

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SINETH MELINKOFF,  
Appellant,  
vs.  
JOHNNY SANCHEZ-LOSADA,  
Respondent.

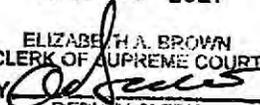
No. 80142-COA

SINETH MELINKOFF,  
Appellant,  
vs.  
JOHNNY SANCHEZ-LOSADA,  
Respondent.

No. 80710-COA

FILED

JAN 25 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Sineth Melinkoff appeals from district court orders denying her motion to modify child custody and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Sineth was married to respondent Johnny Sanchez-Losada.<sup>1</sup> They had one son together, who is now 13 years old. Sineth also had a daughter from a previous marriage. In 2009, Sineth, Johnny, and the children moved from Venezuela to Las Vegas. Sineth and Johnny were divorced in January 2014. In a stipulated decree of divorce, Sineth and Johnny agreed to share joint legal and physical custody of their son.

In April 2014, Sineth filed a motion for primary physical custody of her son and permission to relocate to Miami, Florida where Sineth obtained employment and remarried. Sineth moved with her daughter to Miami in June 2014 and her son remained in Las Vegas with Johnny. After an extended evidentiary hearing on her motion in 2016, the

<sup>1</sup>We recite the facts only as necessary for our disposition.

district court denied Sineth's motion for primary physical custody and relocation. The district court ordered that Sineth and Johnny share joint legal custody of their son and gave Johnny primary physical custody. The court granted Sineth an extensive parenting time schedule, allowing her to visit her son in Las Vegas for approximately 10 days each month, and her son would spend his summer vacations in Miami. Sineth appealed the district court's order, which this court affirmed.<sup>2</sup>

In July 2018, Sineth filed another motion to modify custody, again seeking primary physical custody of her son. This time, Sineth primarily alleged that Johnny was neglecting their son's medical needs. She claimed that their son was chronically underweight and malnourished, that Johnny refused to follow doctors' advice, and that their son gained weight in Sineth's care but lost weight in Johnny's care. The district court determined that Sineth's allegations warranted an evidentiary hearing to determine if there was a substantial change in circumstances affecting the child's well-being.

During an eight-day evidentiary hearing, numerous exhibits were admitted and several witnesses testified. In 2015, the child was first diagnosed with failure to thrive based on his low weight. Since the diagnosis, both parents took their son to numerous doctor appointments. Johnny testified that he is always concerned about his son's health. Sineth and Johnny consistently disagreed about their son's health, weight, and how to best treat him.

The child's gastroenterologist testified that when she first saw the child in 2016, his body-mass index (BMI) was below the normal range.

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<sup>2</sup>*Melinkoff v. Sanchez-Losada*, Docket No. 71380 (Order of Affirmance, Ct. App., February 26, 2018).

The doctor stated that since 2016, the child's weight and BMI have been on an upward trajectory, and at her most recent appointment with him in March 2019, his BMI was in the normal percentile range.

In 2018, a gastroenterologist in Miami prescribed a medication to stimulate the child's appetite, but his Las Vegas gastroenterologist testified that she would have recommended a different regiment. Sineth testified that Johnny did not give the pills to the child. Johnny testified that he administered the pills and followed other doctor recommendations. Sineth stated that Johnny did not provide the medication until their son's Las Vegas pediatrician also recommended them.

Sineth's expert, Dr. Mashimo, testified that the child was underweight, malnourished, and emaciated. Dr. Mashimo opined that Johnny committed medical neglect because Johnny and Sineth's communications reflected that Johnny was not giving the child medicine, he was canceling doctor appointments, and he was stating that their son was in good health. Dr. Mashimo admitted, however, that the child's condition improved and that his weight is currently in a normal range. Johnny's expert, Dr. Shih, testified that while the child's medical records indicated moderate malnourishment when he was first diagnosed with failure to thrive, the child's weight improved over the years and is currently in the normal range. Dr. Shih opined that Sineth was overbearing and excessive in her demands for medical care.

Sineth also alleged that Johnny prevented their son from communicating with her and her daughter. During child interviews several months prior to the hearing, the child confirmed that Johnny would interrupt or quickly end phone conversations. The child also stated that Johnny has a hard time getting over his anger and sometimes made the

child “feel small.” The child expressed that he loved both of his parents and enjoyed spending time in both households, and initially stated that he would not change the time share arrangement with his parents. After further questioning, the child stated that he would flip the arrangement and would like to live with Sineth during the school year since he had been living with Thomas during the school year for the last five years.

After Johnny received the child interview report, he testified that he sought therapy to become a better father. Of note, while the district court admitted the report from this interview, and considered it, the court in its order did not specifically reference the child’s comments regarding changing the living arrangement as a factor favoring Sineth, only that “[t]he court gave weight to [the child’s] beliefs and opinions.”

Sineth also alleged that Johnny does not help their son with schoolwork and that their son has poor grades. For the 2018-2019 school year, however, the child had above average grades.

After the hearing, the district court issued an order denying Sineth’s motion to modify custody. The court reviewed each of the best interest of the child factors under NRS 125C.0035(4) and considered the extensive evidence the parties presented. The district court found that a majority of the applicable factors could be given equal weight. Regarding cooperation between the parents, the district court noted that this has always been a high-conflict case. The court gave some weight to Sineth’s arguments, noting that the disagreements between Johnny and Sineth regarding their son’s medical care raised some red flags about Johnny’s ability to cooperate. Ultimately, the court found that there was no parental abuse or neglect, the child is healthy, and it is in the child’s best interest to remain in Las Vegas with Johnny, with both parents maintaining joint legal

custody. The court maintained Sineth's parenting time schedule. The court admonished Johnny to communicate better with Sineth and to be cognizant of the child's communications and privacy. The district court also awarded Johnny \$40,000 in attorney fees as the prevailing party.

Sineth appeals the district court's denial of her motion to modify custody,<sup>3</sup> arguing that the district court abused its discretion by either misapplying or not giving appropriate weight to some of the best interest factors.<sup>4</sup> We disagree.

The district court has broad discretion to determine child custody matters and this court will not disturb custody determinations absent a clear abuse of discretion. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). However, deference is not owed to legal error.

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<sup>3</sup>Neither party challenges the district court's order maintaining joint legal custody.

<sup>4</sup>Sineth also claims that the district court erroneously awarded Johnny attorney fees because her motion to modify custody was not frivolous. An award of attorney fees is reviewed for abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). In exercising its discretion to award attorney fees, district courts must evaluate the *Brunzell* factors, as well as the financial circumstances of the parties. *Id.* at 623-24, 119 P.3d at 730; *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Here, the district court reviewed all of the *Brunzell* factors and the financial circumstances of the parties and determined that it was appropriate to award Johnny \$40,000 in attorney fees (slightly less than half of the fees he incurred). Sineth does not assert that the district court improperly applied the *Brunzell* factors or that the award was otherwise unreasonable. Additionally, the court was free to award attorney fees without finding that Sineth's motion was frivolous. *See* NRS 125C.250 (providing that the district court has discretion to award reasonable attorney fees and costs in actions to determine legal custody, physical custody, or visitation). Therefore, the district court did not abuse its discretion and the attorney fees award is affirmed.

*Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). A district court's factual findings will not be set aside if they are supported by substantial evidence, "which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis*, 123 Nev. at 149, 161 P.3d at 242.

"[M]odification of primary physical custody is warranted only when (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." *Id.* at 150, 161 P.3d at 242. The party seeking modification must satisfy both prongs. *Id.* at 150-51, 161 P.3d at 242-43. The Nevada Supreme Court has stated that "courts should not lightly grant applications to modify child custody" because of the importance of custodial stability. *Id.* at 149, 161 P.3d at 242.

In this case, the district court did not specifically determine if Sineth met the first *Ellis* prong, instead focusing its analysis on the best interest prong and concluding that it was not in the child's best interest to modify custody. On appeal, Sineth asserts only that the district court abused its discretion in its best interest analysis.

When making custody determinations, the district court's sole consideration is the best interest of the child. NRS 125C.0035(1). NRS 125C.0035(4) provides a list of non-exhaustive factors for courts to consider.<sup>5</sup> District courts must make specific findings as to each statutory

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<sup>5</sup>These non-exhaustive factors include: (1) the wishes of the child if the child is of sufficient age and capacity to form an intelligent preference; (2) any nomination of a guardian by a parent; (3) which parent is more likely to allow frequent associations with the noncustodial parent; (4) conflict between the parents; (5) ability of the parents to cooperate for the child; (6) mental and physical health of the parents; (7) physical, developmental, and

factor. *Lewis v. Lewis*, 132 Nev. 453, 460-61 373 P.3d 878, 882 (2016) (applying the best interest factors in NRS 125.480(4), which in 2015, was repealed and re-codified as NRS 125C.0035(4)).

Sineth argues that the district court incorrectly applied the tenth factor: any history of parental abuse or neglect of the child. *See* NRS 125C.0035(4)(j). The district court stated that Sineth's allegations of neglect and abuse "taken as a whole do not constitute parental abuse under a clear and convincing standard. This factor was given no weight." Sineth asserts the district court should have applied a preponderance of the evidence standard rather than a clear and convincing standard, and that the district court's determination regarding this factor is not supported by substantial evidence. Johnny argues that the court's decision is supported by substantial evidence, and because the court gave the factor no weight, it is irrelevant that the district court may have applied the incorrect evidentiary standard.

Generally, the preponderance of the evidence standard is applied to civil matters, including child custody determinations, absent clear legislative intent to the contrary. *See Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996). Allegations of parental abuse or neglect do not require proof by clear and convincing evidence under NRS 125C.0035(4)(j), in contrast to other provisions in the same statutory scheme. *Compare* NRS 125C.0035(4)(j) *with* NRS 125C.0035(5) (requiring

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emotional needs of the child; (8) nature of the relationship of the child with each parent; (9) ability of the child to maintain a relationship with siblings; (10) history of abuse or neglect; (11) whether there is a history of domestic violence; and (12) whether there is a history of child abduction. NRS 125C.0035(4).

clear and convincing evidence as to alleged domestic violence against the child or a parent of the child); NRS 125C.0035(7) (requiring clear and convincing evidence as to alleged child abduction). Here, the district court incorrectly stated the evidentiary standard.<sup>6</sup> However, because the court treated the factor as neutral and its factual findings are supported by substantial evidence, reversal is not required. *Cf.* NRC 61 (stating that errors that do not affect substantial rights must be disregarded).

The district court's ultimate determination that Johnny did not commit parental abuse or neglect is supported by substantial evidence in the record under the preponderance of the evidence standard. The district court considered numerous exhibits and extensive testimony regarding Johnny's actions and the child's health. The court determined that the child is in good health and all of the testifying doctors agreed that his weight was on an upward trajectory and in the normal range in 2019. The district court noted that there was some evidence that Johnny cancelled or delayed medical appointments, but that the child was not severely harmed by the delays. It is clear that Johnny and Sineth disagreed about their son's health and need for medical treatment, but such disagreement and Sineth's other allegations do not rise to the level of parental abuse or neglect, even under a preponderance of the evidence standard. Because the court ultimately gave this factor no weight and treated it as neutral, and the court's determination was supported by substantial evidence, the fact that the

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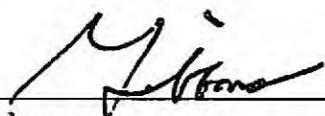
<sup>6</sup>We note, however, that the district court did not reference the incorrect standard as to the parental neglect allegations. The district court's order only refers to "parental abuse" not being proved by clear and convincing evidence. The district court's order did not state that Sineth's allegations about *neglect* were not proven by clear and convincing evidence.

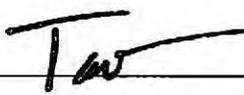
court stated the incorrect evidentiary standard as to one part of one factor does not require reversal.

Sineth next argues that the district court misapplied several other factors in the best interest analysis. She argues that the district court misapplied or gave the incorrect weight to the first, third, fourth, sixth, seventh, eighth, and ninth factors. Johnny asserts that all of the district court's determinations are supported by substantial evidence.

Sineth's arguments are unpersuasive. The district court in its order addressed each of the best interest factors. Overall, Sineth now relitigates the facts presented at the evidentiary hearing, and to the extent she seeks to have this court determine what weight should be assigned to each of the relevant factors, we decline. Such decisions are left to the district court's sound discretion and we will not reverse the district court's factual findings if they are supported by substantial evidence. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242. Nor will this court reweigh witness credibility or the weight of the evidence on appeal. *See id.* at 152, 161 P.3d at 244; *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). Here, all of the district court's factual findings are based on substantial evidence and supported by the extensive record. Accordingly, we

ORDER the judgments of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Linda Marie Bell, Chief Judge, Eighth Judicial District Court  
Department I, Eighth Judicial District Court, Family Court Division  
Barnes Law Group, LLC  
Cutter Law Firm, Chtd.  
Eighth District Court Clerk