IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD T. HOOVER, JR.,
Appellant,
vs.
SERENA J. HOOVER,
Respondent.

No. 36940

FILED

MAR 08 2002

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court granting respondent Serena J. Hoover's NRCP 60(b) motion for relief from judgment.

Appellant Gerald T. Hoover married respondent Serena J. Hoover in Elko, Nevada, in 1989. Two minor children were born to Gerald and Serena. The parties were divorced in 1992. Serena was awarded primary physical custody of the children while both parents retained joint legal custody.

Serena left the State of Nevada, with the children, and moved to Salt Lake City, Utah, in September 1999. Gerald asserts that she did not have his oral or written permission to leave the state. Serena asserts that she had oral permission to leave the state in 1997, but concedes she never obtained oral or written permission from Gerald to move to Salt Lake City.

On February 16, 2000, Gerald filed a motion for modification of the divorce decree, specifically for a change of custody. He asserted that he adhered to the provisions of NRCP 5(b) in noticing Serena of the motion and the date of hearing. Gerald served Serena by mailing a copy of the motion to Serena's last known attorney and to Serena's last known

address, her mother's residence. Gerald had been paying child support through the Elko County District Attorney's Office, and he contacted them to see if they had a more recent address for Serena. They did not. Gerald had also been contacted by authorities in Salt Lake City, Utah, with regard to child support. He contacted the Salt Lake City authorities to obtain a current address for Serena. They declined to release the information.

On March 24, 2000, Serena did not appear at the hearing on Gerald's motion to modify the divorce decree. The district court, after reviewing the evidence presented by Gerald, concluded that a change of custody was warranted under Murphy v. Murphy.[1] The district court found, among other things, that Serena had engaged in a course of conduct designed to defeat any visitation by Gerald, and that she had improperly left the state in violation of NRS 125C.200. The district court concluded that changing custody was in the best interests of the children. Gerald was given primary physical and legal custody of the children.

One day after receipt of the written order, Gerald traveled to Salt Lake City and, with the aid of city law enforcement, retrieved his children and returned to his home in Ely, Nevada. On May 25, 2000, after moving back to Elko, Nevada, and retaining Nevada counsel, Serena filed a motion to set aside the order changing custody pursuant to NRCP 60(b).[2]

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[1]84 Nev. 710, 447 P.2d 664 (1968).

[2] NRCP 60(b)(1) and (2) state, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

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Serena asserted that she did not receive notice of the motion to modify and change custody.

Relying on Dagher v. Dagher,[3] Serena asserted that she was entitled to "specific prior notice" of the proceedings since it involved a change in custodial status, and that custody could not be changed based on perceived maternal misconduct. Further, she asserted that judicial policy favored a decision on the merits in cases involving domestic relations. Serena also contended that Gerald knew the address where Serena and the children were residing in Utah. Therefore, service under NRCP 5(b) was improper. Finally, Serena argued that even if Gerald did not know her Utah address, he had a duty to use due diligence to attempt to locate her, and that her failure to respond was the result of surprise, mistake, inadvertence or excusable neglect.

In his opposition, Gerald argued that Serena had left the state with his children without first obtaining his permission. Gerald also asserted that when Serena and the children were living with Serena's

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> inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment . . . .

[3]103 Nev. 26, 731 P.2d 1329 (1987). We note that while Dagher discusses the heightened standard of review that is given to default changes of custody, nothing in Dagher stands for the proposition that a change of custody can only be accomplished upon actual notice to the opposing party.

boyfriend, Serena was arrested for domestic violence, during which time the children were left with a neighbor.[4] Thus, he was entitled to the statutory presumptions regarding custody under NRS 125.480(4)(c), 125.480(5), and 125C.230. Moreover, Gerald denied that he had knowledge of Serena's actual address in Salt Lake City. Gerald also argued that actual notice of a motion to change custody is not required under Dagher and that service was proper under NRCP 5(b).

After a one-day hearing, the district court set aside and vacated the change of custody order, stating:

> The Court is gonna [sic] find that Mr. Hoover either knew or should have known or should have done a better job of finding out where this lady was. And it's just not fair to, in the bottom analysis, to modify this decree without some type of hearing.

The district court did not address the substance of Gerald's motion for change of custody; in particular, Serena's domestic violence arrest and her failure to gain Gerald's written consent before moving the children to Salt Lake City.[5]

Gerald first argues that service is complete upon mailing, and that mailing satisfies the notice requirements of NRCP 5(b).[6]

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[4]Serena admitted that she had been involved in one incident of domestic violence with her live-in boyfriend while she resided in Salt Lake City, Utah.

[5]The record concludes with the vacation of the order modifying custody. It does not appear from the record that the district court set a new date for a full hearing on the motion to modify.

[6]NRCP 5(b) states, in relevant part:

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Furthermore, Gerald asserts that NRCP 5(b) does not have a due diligence requirement and that the district court cannot, ad hoc, impose such a requirement on the rule. Gerald also contends that Serena has an obligation to keep the court advised of her current address for service of papers pursuant to NRCP 11 and 4 JDCR 14.

Conversely, Serena argues that constructive service pursuant to NRCP 5(b) violates her due process rights where a change of custody is at issue, and she did not have actual notice of the motion to change custody and notice of the subsequent hearing.

A district court's decision to set aside a default judgment is reviewed for an abuse of discretion.[7] We conclude that the district court abused its discretion when it imposed a due diligence requirement upon Gerald. The plain language of NRCP 5(b) contains no such requirement. Service by mail is complete upon mailing and proof of service may be made

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> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. . . . Service by mail is complete upon mailing . . . .

[7]See Price v. Dunn, 106 Nev. 100, 103, 787 P.2d 785 787 (1990); Tahoe Village Realty v. DeSmet, 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979); Lentz v. Boles, 84 Nev. 197, 200, 438 P.2d 254, 257 (1968); Cicerchia v. Cicerchia, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961).

by affidavit.[8] Moreover, proof of receipt of service is not a prerequisite to the exercise of jurisdiction by the court.[9] Further, this court has held that "[t]here is simply no provision in [NRCP 5(b)] authorizing ad hoc additions by district court judges to methods of service specified by [NRCP 5(b)]."[10]

In this case, Gerald adhered to the procedural requirements imposed in NRCP 5(b). He properly served Serena's last known attorney and served her at her last known address. Moreover, even though not required to do so under the rule, Gerald attempted to find Serena's new address through the Elko County and Utah child support enforcement authorities. Accordingly, without a specific finding that Gerald had actual knowledge of Serena's address, we conclude that the district court erred where it found that Gerald did not properly affect service on Serena.[11]

Although we find that service was proper, we further conclude that the district court did not err when it granted Serena's motion to set aside the order modifying custody, although it did so for the wrong reasons.[12] Since Serena was properly served with the motion, Serena's

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[8]Luc v. Oceanic Steamship Co., 84 Nev. 576, 579, 445 P.2d 870, 872 (1968); see also NRCP 5(b).

[9]Luc, 84 Nev. at 579, 445 P.2d at 872.

[10]Cheek v. FNF Constr., Inc., 112 Nev. 1249, 1254, 924 P.2d 1347, 1351 (1996).

[11]If the district court had made a specific finding that Gerald knew of Serena's actual whereabouts, such a finding would have been supported by substantial evidence.

[12]See Rosentein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (concluding that "this court will affirm the order of the district court if it reached the correct result, albeit for different reasons").

motion to vacate the order modifying custody could not be granted absent a finding of mistake, inadvertence, surprise or excusable neglect under NRCP 60(b)(1).

The record does not support an inference that the district court found inadvertence, surprise, or excusable neglect. Serena had a specific obligation to provide the district court with her last known address under NRCP 11 and 4 JDCR 14. She also had an obligation to obtain Gerald's written consent to her move and to personally inform him of her new address in Salt Lake City. Her failure to comply with applicable rules and statutes does not constitute inadvertence, surprise or neglect.

However, we conclude that the record supports an inferential finding of mistake. Serena and others testified that they thought Gerald knew where Serena was because they had given the address to his sister. Although the sister denied this allegation, the district court's oral comments support an inference that the district court believed that Serena thought Gerald knew her address in Salt Lake City. Thus, she may have mistakenly believed she did not need to take any further action to notify Gerald of her exact address. Additionally, although not required to do so, she presented evidence to establish a defense to the allegations contained in the motion to modify.[13] Therefore, the district court could have granted Serena's NRCP 60(b) motion on the alternate grounds of mistake.

Despite our conclusion that the district court did not err in granting Serena's motion to set aside the order modifying custody, we

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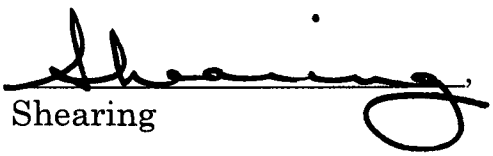
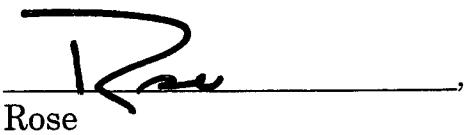
[13]See Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (concluding that a party moving to set aside a default judgment is no longer required to demonstrate a meritorious defense).

conclude that this case must be remanded, nonetheless, for further proceedings regarding the issue of child custody. Specifically, undisputed instances of domestic violence on Serena's part presumptively entitle Gerald to a modification of the children's custody.[14] Because the record does not reflect that a new hearing on the motion to modify was scheduled or conducted, the matter must be remanded for such a hearing. Accordingly, we

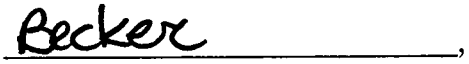
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. J. Michael Memeo, District Judge
G. C. Backus
Michael L. Shurtz
Elko County Clerk

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[14]See NRS 125.480(4) and (5); NRS 125C.230.