

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES W. DOUCETTPERRY,
Appellant,
vs.
MARIA ZERLINE DOUCETTPERRY,
Respondent.

No. 80114-COA

FILED

NOV 02 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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

James W. Doucettperry appeals the district court's findings of fact, conclusions of law, and decree of divorce. Second Judicial District Court, Washoe County; Linda M. Gardner, Judge.¹

James and Maria Zerline Doucettperry were married in Ohio in 1995.² Maria served as a United States Army JAG over the course of the marriage, requiring the family to relocate several times. James had various jobs during this period. They separated in December 2012 and James moved from the family home in Virginia to Texas, where he mostly remained until the divorce proceedings. At the time of divorce in 2019, James and Maria had two minor children.

In 2013, Maria consulted an attorney who prepared a Marital Settlement Agreement (MSA), governing the terms of James's and Maria's separation and divorce. The first paragraph of the first page of the MSA contains an acknowledgement provision, in boldface type, in which James

¹Senior Judge Linda Gardner signed the divorce decree and handled the post-trial motions in this case. Judge Frances Doherty presided over pre-trial matters and Senior Judge David Gamble presided over the trial. Judge Gamble rendered the decisions that are the subject of this appeal.

²We recount only the facts necessary for our disposition.

acknowledges that he has the right to independent legal counsel, that the MSA was drafted by Maria's counsel and in Maria's interests, that it is in James's best interest to have the MSA reviewed by independent counsel, and that James was eligible for free legal advice through the military. James never sought independent counsel to review the MSA, despite the MSA containing terms that favored Maria.

The MSA also contained several terms governing the couple's separation. It provided that Maria would have sole legal and physical custody of the children and that James could exercise reasonable parenting time. James was to pay Maria monthly child support.³ The MSA also waives spousal support, alimony, and retirement benefits, divides property, and assigns marital debts. The MSA provides that it will be incorporated into a future decree or judgment for divorce. It contains a reconciliation term, that if the parties do reconcile after the MSA's execution, the MSA will still be binding unless and until the parties execute a subsequent written agreement. Finally, the MSA contains a governing law clause, stating that it shall be construed according to federal and Virginia law.

James and Maria both initialed the bottom of each page of the MSA. Maria signed and acknowledged the MSA in front of a notary in Virginia, and James did the same eight days later in Texas. Thereafter, the parties lived by the terms of the MSA and never sought to amend, modify, or rescind it.

Later in 2013, Maria moved to Hawaii, as allowed by the MSA, because she got a new job with the Army. For approximately eight months in 2013 and 2014, James lived in Hawaii in an attempt to reconcile the

³At no time after execution of the MSA did James pay any child support.

marriage. After reconciliation failed, James moved back to Texas. During the separation, Maria had flown James into Hawaii to see the children, although the record is not clear as to how often James saw the children during those years. James would also contact the children on the telephone. Maria retired from the military in 2017, secured a new job, and relocated to Reno with the parties' two minor children. Maria filed for divorce in October 2018. James moved to Reno to contest the divorce complaint. In Reno, James went to the children's school activities and to the movies with them. Prior to the divorce trial, while in Reno, he lived in a homeless shelter, had limited income, and no transportation.

James responded pro se to Maria's complaint for divorce asserting, among other things, that the MSA was not valid due to Maria's alleged fraudulent inducement, and that he should be awarded joint legal and joint physical custody of the children. At the case management hearing, the district court declined to definitively rule on the validity of the MSA, but it maintained the status quo as described in the MSA, and informed the parties that James would have the opportunity to attempt to prove his fraud allegations at trial. Additionally, Maria moved to limit discovery to the matters not already addressed in the MSA. The court granted the motion and limited discovery to fraud allegations, custody, and parenting time. The parties were also required to submit updated Financial Declarations.

At trial, the district court found that the MSA was enforceable, but nonetheless, that it would address custody and parenting time. The court found that James did not present credible evidence of fraud in the inducement or overbearing by the fact that Maria was a lawyer. The court ordered that the terms of the MSA, except for child custody, parenting time, and child support, be ratified, incorporated, and merged into the divorce

decree. The court awarded Maria sole legal and primary physical custody. The court also ordered the parties to continue the informal sharing of parenting time for James that the parties had been following during their separation under the MSA. Further, James could file a motion for a specific parenting time plan or mediation if he so desired. James now raises numerous issues on appeal.⁴

Whether the district court erred in finding that the MSA was enforceable

James argues that the district court erred in finding that the MSA was valid and enforceable when it incorporated the MSA into the divorce decree. James contends that the district court improperly treated the MSA as a marital settlement agreement rather than as a postnuptial agreement, and he argues that the court improperly required that James had the burden to prove fraud because Maria owed him a fiduciary duty because she is an attorney. Maria counters that the MSA is valid and enforceable under the laws of Virginia, which should govern the interpretation of the agreement, and that James did not establish that Maria owed him a fiduciary duty. We agree with Maria.

Conclusions of law are reviewed de novo. *Kilgore v. Kilgore*, 135 Nev. 357, 360, 449 P.3d 843, 846 (2019) (citations omitted). “[T]he question of whether a contract exists is one of fact, requiring this court to defer to the district court’s findings unless they are clearly erroneous or not based on substantial evidence.” *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009) (quoting *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d

⁴After entry of the divorce decree, James filed motions to reconsider the order and to amend the findings of fact and conclusions of law. The district court denied the motions. On appeal, James does not assert any error to the denial of his motions.

1254, 1257 (2005)). Substantial evidence is evidence a reasonable person may accept as adequate to support a conclusion. *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008) (citation omitted).

The first issue to address is which state's law controls the MSA's interpretation. In the proceedings below, James requested that the court apply Nevada law while Maria argued that Virginia law must be applied pursuant to the governing law clause in the MSA. At the case management hearing, the district court stated that Virginia law should govern the validity of the MSA. At trial, the court found that the MSA could be enforced in Nevada, but did not specify at trial nor in the order whether it applied Nevada or Virginia law.

Nevada favors the Restatement (Second) of Conflict of Laws (1971) in determining choice-of-law questions in a contract. *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 171, 327 P.3d 1061, 1063 (2014) (citations omitted). "It is well settled that the expressed intention of the parties as to the applicable law in the construction of a contract is controlling if the parties acted in good faith and not to evade the law of the real situs of the contract." *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Inv'rs.*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979) (citations omitted). The Nevada Supreme Court has held that "parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract" so long as the chosen governing law has "a substantial relation with the transaction, [] and the agreement [is] not [] contrary to the public policy of the forum." *Id.*

Here, the governing law provision in the MSA selects Virginia as the governing law. Under Nevada's choice-of-law doctrine, we conclude that Virginia law applies to determine the validity of the MSA because

Nevada's choice-of-law rules grant broad deference to the parties' preferences. The parties were free to choose the law that governed the MSA's validity. Virginia had a substantial relation to the contract when formed. At the time of execution, Maria resided in Virginia with the children, James had formerly resided in Virginia, the parties spent time there as a married couple, and the family home was in Virginia. The MSA also does not violate Nevada public policy because Nevada permits a married couple to enter into a contract that includes terms for spousal support and child custody so long as they agree to an immediate separation. NRS 123.080. Here, the parties immediately separated. The MSA is not in violation of Nevada public policy, the parties chose the law of Virginia, and therefore, Virginia law governs the MSA's validity.

The second issue James argues is that the district court improperly found that the MSA was a marital settlement agreement, rather than a postnuptial agreement, which he asserts would be void under Nevada law due to the provision of spousal support.⁵ However, Virginia law applies. Virginia permits married persons to enter into postnuptial agreements in the same manner they can enter into prenuptial agreements. Va. Code Ann. § 20-155. These marital agreements must be in writing,

⁵In his opening brief, James only argues that the MSA would be void under Nevada law because generally, Nevada prohibits postnuptial agreements that contain terms pertaining to spousal support. See NRS 123.070; NRS 123.080; *Cord v. Neuhoff*, 94 Nev. 21, 24 n.3, 573 P.2d 1170, 1172 n.3 (1978). However, because we conclude that Virginia law applies, we need not address James's Nevada law arguments.

signed by both parties, and may contain terms about the disposition of property, spousal support, and choice of law. Va. Code Ann. §§ 20-149–150.⁶

Because Virginia law must apply, the included waiver of spousal support and alimony does not void the MSA, which is permitted in Virginia. The MSA was validly formed and executed under Virginia law and is therefore enforceable in Nevada. *See Ferdie Sievers*, 95 Nev. at 815, 603 P.2d at 273. The district court properly treated the MSA as a marital settlement agreement and did not err or abuse its discretion in incorporating the MSA terms into the divorce decree.⁷

⁶Both Virginia and Nevada will ratify a valid marital settlement agreement between spouses that includes terms for spousal support and child custody. Va. Code Ann. § 20-109.1; NRS 123.080(4).

⁷James raises two additional issues on appeal that depend on the enforceability of the MSA. First, he asserts that the district court abused its discretion when it did not award him alimony. The MSA contained a provision waiving spousal support and alimony for both parties. Because the district court properly found that the MSA was enforceable, there was no abuse of discretion in not awarding any alimony.

Second, James claims that the district court erred when it awarded an unequal division of community property without citing to any compelling circumstances to do so. However, James did not argue below, nor in his brief on appeal, that any of the property subject to the MSA was in fact community property. James has provided no record or evidence to support his assertion that any of the property was community property. *See Carson Ready Mix, Inc., v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (this court cannot consider matters made that do not properly appear in the record on appeal). The district court made no findings as to the characterization of any of the property set out in the MSA. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (“The district court did not address this issue. Therefore, we need not reach the issue.”). Furthermore, the district court did not make any distribution of property—it enforced the MSA, which contained the division of property, including all property acquired during separation. *See id.*

Third, James contends that the MSA was not enforceable under either Nevada or Virginia law because Maria breached a fiduciary duty she owed to James.⁸ James specifically argues that he and Maria had an attorney-client relationship, thus imposing a fiduciary duty on Maria. Because of this relationship, James asserts, Maria fraudulently induced him to execute the MSA. James also argues that the district court improperly placed the burden on him to prove that the MSA was invalid because the existence of a fiduciary relationship shifted the burden to Maria to prove there was no fraud. Maria counters that she owed no fiduciary duty and James failed to demonstrate there was an attorney-client relationship.

Virginia has held that a confidential relationship may exist “in a familial relationship that is accompanied by an attorney-client relationship.” *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000). Additionally, “marriage and divorce creates a relationship which is particularly susceptible to overreaching and oppression.” *Sims v. Sims*, 685 S.E.2d 869, 874 (Va. Ct. App. 2009) (citation omitted). However, “if a husband and wife separate and employ attorneys to negotiate an agreement in settlement of their property rights, they become adversaries and their former fiduciary or confidential relationship ends.” *Barnes v. Barnes*, 340 S.E.2d 803, 804 (Va. 1986) (citation omitted).

Because the MSA is valid, the distribution of property in the MSA was also validly incorporated in the divorce decree. Therefore, the district court did not abuse its discretion or commit error.

⁸Because we conclude that Virginia law must be applied, we do not address James’s arguments under Nevada law.

The basis for James's argument that he and Maria had an attorney-client relationship is that Maria had previously sent him legal documents to sign, which he would simply execute without question. The district court made no finding as to whether there was an attorney-client relationship, but did conclude that there was "no credible evidence that there was any fraud inducement" or of "any overbearing by virtue of [Maria] being a lawyer." Furthermore, in accordance with *Barnes*, James and Maria were separated at the signing of the MSA and Maria had employed her own attorney, thus ending any alleged former fiduciary or confidential relationship. *See id.* While James did not have his own attorney, the MSA informed him that it would be in his best interest to consult independent counsel, which further indicates that there was no attorney-client relationship, and that James could have access to free counsel through the military. Therefore, under Virginia law, the district court did not err or abuse its discretion when it placed the burden of proving fraud on James, who failed to do so.⁹ *See Ashmore v. Herbie Morewitz, Inc.*, 475 S.E.2d 271,

⁹James also contends that Maria failed to disclose all assets, specifically regarding retirement benefits. Maria testified that when the parties executed the MSA, she would not have had retirement benefits because she had just received notice that she was not selected for a promotion. It was not until after the MSA's execution that Maria was able to find other employment with the military in order to access her retirement benefits. Additionally, the MSA contains a specific clause that each party waives claims to any retirement benefits of the other. There is no other evidence to support James's contention that Maria did not fully disclose everything in the MSA. The district court's finding that the MSA was not produced by fraud or other improper conduct was based on substantial evidence.

275 (Va. 1996) (the party seeking to establish fraud has the burden to do so by clear and convincing evidence).

Whether the district court's custody orders were an abuse of discretion

James argues that the district court's child custody and parenting time orders were an abuse of discretion. We agree.

The district court has broad discretionary powers to determine child custody matters and this court will not disturb custody determinations absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). However, deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

James first asserts that the district court abused its discretion by failing to make specific findings as to the best interests of the minor children when it awarded Maria primary physical custody. Maria counters that there was ample evidence to support the court's decision and the fact that the district court did not make specific findings is harmless error.

In Nevada,¹⁰ there is a preference for a finding that joint physical custody would be in the best interest of the children if certain conditions are met. NRS 125C.0025. However, a district court may award primary physical custody to a parent if the court determines that joint physical custody is not in the best interest of the children. NRS 125C.003. The sole consideration of the court is the best interest of the children. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. When making a custody determination, the court is required to set forth specific findings concerning the best

¹⁰The district court did not adopt the custody provisions in the MSA. The district court established, and the parties do not question, that Nevada has jurisdiction over custody matters under the UCCJEA. See NRS Chap. 125A.

interest of the children, looking to the factors set forth in NRS 125C.0035(4) and other factors that may apply.

A district court abuses its discretion when entering a custody order without making specific findings of fact demonstrating that the order is in the best interest of the children. *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009). “Specific factual findings are crucial to enforce or modify a custody order and for appellate review.” *Id.* “Crucially, the decree or order must tie the child’s best interest, as informed by specific, relevant findings respecting the [statutory factors] and any other relevant factors, to the custody determination made.” *Davis*, 131 Nev. at 451, 352 P.3d at 1143. In the case of *Lewis v. Lewis*, 132 Nev. 453, 460, 373 P.3d 878, 882 (2016), the district court gave the mother primary physical custody based on the fact that the father did not attend to the child’s medical needs, was not accessible by phone, and that the child was often tardy to school while in his care. The Nevada Supreme Court held that the district court abused its discretion, concluding that while “these findings could correspond to some of the [statutory] factors, the district court nonetheless failed to adequately set forth its specific findings as to each factor, and it is unclear from the district court’s order and oral findings when read together whether every [statutory] factor was considered.” *Id.*

Here, the district court made various factual findings in the order that are relevant to the children: Maria acted as the sole legal and physical custodian since she and James separated in December 2012; the MSA provided that Maria would have sole legal and physical custody; the children flourished under Maria’s care; James did not provide financial support; James mostly contacts the children over the phone; and James has attended some of the children’s activities. The district court then

determined that all the facts supported an award of primary physical custody for Maria. The court apparently reached its conclusion because Maria did an excellent job as a single parent and James was largely an absentee father during their years of separation. Nevertheless, the court neither cites to NRS 125C.0035(4), nor addresses any of the factors listed therein; it fails to explain how any of these findings are tied to the best interest of the children. The district court similarly did not discuss the individual factors at trial. While the findings described above are relevant to the best interest factors, just as in *Lewis*, the court did not address each factor “and it is unclear from the district court’s order and oral findings when read together whether every [statutory] factor was considered.” See *Lewis*, 132 Nev. at 460, 373 P.3d at 882. Therefore, the district court abused its discretion and the issue of physical custody is reversed and remanded for further findings.

James next argues that the district court abused its discretion by failing to set forth specific findings related to legal custody when it awarded Maria sole legal custody of the children. Similar to physical custody, when a court makes a legal custody determination, there is a presumption that joint legal custody would be in the best interest of the children if certain conditions are met. NRS 125C.002. “Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child’s health, education, and religious upbringing.” *Rivero*, 125 Nev. at 420, 216 P.3d at 221. “Joint legal custody requires that the parents are able to cooperate, communicate, and compromise to act in the best interest of the child.” *Id.*

Here, the district court’s order states that Maria rebutted the presumption in NRS 125C.002 and awarded her sole legal custody.

However, the court does not explain, in the order or at trial, how Maria overcame the presumption.¹¹ Seemingly, the court based the legal custody determination on the same findings described above as to physical custody. However, the court made no findings as to James's and Maria's ability to cooperate, communicate, or compromise in the best interest of their children, nor were there any specific findings as to how sole legal custody was in the children's best interest. The district court thus abused its discretion in awarding Maria sole legal custody without making specific findings that it was in the best interest of the children. Therefore, the issue of legal custody is reversed and remanded for further findings.

James also contends that the district court abused its discretion when it failed to award him parenting time defined with any specificity. Any order awarding parenting time must define the parenting time "with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved" NRS 125C.010(1)(a). "Sufficient particularity means a statement of the rights in absolute terms and not by the use of the term 'reasonable' or other similar term which is susceptible to different interpretations by the

¹¹In the proceedings below, James did not affirmatively assert that the presumption for legal custody applied. The district court apparently assumed, without specifically finding, that the presumption applied. Maria argues on appeal that the presumption did not apply. The presumption for legal custody applies if "[t]he parents have agreed to an award of joint legal custody" or "[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[ren]." NRS 125C.001(1)(a) and (b). However, it is not controlling in this appeal whether the presumption actually applied because the district court ultimately abused its discretion in finding that Maria rebutted the presumption without making any specific findings about the best interest of the children.

parties.” NRS 125C.010(2). Parenting time must also be tied to the best interest factors in NRS 125C.0035(4). *Davis*, 131 Nev. at 452, 352 P.3d at 1143–44.

Here, the divorce decree states that James may continue to request parenting time from Maria, as he had done during their separation pursuant to the MSA. If he desired a more definite schedule, James could file a motion or request mediation. The MSA provided that James could exercise “reasonable” requests for parenting time. At trial, both James and Maria proposed more specific parenting time schedules. The district court made no findings as to how “reasonable” parenting time was in the best interest of the children and the proposed specific schedules were not. Because the district court’s order is not sufficiently particular to enable enforcement, and because the court did not address the best interests of the children, the court abused its discretion.¹² Therefore, the parenting time award is reversed and remanded for further findings.

Whether the district court abused its discretion when it limited discovery

James lastly argues that the district court abused its discretion when it granted Maria’s motion to exempt some mandatory discovery. “Discovery matters are within the district court’s sound discretion, and we will not disturb a district court’s ruling regarding discovery unless the court has clearly abused its discretion.” *Club Vista Fin. Servs. v. Eighth Judicial*

¹²Maria argues that the order is “sufficiently particular” because the order gives Maria ultimate discretion in giving James parenting time. However, this discretion will make the order difficult to enforce without a more defined parenting time schedule, which James requested.

Dist. Court, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). NRCP 16.2¹³ provides that either party may file a motion for exemption from mandatory discovery or the court may, sua sponte, exempt discovery on a finding of good cause, so long as the exemption is contained in a court order.

James only argues that the MSA should not have been the basis for the court's decision because the MSA was not enforceable.¹⁴ Here, because of the apparent binding nature of the MSA, the district court ordered discovery limited to those matters not already addressed in the MSA. The court permitted discovery related to the allegations regarding fraud in the creation of the MSA, and to custody, child support and parenting time. The parties were also required to submit updated Financial Declarations. This is not an abuse of discretion. The district court's discovery order was reasonably based on the binding nature of the MSA,

¹³The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. To Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018 (“[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date.”). As pertinent here, the court's discovery order was issued after March 1, 2019, so we use the version of the NRCP in effect at that time.

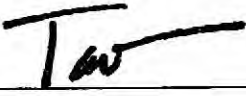
¹⁴During oral argument, James did not show what specific discovery would have been needed or how it would have made a difference. There is similarly nothing in the record to indicate what discovery James was seeking that was prohibited by the order or how James was harmed by that limitation. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (“When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.”). Furthermore, the MSA was found to be binding at trial.

which as discussed above, is a valid and enforceable agreement. The district court properly exercised its broad discretion over discovery matters and did not clearly abuse its discretion. The order limiting discovery is affirmed.

Accordingly, we

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part, AND REMAND for further proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Second Judicial District Court
Hon. Linda M. Gardner, Senior Judge
Hon. David R. Gamble, Senior Judge
McFarling Law Group
Pecos Law Group
Barbara Buckley
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