IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM DAVID KELLEY,
Appellant,
vs.
JULIE ANN KELLEY,
Respondent.

No. 64877

FILED

SEP 30 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

This is an appeal from a district court order awarding respondent Julie Kelley primary physical custody, alimony, and attorney fees following a divorce trial. Eighth Judicial District Court, Clark County; Gayle Nathan, Judge.

We address six issues in this appeal: (1) whether the district court abused its discretion in awarding Julie primary physical custody; (2) whether the district court abused its discretion by not ordering Julie to pay appellant William (Bill) Kelley child support; (3) whether the district court had jurisdiction over the parties' 18-year-old handicapped son; (4) whether the district court abused its discretion in allowing testimony regarding the occupation of Bill's girlfriend (Karen) and ruling that Karen could not be around the children; (5) whether the district court abused its discretion in awarding Julie alimony; and (6) whether the district court abused its discretion in awarding Julie $10,000 in attorney fees.

15-901188

FACTS

Bill and Julie were married for 29 years. They have a son, Dale, and twin daughters, Brittney and Whitney. At the time of trial, Dale was 18 years old; Brittney and Whitney were 17 years old. Dale and Brittney are mentally handicapped; Whitney is not. At the time of divorce, Julie had an annual income of $83,000 and Bill had an annual income of $110,000.

At the trial, Julie offered testimony from a hired private investigator who followed Bill and Karen. The investigator testified as to Karen's profession as an exotic dancer and opined that he thought Karen performed sex acts for money. The court found the testimony credible and also found Bill and Karen had entered into a lease agreement on an apartment and that Bill had paid half the deposit as well as the first month's rent.

The court awarded Julie primary custody of all three children. The court did not interview any of the children because Julie would not waive due process rights as required by the court.[1] Further, the parties could not agree on a third party's interview of the children. Accordingly, the court concluded it did not have much information regarding the children's wishes. During the proceedings, however, the court questioned both parties regarding Bill's allegations that the children wanted to live with him and Julie's allegations that Bill alienated the children from her. Although the court did not accept into evidence either party's testimony as

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[1]NRCP 16.215(e), effective July 21, 2015, prescribes the process for child interviews while respecting due process considerations.

to the children's custodial preference, it did consider the parties' testimony on events indicating the children's preference and possible alienation.

The court awarded Julie child support in the statutory amount, including support for Dale. The court concluded it had jurisdiction to award custody of, and support for, Dale, because of his handicapped status, and because guardianship proceedings had not yet commenced. The court ordered the child support to terminate for Dale and Brittney when they begin receiving social security benefits. The court ordered child support for Whitney to terminate when she turned 19 (as she was still enrolled in high school), or when she emancipated. The order specified Bill would pay child support in the amount of $925 per child, per month.

The court stated two figures for Bill's income, one mistakenly at $130,000 per year, the other correctly at $110,000. The parties later agreed the correct income was $110,000 and the court adjusted the child support to $858 per child, per month. The court awarded Julie alimony of $1,000 per month for ten years based on the length of the marriage (29 years), and the almost $30,000 disparity in income between the parties. The court also awarded Julie $10,000 in attorney fees.

ANALYSIS

First, Bill argues the district court abused its discretion when it awarded Julie primary custody without interviewing the children to ascertain their custodial preferences. Custody matters are within the discretion of the district court and will not be overturned absent an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). When adopting a child custody arrangement, the court must

consider the children's custodial preference; however, the court is not required to interview the children. *See* NRS 125.480(4)(a). While a court may interview a minor child outside the presence of counsel and the parties, it may only do so "[i]n exceptional cases." EDCR 5.06. Moreover, before a minor child may be called as a witness to testify in open court, the court must find "that the probative value of the child's testimony substantially outweighs the potential harm to the child." *Id.*

Thus, the district court was not required to interview the children pursuant to NRS 125.480(4)(a), but, pursuant to EDCR 5.06, it could have under exceptional circumstances, which were not proven in this case. To the extent Bill alleges the court abused its discretion in determining the children's best interest, we conclude it did not abuse its discretion because it considered the best interest factors, including, but not limited to, the nature of the parent-child relationship and the needs of the children. The district court's conclusions as to these factors are supported by the record. The district court is presumed to have acted in the children's best interest. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Further, this court will not reweigh evidence or witness credibility on appeal. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

Bill asserts Brittney and Whitney had a strained relationship with Julie and would prefer living with Bill. Julie ascribes the strained relationship to Bill's attempts to alienate the twins from Julie. The record reflects that the court considered the children's custodial preferences, albeit by the evidence presented during the trial rather than by conducting an interview or a hearing in which a child testified. Therefore,

because the court considered some evidence of preference, but concluded there was insufficient evidence to support the children's custodial preference of either parent, but went on to consider and apply the other best interest factors, especially that Julie was the parent primarily responsible for ensuring that the medical and educational needs of the children were met, we conclude it did not abuse its discretion in awarding Julie primary custody. *See* NRS 125.480(4).

Second, Bill contends the court should have ordered Julie to pay him child support if Whitney decided to move in with him when she turned 18 (Whitney turned 18 in October 2013).[2] Bill cites to NRS 125.510(9) to support his contention. NRS 125.510(9), however, addresses when child support obligations cease, not whether a parent awarded primary custody should be ordered to pay child support if the child chooses to live with the other parent. Because Bill does not cite to any authority or present any cogent argument to support his contention, we decline to address this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Further, the record does not reflect, and Bill does not allege, that Whitney actually moved in with Bill when she turned 18. Therefore, Bill's argument is merely hypothetical and might even be moot. In either event, that issue, and the facts to support it, should have been presented to the district court for it to determine whether a reduction of the payment from Bill to Julie was appropriate, or a new order should be made

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[2]A person is a "minor child" for child support purposes if under 19 years old and enrolled in high school. NRS 125B.200(2)(b).

requiring Julie to pay Bill, before being raised on appeal. *See* NRS 125B.145(2)(b).

Third, Bill contends the court did not have jurisdiction over Dale because he was 18 at the time of the trial and, therefore, not a minor. This is a two-fold inquiry; whether the district court had jurisdiction to order support for Dale, and whether the district court had jurisdiction to award Julie primary custody of Dale.

A district court retains jurisdiction to order support for a child until 19 years old, or until the child graduates high school. *See* NRS 125.510(9)(b); *Ramacciotti v. Ramacciotti*, 106 Nev. 529, 531, 795 P.2d 988, 989 (1990). Here, the complaint for divorce was filed in December 2012, when Dale was 18 years old. Dale did not graduate from high school until May 2013 and did not turn 19 until October 2013. Thus, the district court properly applied the filing date to determine it retained jurisdiction to order support for Dale. *See McLendon v. Allen*, 752 S.W.2d 731, 733 (Tex. App. 1988).

As to its award of custody, a district court generally loses jurisdiction to order custody when a child turns 18. *See* NRS 125.480, NRS 125B.200; *cf. Cavell v. Cavell*, 90 Nev. 334, 338, 526 P.2d 330, 332 (1974); *see also Geygan v. Geygan*, 973 N.E.2d 276, 281-82 (Ohio Ct. App. 2012) (concluding the district court lacked jurisdiction to enter a custody order over a 38 year-old physically and developmentally disabled adult). Thus, although the court had jurisdiction to order support for Dale until he turned 19, it did not have jurisdiction to award custody of Dale to Julie.

The result of this error may have no effect on the outcome of the case. Nevertheless, the custody order with regard to Dale is vacated.

The district court will have to determine what effect, if any, the order has in conjunction with any guardianship proceedings which may have commenced since the decree went into effect.

Bill also contends the court did not comply with guardianship law when it found Dale and Brittney needed a guardian. The court specified that its custody determination was to bridge the gap between the divorce proceedings and the guardianship proceedings both parties agreed were necessary and could be immediately available. *See* NRS 159.0523. The court relied on Dale and Brittney's Individualized Education Program ("IEP") in determining both children were of limited capacity and would require guardianship. The order attempts to provide both Dale and Brittney legal status and protection during the interim period. The district court, however, had no authority to bind a future court which may consider a guardianship petition for an adult, Dale, but did have authority as to Brittney, a minor. *See* NRS 159.061(1) ("The appointment of a parent as a guardian of the person must not conflict with a valid order for custody of the minor."). The guardianship court would have to determine the effect of the custody orders from the family court. *See* NRS 159.061(2) ("[T]he court shall appoint as guardian for an incompetent, a person of limited capacity or minor the qualified person who is most suitable and is willing to serve."). The guardianship issues are not currently before this court beyond what has been stated.

Fourth, Bill maintains the court abused its discretion by admitting testimony relating to Karen's occupation, arguing it was irrelevant under NRS 48.015. When determining the best interest of the child, the court must look to the factors set forth in NRS 125.480(4) as well

as any other relevant factors. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 243 (2007). The court found Bill and Karen rented an apartment together, and although Karen testified she had two other women living with her in the apartment, Bill would most likely be living with Karen in the apartment as well. The court considered this living arrangement in determining the best interest of the children, particularly the handicapped children. The testimony regarding Karen's occupation as an exotic dancer and habits was relevant to the court's custody determination because Bill would be living with Karen, and thus, the children would be living with Karen. Further, Bill does not cite to any authority supporting his assertion that the district court abused its discretion by concluding it was in the best interest of the children for Karen not to be around them; therefore, we do not address that assertion in this appeal. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Fifth, Bill contends the district court misstated Bill's income in determining alimony and abused its discretion in awarding alimony to Julie. An award for alimony supported by substantial evidence will not be disturbed on appeal. *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998). A district court must give adequate consideration to several factors when awarding alimony. *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983); *see also* NRS 125.150(8).

The district court made two findings as to Bill's income. The court first stated Bill earned $130,000 per year, and then stated Bill

earned $110,000 per year.[3] Initially, Bill argues the district court erroneously applied the $130,000 income figure to calculate alimony. The order under appeal and the record as a whole confirms the court used the $110,000 income figure to calculate alimony.

The district court determined the disparity between incomes was $30,000—i.e., the approximate difference between Bill's income of $110,000 and Julie's income of $83,000—and stated its goal of adjusting the income to account for the over $200,000 joint income the parties made while they were married. Had the court used the $130,000 figure, the disparity would have been stated closer to $50,000 and the total income over $220,000. Thus, the court used the correct income figure to determine alimony.

Bill claims the district court also abused its discretion because it did not properly consider the factors set forth in NRS 125.150. The order reflects that the court considered the financial condition, income, age, education, training, and earning capacity of each spouse. *See* NRS 125.150(8)(a), (b), (e). The order reflects that the court also considered the standard of living and duration of the marriage. *See* NRS 125.150(8)(d), (f). The district court is not required to compare child support and alimony when determining an alimony award. *See* NRS 125.150(8)(j). There is substantial evidence to support the conclusion that the district court considered and correctly applied the required factors.

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[3]To complicate matters further, the court found Bill purposefully misled it in his pleadings by representing he earned the same amount as Julie.

Moreover, the court delayed the commencement of the alimony payments until after the child support for Whitney ended. And the court recognized that social security benefits would likely replace Bill's child support obligation for the two handicapped children. Plus the court considered that the payment of alimony resulted in a tax deduction for Bill and taxable income for Julie. Although both the amount and duration of alimony was substantial, we can only review the decision for abuse of discretion. *See Shydler*, 114 Nev. at 196, 954 P.2d at 39. We conclude the court did not abuse its discretion in awarding Julie alimony in view of the evidence it had before it.

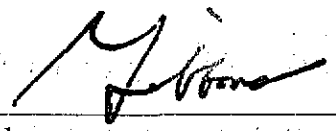
Sixth, Bill challenges the district court's award of attorney fees, arguing that Julie did not follow the court's orders to submit a separate memorandum detailing the fees incurred. The court, however, relied on Julie's testimony as to the amount of attorney fees incurred in lieu of a separate memorandum. A court may award reasonable attorney fees in a divorce proceeding. NRS 125.150(3). In addition, the court must consider whether there is a disparity of income when awarding attorney fees. *See Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).

Here, the court found Julie's testimony credible as to the amount of attorney fees incurred. The court also found a disparity of income of almost $30,000. Julie requested over $25,000 in attorney fees, yet the court only awarded $10,000. The record thus generally supports both the finding of disparity in income and the amount of attorney fees. *See Gunderson v. D.R. Horton*, 130 Nev. ___, ___, 319 P.3d 606, 615 (2014) (explaining that a district court's decision regarding attorney fees is

generally reviewed for an abuse of discretion). Nevertheless, the court made several errors in its rulings. In these circumstances, the award of fees must be vacated and the *Brunzell* factors[4] individually applied upon remand before fees can be awarded. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005).

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.[5]



_____, C.J.
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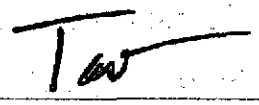

_____, J.
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[4]The four factors include: (1) the qualities of the attorney; (2) the character of the work to be done, (3) the actual work performed by the attorney, and (4) the result of the case. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

[5]The Honorable Abbi Silver, Judge, did not participate in the decision in this matter.

cc: Hon. Lisa Brown, District Judge
Carolyn Worrell, Settlement Judge
Karen A. Connolly, Ltd.
Aaron Grigsby
Fuller Law Practice, PC
Eighth District Court Clerk