IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIFFANY WAGNER,
Appellant,
vs.
MARK MARINO,
Respondent.

No. 80032-COA

ORDER OF AFFIRMANCE

Tiffany Wagner appeals a district court order denying her motion to modify legal custody, denying in part her motion to modify child support, and denying her requests to rule on or set aside previous district court orders. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Tiffany Wagner and Mark Marino have one child together, born in October 2013.[1] Tiffany and Mark were never married. They initially shared joint legal and joint physical custody. In March 2016, Tiffany pepper sprayed Mark during a custody exchange; Tiffany was ultimately convicted of battery domestic violence and the parties have been involved in extensive litigation over child custody since then.

The district court held an evidentiary hearing and entered a custody determination in July 2017. The court awarded Mark primary physical custody, and sole legal custody only for educational decisions, and ordered Tiffany to pay child support. The district court ordered that Mark have sole legal custody for education because it found that Tiffany attempted to interfere with the child receiving special educational services that were available because the child is hearing impaired. The district court

[1]We recite the facts only as necessary to our disposition.

determined that Mark was the prevailing party and, in a second order, later awarded him attorney fees and costs. Tiffany appealed the July 2017 order and this court affirmed in part, reversed in part, and remanded.[2]

This court determined that the district court abused its discretion regarding the physical custody determination because the district court failed to address all of the best interest factors enumerated in NRS 125C.0035(4). This court also concluded that the district court failed to make specific findings that the custody arrangement would adequately protect the child and parent, as required when a party has engaged in domestic violence under NRS 125C.0035(5). This court, however, affirmed the district court's order regarding various evidentiary issues and an expert fee payment, and determined that the issue of attorney fees was not properly before this court because Tiffany did not appeal the order awarding attorney fees; she only appealed the July 2017 order.

On remand, the district court permitted the parties to submit supplemental briefing and the court reviewed the evidence presented at trial.[3] The district court entered an order to address the deficiencies noted by this court. However, the district court determined there was not enough information in the record to render the best parenting time arrangement, and the court ordered that the July 2017 custody order remain in place so the parties could submit additional information on that issue.

Before any additional findings could be made, Tiffany and Mark stipulated to joint physical custody in a May 2019 hearing after Tiffany filed

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[2]*Wagner v. Marino*, Docket No. 73611 (Ct. App., Order Affirming in Part, Reversing in Part and Remanding, June 28, 2018).

[3]This case was reassigned to Judge Duckworth, from Judge Rena Hughes, during the pendency of the first appeal.

another motion to modify custody. Shortly after the stipulation, Tiffany filed a motion to modify legal custody and child support, requested that the court review prospective child support and arrears, and renewed a previous motion to set aside the prior attorney fee award. During the hearing, Tiffany also requested that the district court rule on the validity of the July 2017 custody order, arguing that it was filed based on an ex parte communication between the court and Mark's former attorney.

Tiffany argued that she and Mark should have joint legal custody for education because they had recently cooperated and agreed that the child attend kindergarten at the school near Tiffany's home. Mark argued that he should retain sole legal custody for education because, despite the fact that they were able to cooperate on this decision, Tiffany and Mark still often had disagreements. Mark was worried that Tiffany would use the joint legal custody status to interfere with the child's education, as she had done in the past, and the court acknowledged Mark's concern that the parties would have to be in court over every educational decision if Tiffany had joint legal custody for education.

The district court commended the parties for their recent cooperation, but noted that Mark should not be punished because he chose to cooperate with Tiffany in selecting a school for the child. The court found that the recent cooperation did not provide adequate cause to hold a hearing or to modify legal custody. The district court partially granted Tiffany's motion to modify child support; it set child support to zero from the time the parties stipulated to joint physical custody, but found there was insufficient information to address Tiffany's requests for prospective child support and arrears. Lastly, the district court stated at the hearing that it would not make any ruling regarding the July 2017 custody order, stating that it did

not have jurisdiction over that issue, and did not address Tiffany's renewal of her motion to set aside attorney fees.

Tiffany now appeals. She argues that the district court abused its discretion when it denied her motion to modify legal custody, erred when it would not rule on the validity of the July 2017 order, abused its discretion when it would not set aside the previous order for attorney fees and costs, and abused its discretion when it did not modify child support like Tiffany requested. We disagree.[4]

First, Tiffany contends that the district court abused its discretion in denying her motion to modify legal custody because she has de facto joint legal custody for education. Tiffany also contends that the district court abused its discretion when it did not hold an evidentiary hearing on the custody issue and that the court is punishing Tiffany for her alleged misconduct.[5]

The district court has broad discretion to make child custody determinations and we will not disturb the district court's order absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). However, deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). "Legal custody involves

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[4]Mark is proceeding pro se in this appeal and he did not file a response. We decline to find Mark's failure to respond to be a confession of error because the best interest of the child is at stake, we have an adequate record, and the law is clear.

[5]Tiffany provides no explanation nor points to anywhere in the record to support her assertion that the custody determinations were intended to punish her for alleged misconduct. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing." *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009) (citing *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing J., concurring)). "[T]he parents need not have equal decision-making power in a joint legal custody situation." *Id.* at 421, 216 P.3d at 221.

Modification of a custody decision requires a substantial change in circumstances affecting the welfare of the child and that the modification is in the child's best interest. *Ellis*, 123 Nev. at 150, 161 P.3d at 242. A district court is not required to hold an evidentiary hearing unless the party requesting the custodial modification demonstrates "adequate cause." *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (citing *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)). There is adequate cause when the party requesting modification "presents a prima facie case that the requested relief is in the child's best interest." *Id.* (internal quotation marks omitted) (citing *Rooney*, 109 Nev. at 543, 853 P.2d at 125). A prima facie case requires that "(1) the facts alleged in the affidavits are relevant to the [relief requested]; and (2) the evidence is not merely cumulative or impeaching." *Id.*

The district court found that Tiffany did not demonstrate adequate cause to warrant custody modification or further proceedings. Tiffany maintains that the parties' recent cooperation constituted a substantial change in circumstances warranting modification and that this cooperation resulted in de facto joint legal custody. However, as the district court noted, while the recent cooperation was commendable, there were still feelings of hostility between the parties. The district court's finding is supported by the record, in which the parties disparaged each other during

the hearings, the parties said the other made false allegations, and Tiffany admitted to ongoing hostility. Furthermore, the district court noted that Mark should not be punished by revoking his sole legal custody because he cooperated with Tiffany and that there was a history of Tiffany interfering with educational decisions to the child's detriment. Tiffany presents no argument that she demonstrated adequate cause to warrant an evidentiary hearing on the matter, nor does she support her claim with relevant authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Similarly, Tiffany has provided no argument or authority supporting the notion that if the parties agree to an educational decision, then de facto joint legal custody exists. *See id.* Therefore, the district court did not abuse its discretion when it found that Tiffany did not demonstrate adequate cause to modify legal custody.

Second, Tiffany argues that the district court erred when it declined to rule on the validity of the July 2017 custody order, based on her allegation that she was never presented with a proposed order as required by the Eighth Judicial District Court Rules. Tiffany infers that there must have been an ex parte communication, and therefore, the July 2017 order is entirely invalid. However, Tiffany cites no authority to support her assertion that even if there was an improper ex parte communication, the entire order should be invalidated. *See id.* Additionally, the July 2017 custody order was already the subject of appeal, and this issue was not presented during that appeal.[6] *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not

[6]Tiffany never filed a petition for rehearing or a petition for review, but Tiffany made these arguments about an alleged ex parte communication in her district court motions before this court's order was entered.

raised on appeal are deemed waived). As a result, this issue was waived after it was not addressed in the first appeal and we need not address it now.

Third, Tiffany argues that the district court abused its discretion because it would not set aside the attorney fee award issued after the July 2017 custody order, and she claims that the order to pay an expert fee for a psychological evaluation was erroneous. As this court noted in the previous appeal, Tiffany never specifically appealed the district court's order awarding attorney fees; she appealed only the July 2017 custody order, which stated that Mark was the prevailing party. In the current appeal, Tiffany, again, never specifically appealed the district court's order awarding attorney fees; she appealed only the October 2019 order on her motion for orders to modify child support, child custody, and related relief, and Mark's opposition.

Regardless, an appeal of this attorney fee order now would have been untimely. *See* NRAP 4(a)(1). Further, both the attorney fee and expert fee issues are barred by the law of the case doctrine. "Under the law of the case doctrine, when an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and *upon subsequent appeal*." *Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (internal quotation marks omitted) (emphasis added). As this court already determined that Tiffany did not properly appeal the attorney fee award and affirmed the expert fee, the district court was limited by this court's previous decision and did not abuse its discretion when it declined to set aside the previous orders.

Lastly, Tiffany contends the district court abused its discretion when it would not modify child support as she requested and that the court

failed to make a child support order based on the parties' income and timeshare. We review child support decisions for an abuse of discretion. *Rivero*, 125 Nev. at 438, 216 P.3d at 232. Here, Tiffany misrepresents the district court's order. She states that despite her request to have a special hearing master review child support, the district court only ordered to stop child support from the date of the joint physical custody stipulation. It is true that the district court ended her obligation to pay child support from the date the parties agreed to joint physical custody and did not immediately order Mark to pay child support. But contrary to Tiffany's assertions, the district court explicitly stated, "[t]here is insufficient information" to make a full child support determination. The court then instructed Tiffany to file a new case in front of the child support hearing master to address child support going forward and any possible arrears. The hearing master would then receive evidence and determine the correct arrears and ongoing child support obligations and make appropriate recommendations to the district court. Tiffany makes no argument that there was sufficient information in the record in front of the district court to adequately address child support and immediately issue an order. Therefore, the district court did not abuse its discretion in its child support determination. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Law Offices of Scott Clark, PC
Mark Marino
Eighth District Court Clerk