

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH BRADY,
Appellant,
vs.
KELLY FORTIN,
Respondent.

No. 75130-COA

FILED

NOV 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Kenneth Brady appeals a district court decree of custody. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.¹

In the underlying case, respondent Kelly Fortin initiated proceedings seeking a custody order regarding the parties' minor children. During the evidentiary hearing, the district court heard evidence that Kenneth was criminally charged for committing an act of domestic violence against Kelly, heard testimony from both parties relating to that incident, and that Kenneth ultimately entered a nolo contendere plea to battery. Following the hearing, the district court awarded the parties joint legal custody and awarded Kelly primary physical custody. This appeal followed.

On appeal, Kenneth asserts that the district court abused its discretion in awarding Kelly primary physical custody. This court reviews a child custody decision for an abuse of discretion, but "the district court

¹Although the Honorable Jennifer Elliott, Judge, signed the decree in this matter, the Honorable Gerald Hardcastle, Senior Judge, presided over the evidentiary hearing.

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must have reached its conclusions for the appropriate reasons.” *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007).

First, Kenneth challenges the district court’s consideration of his nolo contendere plea to battery in awarding custody. NRS 125C.0035(5) states that if a court finds by clear and convincing evidence that one party has engaged in an act of domestic violence against the other party, or child, a rebuttable presumption exists that joint physical custody is not in the best interest of the child. Here, the district court improperly considered Kenneth’s nolo contendere plea. Under NRS 48.125(2), “[e]vidence of a plea of nolo contendere or of an offer to plead nolo contendere to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer.” But any error was harmless as other substantial evidence supports the district court’s finding of domestic violence. Specifically, the district court found that Kelly’s testimony was credible as to the incident resulting in the battery conviction and that testimony constitutes substantial evidence on which the district court could rely for this finding.

However, NRS 125C.0035(5) goes on to require that the district court set forth findings that the custody order adequately protects the child and the parent who were the victims of the domestic violence. Here, while the district court found by clear and convincing evidence that Kenneth did engage in an act of domestic violence against Kelly, as noted above, based on the district court’s order, it is not clear whether the district court applied the rebuttable presumption that joint physical custody was not in the children’s best interest, pursuant to NRS 125C.0035(5), or whether it found that Kenneth overcame the rebuttable presumption that joint physical custody was no longer in the children’s best interest. Additionally, the

district court failed to make any findings that the custody order issued adequately protects the children and Kelly. *See* NRS 125C.0035(5)(b). Because the district court failed to make these required findings, we must necessarily reverse this matter and remand the case to the district court pursuant to NRS 125C.0035(5)(b).²

Kenneth next argues that the district court abused its discretion in concluding that the best interest factors weighed in favor of granting Kelly primary physical custody. In making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Moreover, the district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Without specific findings and an adequate explanation for the custody determination, this court cannot determine whether the custody determination was appropriate. *Id.* at 452, 352 P.3d at 1143.

Here, although the district court's order enumerates all of NRS 125C.0035's best interest factors, the order simply restates the parties' testimony, without making findings, or sets forth factual findings without discussion of the associated best interest factors as they relate to the custody order. *Davis* requires the district court to tie the children's best interest, based on specific, relevant findings regarding the best interest

²We note that it appears from the record that the district court may have found Kenneth rebutted the NRS 125C.0035(5) presumption based on his testimony and his having completed domestic violence classes. But the district court's order does not make such a finding.


factors and any other relevant factors, to the ultimate custody determination. 131 Nev. at 451, 352 P.3d at 1143. We also note that the order concludes that the majority of the best interest factors are neutral. However, the order concludes that two factors are not neutral—the level of conflict between the parties and the parties' ability to cooperate. As to these two factors, the order concludes that there is a high level of conflict, but makes the contradictory conclusion that the parties can cooperate and communicate. Based on the foregoing, we cannot say that the district court provided specific findings as to all of the relevant best interest factors and an adequate explanation for the custody determination, such that we can say with assurance the determination was appropriate.³ *See id.* at 452, 352 P.3d at 1143.

³As to Kenneth's argument that the district court abused its discretion in determining the parties' time-share arrangement amounted to a primary physical custody designation, we discern no abuse of discretion in the district court's determination, but note that the district court should consider this issue as necessary on remand. *See Bluestein v. Bluestein*, 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015) (explaining that the district court has broad discretion in determining whether a time-share arrangement should be designated as primary or joint physical custody, and that such a determination should be based on the child's best interest). We similarly discern no abuse of discretion in the district court's award of child support pursuant to statute, but again note that, on remand, the district court should address the child support order as necessary pursuant to law. *See Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (providing that this court reviews a child support order for an abuse of discretion.).

We have also considered Kenneth's challenge to the district court's temporary award of primary physical custody and conclude it does not warrant relief as Kenneth fails to provide any cogent argument as to this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Linda Marie Bell, Chief District Judge
Hon. Bryce C. Duckworth, Presiding District Judge, Family Court
Division
Eighth Judicial District Court, Department L
Kenneth Brady
Smith Legal Group
Eighth District Court Clerk

P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims not cogently argued).

⁴The Honorable Jerome Tao, Judge, voluntarily recused himself from participating in the decision of this matter.