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### Micone v. Micone, 132 Nev. Adv. Op. 14 (March 3, 2016)

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## FAMILY LAW

### **Summary**

The Court considered an appeal from a district court order modifying a child custody decree. The Court affirmed in part and reversed in part the Eight Judicial District Court's order. The Court affirmed the District Court's order barring modification of certain child support arrearages<sup>2</sup>. The Court reversed the District Court's award of primary physical custody to the child's nonparty grandparents.

### **Background**

Appellant Kerstan Micone divorced Michael Micone in 2009. Pursuant to the divorce decree, the two shared joint legal custody of their two children, while Kerstan retained primary physical custody of them. After the 2009 school year, the children were to attend public school in Las Vegas, unless both parents agreed to share the cost of private school tuition. The Micones' daughter, I.M., the child at issue in this case, received poor grades in public school. Michael agreed to pay half of I.M.'s private school tuition, providing I.M. attend private school in Reno, where he resides. Both parents felt that it would be in I.M.'s best interest for her to live with her paternal grandparents while she was residing in Reno. I.M. returns to Las Vegas to reside with Kerstan during the summer.

In 2014, Michael sought to obtain full custody of I.M. Kerstan opposed, explaining that while she agreed to allow I.M. to live with her grandparents during the school year, she did not agree to change I.M.'s physical custody status. The District Court, on January 15, 2015, without joinder of the grandparents, notice to the parents that the grandparents might be award custody, or the requisite findings to overcome the parental preference, unilaterally awarded the grandparents physical custody of I.M.

### **Discussion**

This Court reviews a child custody determination for an abuse of discretion.<sup>3</sup> Though the Court noted that it has not expressly addresses child custody awards to nonparty nonparents, the Court recognized that a court is required to have jurisdiction over a party before a court can enter a judgment affecting the party.<sup>4</sup> The Court, looking to other jurisdictions, determined that applying the *Young* standard to child custody cases is appropriate.<sup>5</sup> A Texas court, in *Landry*, held that simply finding that awarding custody to a nonparent is in the best interest of the children is no longer enough.<sup>6</sup> A nonparent must bring or intervene in a custody suit and present evidence to

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<sup>1</sup> By Ronni N. Boskovich.

<sup>2</sup> The Court, in fn. 1, rejected Appellant's issue-preclusion-based challenge, because the District Court order relies on video transcript from a hearing, which Appellant failed to include in the record on appeal.

<sup>3</sup> *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

<sup>4</sup> *Young v. Nev. Title. Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987).

<sup>5</sup> See *Landry v. Nauls*, 831 S.W.2d 603, 605 (Tex. Ct. App. 1992); *Elton H. v. Naomi R.*, 119 P.3d 969, 979 (Alaska 2005).

<sup>6</sup> *Landry*, 831 S.W.2d at 605.

overcome parental preference.<sup>7</sup> The Court determined that *Landry*'s holding is consistent with current NRS language explaining that a court should have jurisdiction over a party in a child custody case.<sup>8</sup> If a court attempts to award custody to a nonparent nonparty, the individual's due process rights may be violated.<sup>9</sup>

Here, the District Court did not have jurisdiction over the nonparent, nonparty grandparents. The District Court unilaterally awarded custody to the nonparty grandparents. This award failed to provide notice and the opportunity to be heard, both of which are aspects of fundamental fairness and due process. Neither of the parties to this case was aware that the court was even considering awarding full custody to the grandparents. Additionally, the District Court did not make specific findings that awarding custody to either parent would be detrimental to I.M.

### **Conclusion**

Because the nonparty grandparents did not "bring or intervene in [the] custody suit" and present evidence to overcome the parental preference, the District Court's unilateral award of primary physical custody was an abuse of discretion. Not only did the District Court fail to make the requisite findings to overcome the parental preference, it violated the Micones' due process rights by failing to provide notice and the opportunity to be heard.

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<sup>7</sup> *Id.*

<sup>8</sup> NEV. REV. STAT. § 125.510 (2013) (while this Legislation was repealed in 2015, the same language was added to NRS Chapter 125C).

<sup>9</sup> *Gonzales-Alpizar v. Griffith*, 130 Nev. Adv. Op. 2, 317 P.3d 820, 827 (2014).