

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JANEA CALKINS,
Appellant,
vs.
WAYLON HUBER,
Respondent.

No. 83053-COA

FILED

FEB 17 2022

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

ORDER OF REVERSAL AND REMAND

Janea Calkins appeals from a district court order denying her motion for change of custody and entering permanent custody. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Janea Calkins and Waylon Huber married in 2010.¹ Two years later, their twin children were born. The couple divorced in 2016 in Nevada. In their Marital Settlement Agreement, which the district court ratified, approved, and incorporated by reference into the divorce decree, the two agreed to joint legal custody and joint physical custody of their children. However, Waylon also agreed that Janea could temporarily relocate with the children to Boise, Idaho for two years so Janea could complete her education.

Thereafter, a series of events led the district court to conduct an evidentiary hearing in July 2020 with both parties present. The court entered an order modifying temporary custody granting Waylon temporary sole physical custody and Janea supervised parenting time.² In March

¹We do not recount the facts except as necessary to our disposition.

²The order granting Waylon temporary sole physical custody was seemingly indefinite, as it did not contain a hearing date or any other event that would cause it to become permanent. The district court did state that

2021, Janea filed a pro se motion for change of custody or visitation requesting that the children be returned to her custody to live in Idaho. In May 2021, Waylon filed an opposition to Janea's motion and a cross-motion for permanent custody. Days later, and without an evidentiary hearing, the district court denied Janea's motion for change of custody or visitation because Janea had not demonstrated a substantial change of circumstances affecting the welfare of the children nor that it would be in the children's best interest to live with her in Idaho. The court also summarily granted Waylon's cross-motion for permanent custody. In its order, the district court noted that "the current temporary custody order shall now be entered as a permanent custody order[.]"

On appeal, Janea argues that (1) she was not provided with the opportunity to respond to Waylon's cross-motion, which permanently altered custody; (2) she should have been provided with a copy of Waylon's ex-parte motion from June 2020, which was the basis for the district court's order modifying temporary custody and granting Waylon temporary sole physical custody in July 2020, because it was a contempt motion in the guise of a custody motion; (3) the district court erred in finding that she had not presented a prima facie case requiring a hearing to review custody; (4) the district court applied the wrong legal standard to the final custody determination; and (5) substantial evidence did not support the district court's findings in its permanent custody order.³

if Janea moved back to Nevada, it would revisit the terms of her parenting time and entertain a modification of the order.

³Waylon, acting in pro se, does not substantively respond to Janea's arguments. Rather, he asserts that Janea's fast-track statement was procedurally deficient and that the district court did its due diligence.


Here, we need not reach the merits of the parties' arguments other than the first issue because the district court did not follow the proper procedure in entering its order of permanent custody. Janea filed a pro se motion to modify custody unsupported by points and authorities, which Waylon opposed with a detailed opposition and declaration, and cross-motion for permanent custody. The district court, however, prematurely resolved the case in applying the modification standards under *Ellis v. Carucci*, 123 Nev. 145, 153 P.3d 239 (2007), before Janea had a chance to file a reply to the opposition to her motion, and before she was able to oppose the cross-motion for permanent custody. The district court considered the matter submitted for a decision two days after Waylon filed his pleading and entered its order a mere seven days after Waylon filed his pleading. Yet DCR 13(3) allows a party 7 days to respond to an opposition and 14 days to respond to a motion, which did not happen here.

Further, after citing *Ellis*, the district court then converted the temporary order into a permanent order but did so without an evidentiary hearing that would have allowed the parties to present evidence regarding the children's best interests. The district court appeared to believe that because Janea failed to satisfy the first prong of *Ellis*, a substantial change of circumstances affecting the welfare of the children, that it could enter its order without further proceedings. But it failed to apply *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993) (requiring that a district court hold an evidentiary hearing on a motion to modify custody if the moving party demonstrates "adequate cause" for the hearing, which is "something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change[]"), the threshold step in determining whether a hearing is required. Thus, we are unable to

determine whether an evidentiary hearing would be necessary to resolve the custody issue. The district court, which is very familiar with these parties, should determine this in the first instance. *See Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Because of the failure to allow adequate time for responsive pleadings, as well as a determination on the merits without first deciding whether an evidentiary hearing should be conducted, there was error. Accordingly, we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Montero, District Judge
Carolyn Worrell, Settlement Judge
Bittner Legal LLC
Waylon Huber
Humboldt County Clerk