

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KELLY BYRD,
Appellant,
vs.
CODY DEAN BYRD,
Respondent.

No. 76460-COA

FILED

FEB 05 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Kelly Byrd appeals from the district court's findings of fact, conclusions of law, and decree of divorce. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

Kelly and Cody Dean Byrd filed for divorce in 2016. They vigorously litigated the divorce action, disagreeing over custody of their minor twin children; child support; alimony; and the distribution of their property. The district court ultimately granted the divorce decree, awarding Kelly and Dean joint legal and joint physical custody of the children. The court also ordered Dean to pay Kelly the maximum presumptive amount in child support, as well as alimony; in doing so, the district court imputed \$30,000 in income to Kelly. Finally, the district court valued Dean's business at \$270,000 and ordered it to be split equally as community property.¹

On appeal, Kelly argues that the district court abused its discretion by awarding joint legal and joint physical custody of the children, by improperly calculating child support and alimony, and by improperly

¹We do not recount the facts except as necessary to our disposition.

distributing the former couple's community property.² We review each issue in turn.

First, Kelly argues that the district court abused its discretion by awarding joint legal and joint physical custody because she presented clear and convincing evidence at trial that Dean committed domestic violence against her, raising a presumption that joint physical custody is not in the children's best interests. We review a district court's child custody determination for an abuse of discretion. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). "[W]e will not set aside the district court's factual findings if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

Nevada has a presumption that joint legal custody, and a preference that joint physical custody, is in the best interest of a minor child if "[a] parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child." NRS 125C.002(1)(b); NRS 125C.0025(1)(b). "In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child." NRS 125C.0035(1). Joint physical custody is presumed not to be in the best

²Kelly also argues that the district court abused its discretion by denying her request for attorney fees. However, no notice of appeal was filed from the post-decree order denying attorney fees, and, therefore, we do not have jurisdiction to resolve this claim. See NRAP 4(a)(1) (providing that a notice of appeal in a civil case "must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served"); *Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 330, 741 P.2d 432, 432 (1987) ("[A]n untimely notice of appeal [fails] to vest jurisdiction in this court to hear [the] appeal.").

interest of the child if the court has determined by clear and convincing evidence that a parent has committed domestic violence against another parent. NRS 125C.003(1)(c).

The district court's order indicates that the court weighed the evidence presented at trial regarding the alleged domestic violence. The district court concluded that it could not determine by clear and convincing evidence whether domestic violence occurred, and if so, who was the primary aggressor. The record includes substantial evidence to support this conclusion: Dean was never arrested, the police never contacted Dean, the case against Dean was dismissed, and both parties' testimony presented similar stories that differed as to who perpetrated the incident and who was the primary aggressor. Therefore, we conclude that the district court could find the evidence of domestic violence presented at trial was not clear and convincing and therefore properly refuse to invoke the presumption or apply that best interest factor. See NRS 125C.0035(4)(k) and (5). Thus, the district court did not abuse its discretion in awarding joint legal and joint physical custody.³

Second, Kelly argues that the district court abused its discretion by incorrectly determining Dean's monthly income, affecting the court's ultimate award of child support and alimony. We review both a district court's child support determination and its alimony determination for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev., Adv. Op. 9, 439 P.3d

³To the extent that Kelly argues the district court failed to give proper weight to her testimony and to the fact that charges against Dean existed, this court will not reweigh witness credibility or the weight of the evidence on appeal. See *Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determination on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal).

397, 400 (2019); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

To calculate child support, the district court must first determine the appropriate percentage of each parent's gross income. *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). Gross monthly income is:

the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

NRS 125B.070(1)(a). Additionally, when considering whether to award alimony, the district court should consider each spouse's income and financial condition, among other things. *See* NRS 125.150(9).

Here, we conclude that the district court abused its discretion by apparently relying solely on Dean's 2015 tax return when his 2016 tax return was also presented at trial.⁴ The 2016 return showed a higher gross monthly income, which would have changed the district court's ultimate child support calculation and may have changed the court's alimony calculation. Therefore, we reverse and remand on this issue so the district court may properly calculate child support and alimony based on Dean's correct gross monthly income.

⁴During oral argument, Dean represented that the district court did in fact determine his gross monthly income determination based on the 2016 tax return. However, our review of the record demonstrates that the district court used the 2015 tax return even though the 2016 tax return was also available.

Kelly next argues that the district court abused its discretion by imputing \$30,000 in income per year to her for the purpose of calculating child support and alimony. When the district court determines a child support obligation under the *Wright v. Osburn* framework, the court may impute income to one party when that party “purposely earns less than [her] reasonable capabilities permit.” *Rosenbaum v. Rosenbaum*, 86 Nev. 550, 554, 471 P.2d 254, 256-57 (1970). “If 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.” NRS 125B.080(8).

In that case, “where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support.” *Minnear v. Minnear*, 107 Nev. 495, 498, 814 P.2d 85, 86 (1991). Then, the burden of proof shifts to the parent with a support obligation to prove that his or her underemployment is not for avoiding a support obligation. *Id.* at 498, 814 P.2d at 86-87. The district court abuses its discretion when it imputes income to a parent for the purpose of calculating child support without also making the necessary findings that the parent is underemployed or unemployed for the purpose of avoiding a support obligation or that the parent failed to overcome the *Minnear* presumption. *See Slezak v. Slezak*, Docket No. 69518-COA (Order Affirming in Part, Reversing in Part, and Remanding, April 28, 2017).

With respect to the district court’s child support calculation, we conclude the court abused its discretion by failing to reference or make any findings regarding *Minnear* when it imputed \$30,000 in income to Kelly after she offered evidence as to why she did not become employed. Because we have already directed the district court to recalculate Dean’s gross monthly income, and because on remand the district court may find that Dean is in a

higher maximum amount of child support bracket, changing the ultimate award of child support, we conclude the district court must also make the proper findings under *Minnear* to support the imputation of income to Kelly. Thus, we reverse and remand for the court to determine if Kelly rebutted the presumption that she was willfully unemployed.

However, the *Minnear* factors do not apply when calculating alimony, and the district court may impute income to a parent who earns less than her abilities permit. See *Rosenbaum*, 86 Nev. at 554, 471 P.2d at 256-57. We conclude that the district court did not abuse its discretion by imputing income to Kelly for its alimony determination. The court properly considered Kelly's education, prior work history, and failure to seek employment during the divorce proceedings despite being admonished to do so. Therefore, we affirm the district court's decision to impute income to Kelly for the purpose of calculating alimony, and we do not disturb any of the other factual findings made by the district court in determining the alimony award.⁵

Finally, Kelly argues that the district court abused its discretion by improperly determining the value of Byrd Insurance and by improperly distributing the former couple's personal property. We review the district court's distribution of property in a divorce proceeding for an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). "In granting a divorce, the court [s]hall, to the extent practicable, make an equal disposition of the community property of the parties" unless there is a compelling reason to make an unequal disposition. NRS 125.150(1)(b); see also *Kogod*, 135 Nev., Adv. Op. 9, 439 P.3d at 406.

⁵However, we note that the alimony calculation may change if the district court determines that Dean's income differs from the amount found at trial as described above.

We conclude that the district court's determination that Byrd Insurance was valued at \$270,000 is supported by substantial evidence. An independent expert valued the company at \$270,000 to \$330,000, and the district court was within its discretion to choose the lower valuation.⁶ Therefore, the district court did not abuse its discretion on this point.


Next, we consider the district court's finding that neither party claimed that either was in possession of the other party's furniture or other personal property. At trial, Kelly testified that Dean came to the marital home while she was on vacation and removed both furniture and personal property. Kelly did not state whether these items were her personal property, property she acquired before the marriage or during the marriage, or the property's respective values. Most of the items she named were likely community property items, such as artwork, a china hutch, dining room furniture, a mattress and box spring, crystal, children's items, and guns. Kelly also named her aunt's sterling silver, which could have been Kelly's separate property acquired before Dean and Kelly married, but again, Kelly did not specify. Thus, the court did not abuse its discretion by finding that neither party made any specific claims regarding furniture, furnishings, or personal property. Therefore, we conclude that the district court properly distributed the Byrd's property by awarding each party their individual personal property and any related personal property in their possession.


⁶To the extent that Kelly argues the district court failed to give proper weight to her testimony and to the fact that a tax return showed that the business had a higher profit (rather than a higher value as Kelly contends), this court will not reweigh witness credibility or the weight of the evidence on appeal. See *Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determination on appeal); *Quintero*, 116 Nev. at 1183, 14 P.3d at 523 (refusing to reweigh evidence on appeal).


We additionally note, in the event that either party disputed the current status of any furniture and furnishings, the district court instructed Kelly and Dean to first create an inventory of all items in their possession within 30 days of entry of the divorce decree, then Kelly would divide the personal property into two lists of equal value within 10 days, and then Dean would choose one of the two lists within 7 days. The notice of entry of the divorce decree was entered on June 18, 2018. On July 18, 2018, Kelly sent Dean (via their attorneys) a list of items she alleged he had removed from the marital home, not an inventory of all items within her possession as ordered by the court. Nothing in the record shows that Dean sent an inventory to Kelly. Because Kelly failed to follow the court's order below, we will not provide her redress on appeal here. *See Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 206-07, 322 P.3d 429, 436 (2014) (refusing to consider the merits of an appeal when the appellants failed to follow the briefing and motions practice rules below).

Based on the above discussion, we

ORDER the judgment of the district court **AFFIRMED IN PART AND REVERSED IN PART AND REMAND** this matter to the district court for further proceedings on the child support and alimony issues consistent with this order.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Denise L. Gentile, District Judge, Family Court Division
Clark Hill PLLC
Ford & Friedman, LLC
Eighth District Court Clerk