IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LINO PASQUALE DALBA,
Appellant,
vs.
AMIE ELIZABETH ANDERSON,
Respondent.

No. 78623-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Lino Pasquale Dalba appeals from a district court order denying modification of physical custody and granting modification of child support. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Dalba and respondent Amie Elizabeth Anderson have one child together. Per a stipulated order, Anderson was awarded primary physical custody, subject to Dalba's parenting time. Dalba subsequently moved for modification of physical custody, arguing that the parties actually exercised joint physical custody. Anderson opposed the motion and moved for modification of child support. After an evidentiary hearing, the district court denied the request for modification of physical custody, finding that Dalba did not have the child enough time for it to be considered a joint physical custody arrangement and that, although there was a change in circumstances, it was in the child's best interest for Anderson to continue having primary physical custody. The court also granted a modification of child support, awarding $1,054 per month, which represented 18 percent of

Dalba's imputed income, plus an upward deviation for child care costs. This appeal followed.

This court reviews child custody and child support orders for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). 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). Additionally, the district court must apply the correct legal standard in reaching its conclusion and no deference is owed to legal error. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992).

On appeal, Dalba argues that the district court may have improperly calculated the custody timeshare when determining whether the parties were exercising joint physical custody because it only considered the time that he actually had the child in determining his timeshare but may not have done so in calculating Anderson's share. But the district court order specifically noted and applied the correct standard from *Rivero v. Rivero* in making its determinations and addressing the evidence presented at the hearing. 125 Nev. 410, 427, 216 P.3d 213, 225 (2009) (noting that the district court should focus on the number of days the party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child, rather than focusing on the exact number of hours the child was with the parent, whether the child was sleeping, or whether the child spent time in the care of a third-party). Under these circumstances, and given that the evidence presented supported the conclusion that Anderson had primary physical

custody of the minor child, the district court did not abuse its discretion in in determining that Anderson had primary physical custody of the child. *See Wallace*, 112 Nev. at 1019, 922 P.2d at 543.

As to the decision to deny modification, to modify primary physical custody, the party seeking modification must prove "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). Additionally, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004).

Here, the district court determined that a change in circumstances had occurred and then moved on to consider whether modification was in the best interest of the child, including making the required findings regarding the best interest factors set forth in NRS 125C.0035(4). *See Davis*, 131 Nev. at 452, 352 P.3d at 1143 (requiring the district court to make specific findings as to the best interest of the child and to provide an adequate explanation for the custody determination). Having considered the district court's best interest findings, we cannot say the district court abused its discretion in making these determinations or concluding they supported denying the motion to modify. Our conclusion in this regard is further supported by Dalba's failure to offer specific arguments asserting that any of the best interest findings were incorrect. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant's opening brief are waived). We therefore affirm the custody determination.

Dalba also raises the issue of whether the district court abused its discretion in reviewing child support. Under NRS 125B.070, the amount of support for the minor child should be 18 percent of Dalba's income, subject to the presumptive maximum per month per child, unless the district court sets forth specific findings of fact as to the basis for a different amount pursuant to NRS 125B.080(6). Here, the district court correctly determined that 18 percent of the income it imputed[1] to Dalba yielded a monthly support payment of $954, but it then failed to reduce that number to the presumptive statutory maximum of $781. *See Garrett v. Garrett*, 111 Nev. 972, 973-74, 899 P.2d 1112, 1113-14 (1995) (stating that the presumptive maximum is "the starting point from which the court must begin its calculations in furtherance of any award that might be greater or less than the amount established under the applicable formula" (internal quotation marks omitted)). And while the district court made findings in support of its provision for an increase of $100 over the $954 payment due to child care costs, which was permissible under NRS 125B.080(6) and (9)(b), it failed to address and set forth findings of fact regarding the basis for the upward deviation from the presumptive statutory maximum of $781 to the initial $954 payment amount. *See Jackson v. Jackson*, 111 Nev. 1551, 1554, 907 P.2d 990, 992 (1995) (providing that a "district court must make

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[1]A district court may impute income when it finds that NRS 125B.080(8) (providing that "[i]f a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity") applies.

specific findings of fact in order to justify a deviation from the statutory formula in setting a child support award"). Therefore, we must necessarily reverse and remand the award of child support for further proceedings consistent with this order.[2]

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
Lino Pasquale Dalba
Amie Elizabeth Anderson
Eighth District Court Clerk

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[2]To the extent this order does not specifically address arguments raised by Dalba, we have considered the same and conclude they do not provide a basis for relief.