IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALI SHAHROKHI,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MATHEW HARTER, DISTRICT JUDGE,
Respondents,
and
KIZZY BURROW,
Real Party in Interest.

No. 79336-COA

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS IN PART AND DENYING PETITION IN PART

This original, emergency petition for a writ of mandamus challenges July 16 and August 6, 2019, district court orders in a child custody matter that, respectively, impose a no-contact restriction on petitioner Ali Shahrokhi and grant real party in interest Kizzy Burrow temporary sole legal and physical custody of the parties' minor child, allowing her to temporarily relocate with the child out of state. On August 14, 2019, we entered a partial stay of the district court's no-contact order to allow limited contact between Ali and the child, as the district court had not connected the no-contact restriction with any specific safety concern involving the child or with the child's best interest and apparently had entered the order without considering whether any lesser measures would sufficiently protect the parties. We also directed Kizzy to file an answer to the petition. Having considered the petition, Kizzy's timely filed answer, and Ali's reply thereto, we grant the petition in part and deny it in part.

19-45651

Facts and procedural history

Ali and Kizzy never married and have one child together. They filed competing complaints for child custody in December 2018. In January 2019, in the context of a separate temporary protection proceeding, the parties stipulated to share custody of the child pending a final determination in the custody action. In March, the court ordered the parties to use Our Family Wizard (OFW) to communicate and altered the parties' shared custodial agreement so that each party could have weekend time with the child. Thereafter, Kizzy filed a motion for primary physical custody and to relocate to Oregon with the child, which motion Ali opposed. Although the original hearing on that motion was vacated, on June 28, 2019, the district court entered minutes addressing multiple motions that Ali had filed and stating that "ANY and ALL Motions filed until July 4, 2019 shall be scheduled on July 11, 2019 to be consolidated with the already pending hearings."

At the July 11 hearing, the district court brought up concerns arising from its review of Ali's OFW communications. The court noted that, in the communications, at least one of which had been filed just the day before, Ali demeaned Kizzy's boyfriend, indicated that he would have the boyfriend arrested, and stated that he knew Kizzy's address. No other evidence was admitted. Two orders resulted from the hearing: (1) a July 16 order restricting all communications between Ali and both Kizzy and the child, and (2) an August 6 order, in which the court made domestic violence findings based on the OFW communications, determined that it would be in the child's best interest to temporarily relocate to Oregon, granted Kizzy temporary sole legal and physical custody, and ordered Ali to obtain a psychological evaluation addressing whether it was in the child's best interest to have contact with Ali. The order is not appealable, and Ali thus seeks writ relief. *See* NRS 34.170.

Discussion

A writ of mandamus will issue to compel the district court to comply with a legal duty or to control a manifest abuse of discretion. NRS 34.160; *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Although we often will not entertain writ petitions challenging temporary orders, as those orders frequently involve on-going matters and are subject to periodic district court review, we may do so when compelling circumstances so require. *See Aug. H. v. State*, 105 Nev. 441, 443, 777 P.2d 901, 902 (1989) (recognizing that even temporary custody orders can "have far reaching consequences for both the parents and the children"); *In re Vernor*, 94 S.W.3d 201, 209-10 (Tex. App. 2002) ("[M]andamus is an appropriate remedy when a court abuses its discretion involving temporary orders in a suit affecting the parent-child relationship."). This is such a case.

Ali complains that the district court suspended his contact with the child and entered an order changing the previously agreed-upon temporary joint custody status without providing him adequate notice of the hearing or an adequate opportunity to respond, as Kizzy had not moved for sole custody or to temporarily relocate pending a final custody decision. He further argues that the court improperly required him to obtain a psychological evaluation, failed to set an evidentiary hearing, and demonstrated bias against him. Consequently, Ali asks for a writ of mandamus directing the district court to vacate its two orders stemming from the July 11 hearing, reinstate the previously stipulated shared custody agreement, and set an evidentiary hearing on custody and relocation; he also asks that another department be assigned to hear this case.

"[P]arents have a fundamental liberty interest in the care, custody, and control of their children." *In re Parental Rights as to A.G.*, 129 Nev. 125, 135, 295 P.3d 589, 595 (2013). And due process generally requires

notice and a hearing before that right is altered. *See Gordon v. Geiger*, 133 Nev. 542, 546, 402 P.3d 671, 674 (2017). For this reason, orders that alter custody sua sponte may violate due process. *See id.* at 546, 402 P.3d at 674-75 (holding that a district court's sua sponte order granting an oral request to modify a parent's allotted time with her children without providing notice and a hearing violated due process); *Micone v. Micone*, 132 Nev. 156, 159, 368 P.3d 1195, 1197 (2016) (holding that a district court's surprise order awarding primary physical custody to nonparty grandparents violated due process where the parents were not provided notice).

We conclude that Ali's fundamental rights were violated here. The district court entered the no-contact and temporary custody orders without notice to Ali that the court was considering precluding contact and awarding sole temporary custody to Kizzy, without holding a full adversarial hearing on the matters, and without setting the matters for a proper hearing at any time in the future.[1] *See generally Andrew V. v. Superior Court*, 183 Cal. Rptr. 3d 517, 519 (App. Ct. 2015), *as modified* (Feb. 9, 2015), *as modified* (Mar. 3, 2015) ("A full adversarial hearing must precede, not follow, any out-of-state move-away order, however denominated."); *Martin R.G. v. Ofelia G.O.*, 809 N.Y.S.2d 1, 1 (App. Div. 2005) ("[A] hearing is generally required before a judge may award a temporary change of custody in a non-emergency situation."). The court explicitly "[kept] the hearing to a minimum," and it altered the stipulated custody arrangement and allowed relocation after expressly stating that it would not determine whether Kizzy had made a prima facie case for

[1]Although Ali complains that he did not receive notice of the July 11 hearing until one day prior, the record includes a certificate of service indicating that Ali was mailed notice of the hearing date on June 28, 2019, and then later informed of the time changes related to that hearing. Based on the record, it appears that Ali had notice of the hearing.

relocating. Moreover, the court made domestic violence findings, which could later be used in determining custody and possibly other matters, *see* NRS 125C.0035(4)(k), without taking any testimony or allowing for an adequate opportunity to respond to the allegations. *See* NRS 125C.0035(5) (contemplating an evidentiary hearing before domestic violence findings are made).

We must acknowledge, however, the exigent circumstances under which the district court made these orders. Before the hearing, the district judge, who is familiar with the history of this case and the parties, had reviewed several increasingly threatening communications from Ali. In the communications that the court reviewed, Ali not only demanded that Kizzy take several particular actions toward their child but also expressed his willingness to disobey court orders if she did not comply with his demands. Ali stated that he had discovered her address and threatened to remove the child from there and to arrest Kizzy's boyfriend. At the hearing, the judge learned that Ali had also obtained personal information about Kizzy's attorney and claimed to know where he lived. Thus, the district court's concerns about the parties' safety and the child's well-being are supported by the evidence before the court. In such cases, we will not substitute our judgment for that of the district court. *In re Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002) ("[W]e will not attempt to substitute our judgment for that of the trial court in an area of heightened sensitivity . . . .").

Given the district court's justified safety concerns, we will not overturn the current temporary custody arrangement, with the exception that the limited contact directed in our August 14 order granting a stay in part should remain in place, pending further proceedings in and order of the district court. Nevertheless, we are concerned that the district court has required Ali to undergo a psychological evaluation without identifying

the "time, place, manner, conditions, and scope of the examination," or naming the person who will perform the examination, as required by NRCP 35(a)(2)(B),[2] and that the court has suggested that it will not make a further custody determination until such evaluation has been completed.

Under NRCP 35, the district court has authority to order a party to submit to a psychological evaluation. However, the court's order must comply with NRCP 35's requirements, and the August 6 order does not. Further, the August 6 order directs the evaluator to determine "whether it is in the child's best interest for the child to have contact with Ali," even though the evaluator will not be examining the child. Whether it is in the child's best interest to have contact with his father is the district court's determination to make after reviewing the evidence before it, including any psychological evaluation, although the evaluator may make a recommendation in the appropriate circumstances. *See Bautista v. Picone*, 134 Nev. 334, 337, 419 P.3d 157, 159 (2018) ("[T]he district court has the ultimate decision-making power regarding custody determinations, and that power cannot be delegated . . . ."). Therefore, the portion of the August 6 order requiring a psychological evaluation must be stricken, and if a psychological evaluation is still desired, the district court should issue a new order that complies with NRCP 35, including describing the appropriate scope of the evaluation. Alternatively, if the district court orders an evaluation pursuant to NRCP 16.22, a new order must be issued

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[2]We also note that newly adopted NRCP 16.22 governs custody evaluations. If the district court decides to order a custody evaluation of Ali for the purpose of determining custody versus an NRCP 35 examination for the purpose of determining if Ali should have any contact with his child, we take this opportunity to indicate that NRCP 16.22(b)(1) contains the same "time, place, manner, conditions, and scope of the examination," and examiner identification requirements as NRCP 35.

that comports with requirements of that rule, which are substantially similar to those contained in NRCP 35.

Ultimately, regardless of whether an evaluation is obtained, the district court must move forward with an adversarial hearing on the temporary custody and relocation issues, and also with making a final custody and relocation determination. When exigent circumstances cause a court to make temporary child custody modifications without prior notice or a full adversarial hearing, the fundamental interests at stake require that such a hearing be provided as soon as possible thereafter. *See, e.g.*, *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003) (recognizing that parental rights are not absolute and may be limited or removed altogether when the child's safety is at risk, so long as due process requirements are met); *Matin v. Hill*, 801 So. 2d 1003, 1005 (Fla. Dist. Ct. App. 2001) (stating that, when the court is compelled to issue a temporary child custody order without allowing both parties to be heard, it must provide an opportunity to be heard as soon as possible thereafter); *Alix A. v. Erika H.*, 845 N.Y.S.2d 306, 307 (App. Div. 2007) (explaining that the nature and extent of a hearing on temporary custody may vary with the circumstances). Accordingly, the district court must immediately set a hearing on the temporary custody and relocation issues.

Further, under SCR 251, matters affecting custody of minor children are to be resolved within six months of the date the issues are contested by a responsive pleading, unless the court finds that unforeseeable circumstances preclude doing so and enters specific findings of fact to justify an extension of time. The pending custody issues in this case are approaching one year, and the district court apparently has not yet scheduled an evidentiary hearing to resolve them or entered specific findings justifying the delay. Therefore, we direct the district court to promptly schedule an evidentiary hearing to determine custody. All other

requested relief, including reassignment to a different department, is denied. *See Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006).

Conclusion

Based on the discussion above, we

ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to (1) vacate its July 16 no-contact order as to the child, only, and enter a new order setting forth the limited contact provided pursuant to our August 14 order; (2) immediately set an adversarial hearing on the temporary custody and relocation issues; (3) strike the portion of its August 6 order requiring a psychological evaluation, subject to any new order that complies with NRCP 35, or alternatively NRCP 16.22; (4) strike the portion of the August 6 order making domestic violence findings—any future domestic violence findings should be made only after an evidentiary hearing affording an adequate opportunity to respond to the allegations; and (5) schedule a full evidentiary hearing to finally determine custody and relocation.[3]

_____, C.J.
Gibbons

_____, J.
Bulla

[3]Ali's counsel has moved to withdraw and attached Ali's declaration to the motion, in which Ali indicates that he asked counsel to immediately withdraw from representing him in this proceeding and in which he provided his address for service. The motion to withdraw is granted, and the clerk of this court shall serve this order on Ali at the address provided in the declaration. NRAP 46(e)(3); SCR 46(1). We note that granting this motion does not suspend the time for filing for rehearing under NRAP 40.

TAO, J., dissenting:

I dissent. After being confronted with evidence that Ali might have a serious anger management problem that could easily lead to violence, the district court ordered him to undergo a psychological evaluation and suspended further hearings until he did so. Rather than even trying to comply, he loitered inexplicably for months and then belatedly filed this petition as an afterthought. I don't know why two members of this court are so eager to jump in and second-guess the way the district court chose to handle a recalcitrant and uncooperative party who defiantly refused to do what the district court ordered for months—especially when the district court's concerns about Ali's potential anger are so clearly supported by the record.

Appellate courts exist to review final judgments; the "judicial power" enshrined in the U.S. Constitution encompasses the ancient "final judgment" rule adopted from medieval England and firmly recognized by American courts at the founding. Pursuant to that ancient rule, we do not intervene to review interlocutory orders unless some "extraordinary" reason exists for doing so and there will never be any other avenue for appellate relief except for interlocutory intervention.

But here, neither of these requirements has been met, much less both of them. The district court's order was expressly designed to be temporary and to only remain in effect so long as Ali continued to dig in his heels and refuse to cooperate. Whether that order is something we agree with in all of its particular details is beside the point. The relevant point is that Ali has not suffered any kind of "irreparable harm" that cannot be addressed through an ordinary appeal under the usual rules of appellate procedure that would apply whenever this case runs through the normal course that we expect every other case to run through. Quite to the

contrary, the only reason he is suffering any (purported) adversity at all is because he refuses to do what the district court ordered him to do. As far as we can tell from the record, he never even attempted to comply. There is nothing "extraordinary" going on here that requires us to jump into the middle of this case and start second-guessing the district court before it has entered any kind of "final judgment" that the Constitution actually permits us to review.

Even if we can say that Ali is suffering any kind of adversity, he possessed the power to lift it any time he wanted by just choosing to follow the district court's order. But instead we're jumping in to let him off the hook, thereby destroying any incentive for him to ever comply in the future and instead encouraging him (along with all other uncooperative and vexatious litigants who intend to defy court orders) to keep drawing out this case by filing future petitions that we just might grant whether or not there is anything even remotely extraordinary or irreparable. I don't know why we would do that, and I respectfully dissent.

Tao, J.

Tao

cc: Hon. Mathew Harter, District Judge
Pecos Law Group
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Ali Shahrokhi
Eighth District Court Clerk