IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK ADAMS,
Appellant,
vs.
KATRINA HERRLING,
Respondent.

No. 76878-COA

MARK ADAMS,
Appellant,
vs.
KATRINA HERRLING,
Respondent.

No. 79398-COA ✓

FILED

OCT 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

In these related appeals, Mark Adams appeals a decree of custody and post-custody decree orders. These appeals are not consolidated. Eighth Judicial District Court, Family Court Division, Clark County; Department L.

In the proceedings below, after a trial, the district court entered a custody decree awarding the parties joint legal custody, awarding respondent Katrina Herrling primary physical custody, and ordering Mark to pay Katrina child support. Mark then filed a motion to alter or amend the findings of fact, for a new trial, and to modify the child support order based on a change in circumstances. The district court denied Mark's motion to alter or amend the findings of fact and for a new trial, awarded Katrina attorney fees as to that motion, and set the motion to modify child support for an evidentiary hearing. Following the evidentiary hearing, the district court denied Mark's motion to modify child support, concluding that

he was willfully underemployed and that his income had not changed by at least twenty percent, and awarded Katrina attorney fees relating to the motion to modify child support. Mark appealed the decree of custody, the denial of his post-decree motion to alter or amend the findings of fact and for a new trial, and the corresponding award of attorney fees in Docket No. 79398-COA.[1] Mark appealed the denial of his motion to modify child support and the related award of attorney fees in Docket No. 76878-COA.

With regard to Mark's challenge to the district court's granting Katrina primary physical custody and subsequent denial of his motion to amend the findings of fact and for a new trial, Mark argues, as he did below, that the district court failed to properly apply its factual findings to the best interest factors, as required by *Davis v. Ewalefo*, 131 Nev. 445, 352 P.3d 1139 (2015). Accordingly, Mark asserts that he is entitled to an award of joint physical custody.

This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm the district court's factual findings if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.* When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Further, we presume the district court properly exercised its discretion in

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[1]Although Mark indicates that he is appealing the award of attorney fees in Docket No. 79398-COA, he makes no argument as to that award and thus we necessarily affirm it. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004). Similarly, this court reviews the denial of a motion to alter or amend pursuant to NRCP 59(e) and the denial of a motion for a new trial for an abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (this court reviews an order denying an NRCP 59(e) motion to alter or amend a judgment for an abuse of discretion); *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007) (this court reviews the denial of a motion for new trial for an abuse of discretion).

Here, the district court's order makes numerous factual findings as to the child's best interest, all of which are supported by substantial evidence in the record. *See* NRS 125C.0035(4) (enumerating a list of factors the district court must consider when determining the child's best interest). For example, the district court found that Katrina is the parent more likely to allow frequent associations and a continuing relationship with the child, while Mark is uncooperative, disparaging, and is not conciliatory. Additionally, the district court found that there is conflict between the parties, that Mark violated the court's behavior order, that he has improperly questioned the child about Katrina, and that he has created issues for the parties. The district court went on to find that Katrina has been the parent to provide a more stable environment for the child and tries to meet the financial and emotional needs of the child, while Mark has shown a level of irresponsibility in this regard. Further, the district court made findings as to the remainder of the best interest factors, some of which were neutral, and made additional findings relating to the child's best interest that do not relate to a specifically enumerated best interest factor. *See* NRS 125C.0035(4) (providing that the court shall

consider the enumerated best interest factors "among other things"); *Nance v. Ferraro*, 134 Nev. 152, 158, 418 P.3d 679, 685 (Ct. App. 2018) (explaining that the statutory best interest factors provides a non-exhaustive list for the district court's consideration).

Based on these findings, we cannot conclude that the district court abused its discretion in awarding Katrina primary physical custody or in denying Mark's motion to modify the findings of fact and for a new trial. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241; *AA Primo Builders, LLC*, 126 Nev. at 589, 245 P.3d at 1197; *Nelson*, 123 Nev. at 223, 163 P.3d at 425. And to the extent that Mark challenges the district court's findings as to the weight of the evidence he presented and the court's determinations as to witness credibility, this court will not reweigh the same on appeal. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to make credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal).

We next address Mark's challenge to the district court's denial of his motion to modify child support based on an alleged change in circumstances. First, Mark contends that he is not willfully underemployed as the evidence shows he obtained gainful employment after being laid off from his prior construction job due to a lack of work. Additionally, Mark asserts that, while he earns less per hour at his current job, the hours are consistent such that it is a better position overall. This court reviews a child support order for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996); *see also Flynn*, 120 Nev. at 440, 92 P.3d at 1227. An abuse of discretion occurs when the district court's decision is not supported by substantial evidence. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013); *Flynn*, 120 Nev. at 440,

92 P.3d at 1227 (explaining that this court will uphold a district court decision that is supported by substantial evidence).

As relevant here, the district court may modify a child support order if there has been a factual or legal change in circumstances since the order was entered and modification is in the best interest of the child. NRS 125B.145; *Rivero v. Rivero*, 125 Nev. 410, 432, 216 P.3d 213, 228 (2009). Additionally, a twenty percent change in gross monthly income, or more, constitutes a change in circumstances requiring a review of child support for modification purposes. NRS 125B.145(4). Moreover, in setting child support, the district court may impute income to a parent if the parent is willfully underemployed to avoid a child support obligation, as the child support amount must be based on "the parent's true potential earning capacity." NRS 125B.080(8).

Here, the district court found at trial that Mark was not credible as his testimony was inconsistent, but based on the evidence presented, the court found that Mark's gross monthly income was $2,583.33 and ordered Mark to pay $465 per month in child support. In support of his motion to modify child support, Mark presented evidence that he was laid off from his job and obtained new employment, albeit at a lower hourly wage. But the district court specifically found that, based on the pay stubs Mark provided, his income had not changed by twenty percent. Based on this conclusion and the fact that such a short time had passed since the initial child support order was entered, the court determined that Mark had failed to show a change in circumstances warranting modification. Additionally, the court found that Mark was willfully underemployed and that Mark has held jobs in the past making more than he currently makes, but by his own testimony, Mark has decided that he does not want to work

full time. As a result, the district court denied Mark's motion to modify child support.

Based on our review of the record, substantial evidence supports these findings and thus we cannot conclude that the district court abused its discretion in denying Mark's motion to modify child support. *See Flynn*, 120 Nev. at 440, 92 P.3d at 1227. We similarly discern no abuse of discretion in the district court's child support order in the decree of custody as its determination was based on substantial evidence.[2] *Id.*

Finally, Mark challenges the district court's award of attorney fees. This court reviews a district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). As an initial matter, we note that the district court did not expressly cite the rule it relied upon in awarding attorney fees and Mark is correct that attorney fees pursuant to NRS 18.010(2)(a) would be improper here. However, it does not appear that the district court awarded fees pursuant to that section of the statute. Rather, the district court's findings support an award pursuant to NRS 18.010(2)(b) or EDCR 7.60(b). Regardless, the district court has discretion to award attorney fees in child custody matters pursuant to NRS 125C.250. And from our review of the record and the parties' arguments as to the award of fees, we cannot conclude that the district court abused its discretion in determining an award of attorney fees

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[2]To the extent Mark challenges the sufficiency of the evidence relied upon by the district court, as noted above, this court will not reweigh witness credibility or the weight of the evidence on appeal, and we therefore discern no abuse of discretion in the district court's conclusions. *See Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004); *Ellis*, 123 Nev. at 152, 161 P.3d at 244; *Quintero*, 116 Nev. at 1183, 14 P.3d at 523.

was warranted. *See Miller*, 121 Nev. at 622, 119 P.3d at 729; *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm the district court's order if [it] reached the correct result, even if for the wrong reason.").

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Presiding District Judge, Family Court Division
Mark Adams
Kelleher & Kelleher, LLC
Eighth District Court Clerk

[3]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal. We likewise have considered Mark's documents filed in Docket No. 76878-COA and conclude that they do not provide a basis for relief or otherwise require action from this court.