

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TEMPEST ALCANTAR,  
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND  
FOR THE COUNTY OF CLARK; AND  
THE HONORABLE RENA G. HUGHES,  
DISTRICT JUDGE,

Respondents,

and

MARK ALCANTAR,  
Real Party in Interest.

No. 79510-COA

**FILED**

**OCT 31 2019**

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

*ORDER GRANTING PETITION FOR WRIT OF MANDAMUS OR  
PROHIBITION IN PART AND DENYING PETITION IN PART*

This original, emergency petition for a writ of mandamus or prohibition challenges September 4, 2019, district court orders directing petitioner Tempest Alcantar to return the parties' children to Nevada. On September 3, 2019, after the district court had orally ruled but before the written order was entered, we directed real party in interest Mark Alcantar to file an answer to the petition within 14 days and imposed a temporary stay of the district court's ruling, pending our receipt and consideration of any opposition to the stay.

To date, Mark has not filed any opposition to the stay or an answer to the writ petition. Instead, upon Tempest's motion to treat Mark's failure to timely file an answer as a confession of error under NRAP 31(d)(2), Mark opposed the motion and requested an extension of time to file the answer, claiming that he is unable to file an answer because the record is incomplete, as this court has not ruled on Tempest's motion to file the child interview report under seal.

As this matter involves time-sensitive child custody issues and requires prompt additional attention by the district court, we deny Mark's request for an extension of time, NRAP 31(b)(3)(C) (motions for extensions of time in child custody cases will be granted only in extraordinary circumstances), and grant the motion to treat Mark's failure to timely file an answer as a confession of error. The petition for a writ of mandamus or prohibition is granted in part, as follows.

Under NRS 125C.0035, the district court is required to determine the best interests of the children when making child custody determinations. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Here, the district court ordered the children's return to Nevada because Tempest's move with the children to Arizona interfered with Mark's joint custody of the children, in that Mark and the children were unable to enjoy the benefits of close proximity that they had shared before the move. While this may be a factor in determining the children's best interests, see NRS 125C.0035(4); *Druckman v. Ruscitti*, 130 Nev. 468, 474, 327 P.3d 511, 515 (2014) (listing various considerations the district court must take into account when considering a custody dispute involving relocation), the court failed to consider any other factors and did not make any best interests findings on the record. Indeed, the district court expressly stated that it was not making a custody determination at that time.

However, under the circumstances, by ordering the children's return to the marital residence, where Mark lived but Tempest did not, the court's ruling unavoidably affected the parties' custody of the children. Therefore, because the district court made an implied custody determination without considering the children's best interests, the court

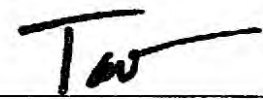
arbitrarily and capriciously exercised its discretion in this matter, warranting our extraordinary intervention. *See Sims*, 109 Nev. at 1148-49, 865 P.2d at 330 (recognizing that custody determinations must be based solely on the best interests of the children and may not be used to punish parental misconduct); *see also* NRS 34.160; *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (a writ of mandamus may issue to correct an arbitrary and capricious exercise of discretion).

The district court appears to have conducted a hearing on October 10, 2019, that may have included the question of custody. However, to date neither party has reported to us regarding what occurred at that hearing. If the district court has entered a new custody order as a result of the October 10 hearing, then this petition may very well now be moot, as the petition challenges only the previous order which may or may not be still in effect. But as neither party has supplied us with the appropriate information relating to the October 10 hearing, we have no way of determining whether that is so. Accordingly, based on the circumstances that have been presented to us, we grant Tempest's petition in part. We direct the clerk of this court to issue a writ of mandamus instructing the district court (1) to vacate its September 4 orders requiring Tempest to return the children to Nevada and (2) to hold an evidentiary hearing as soon as possible to determine temporary custody of the children based on their best interests, if such custody has not yet been determined. All other relief requested in the petition, including a writ of prohibition and reassignment to a different department, as well as Tempest's motion for leave to file the

child interview report under seal, is denied.<sup>1</sup> In light of this order, our September 3 temporary stay is vacated as moot.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Rena G. Hughes, District Judge, Family Court Division  
Leavitt Law Firm  
Law Offices of F. Peter James, Esq.  
Eighth District Court Clerk

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<sup>1</sup>The clerk of this court shall return, unfiled, the second supplemental appendix provisionally received in this court on September 6, 2019.