *See Flynn*, 120 Nev. at 440, 92 P.3d at 1226-27.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

cc: Hon. Rena G. Hughes, District Judge, Family Court Division
Alex B. Ghibaudo, PC.
Mariana Elisa Hall
Eighth District Court Clerk

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[3]To the extent Ashley intended to contest the custody provision in the decree of divorce, rather than the subsequent order modifying custody, his arguments would likewise fail as he could no longer seek to modify a custody order no longer in effect.

[4]We have carefully considered the remaining arguments on appeal and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.