

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES RUTLEDGE KIRNER,  
Appellant,  
vs.  
KIMBERLY ANN KIRNER,  
Respondent.

No. 81808-COA

FILED

JUN 16 2021

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

*ORDER OF AFFIRMANCE*

James Rutledge Kirner appeals from a district court order denying a motion to modify child custody and denying attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

James and Kimberly Kirner divorced in 2016.<sup>1</sup> As part of their divorce decree, they agreed to joint legal and joint physical custody of their two minor children, currently ages 9 and 11. In May 2019, during Kimberly's custodial time, she drove their son to his soccer match, which James also attended. At the match, Kimberly was slurring her words, unsteady on her feet, and smelled like alcohol. Several adults attending the match believed Kimberly was under the influence of alcohol; although no one witnessed her consume alcohol nor was any testing performed to support that she was legally intoxicated. One of the adults who observed Kimberly's behavior was an off-duty Nevada Highway Patrol (NHP) trooper. He offered to give Kimberly and her son a ride home, but Kimberly refused. The NHP trooper recorded a video of this conversation.

After the soccer game, Kimberly was walking to the parking lot with her son and her car keys. Several adults intervened to prevent

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<sup>1</sup>We recount the facts only as necessary for this disposition.

Kimberly from driving and offered to drive her and her son home. Kimberly initially refused, but eventually allowed someone else to drive them home. The NHP trooper believed Kimberly was intoxicated and had driven her son to the soccer match while intoxicated, so he filed a report with Child Protective Services (CPS). Shortly thereafter, James filed an emergency motion to suspend Kimberly's custodial time, requesting primary physical custody while limiting Kimberly to supervised parenting time until she could resolve her purported alcohol abuse problem and submit to drug and alcohol testing. James also unilaterally withheld the children from Kimberly after he filed his motion.

At the initial hearing on the motion, the district court indicated it did not believe a temporary custody modification was necessary and that there was not adequate cause for an evidentiary hearing. The court elected to wait for the CPS investigation to be completed. At the hearing, Kimberly reported that she voluntarily wore a SCRAM Continuous Alcohol Monitoring device for seven days and it reported no consumption or tampering events over that time. At this point, James was still withholding the children. The court ordered an exchange contingent upon Kimberly wearing the SCRAM device for an additional month. The SCRAM device reported no consumption or tampering events after Kimberly wore the device for an additional 26 days.

At the status check hearing that followed, James subpoenaed the CPS investigator, Lisa Casey, to testify, even though her investigation was not yet complete. Casey testified that several sources observed that Kimberly was intoxicated at the soccer game. Casey also conducted individual interviews with the children. Both of the children told Casey their mother drank Shock Top beer, and that sometimes she would drive



after. The district court decided to wait to set further proceedings until the CPS investigation was completed. A few months later, the court received the CPS report that substantiated the allegations from the soccer match and found Kimberly had maltreated her son when she exposed him to a risk of serious harm or death. The court finally determined that an evidentiary hearing was necessary and opened discovery. The court maintained the joint physical custody schedule.

Kimberly internally appealed the CPS decision, which was ultimately overturned for unknown reasons. Through discovery, James learned that Kimberly, a sixth grade teacher, was twice placed on administrative leave from work for suspected intoxication on the job during the 2018-2019 school year. Kimberly was sent for lab tests each time, and each time, the lab tested only for drugs other than alcohol. Kimberly's results were negative and she returned to work. James also obtained school records for their daughter, which indicated that their daughter was struggling in school and had expressed to her teacher that she was unhappy in Kimberly's home.

The district court held an evidentiary hearing in June 2020.<sup>2</sup> James presented evidence about what happened at the soccer match and

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<sup>2</sup>SCR 251 provides that "In all cases affecting the custody or visitation of minor children . . . the district courts must resolve the issues affecting the custody or visitation of the child or children within six months of the date that such issues are contested by the filing of a responsive pleading that contests the custody or visitation issues. Extraordinary cases that present unforeseeable circumstances may be subject to extensions of time beyond the six-month period only upon entry by the court of specific findings of fact regarding the circumstances that justify the extension of time." While the court in this case held several hearings and status checks after Kimberly opposed James's motion, it did not resolve the matter until almost

Kimberly's suspected alcohol use at work on the two occasions. The NHP trooper testified that in his interactions with Kimberly over the previous 3 to 4 years, he had not suspected she was intoxicated, but he believed she was intoxicated at the May 2019 soccer match. James also called their daughter's teacher to testify about their daughter's behavior issues at school. James, Kimberly, and their daughter's teacher agreed that the child had a tendency to stretch the truth and make up stories. The teacher also testified that she suspected Kimberly was intoxicated at a parent-teacher conference in fall 2018, but out of her several other interactions with Kimberly over two years, did not suspect other intoxication.

James testified that he believes Kimberly presents an ongoing safety risk to the children, but is not aware if the children have been harmed in Kimberly's care. In the fall of 2019, while James's motion was pending, he asked Kimberly to care for the children during his custodial time so he could go on a trip. Kimberly testified that she rarely consumes alcohol, did not recall the last time she consumed alcohol, and did not know how often she consumed alcohol, but that she did not drink on the day of the soccer match or at school.

The district court took the matter under advisement and issued its order in August 2020. The court denied James's motion to modify custody and denied his request for attorney fees.<sup>3</sup> The court found that

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fifteen months after it became contested and did not make any findings justifying treatment as an extraordinary case subject to such a lengthy extension of time. We caution the district court to scrupulously follow SCR 251 in the future.

<sup>3</sup>The district court did not abuse its discretion when it denied James's request for attorney fees. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d



persuasive evidence and credible testimony demonstrated Kimberly was under the influence of alcohol at the soccer match. The court strongly admonished her about her poor judgment but said there was not enough in the record to support a finding that Kimberly was either legally intoxicated at the match or that she is an alcoholic. The court found that James did not overcome the preference for joint physical custody and that modification was not in the best interest of the children after analyzing all of the best interest factors. The court ordered Kimberly to participate in an alcohol assessment and related counseling, and that she could not consume alcohol during her custodial time.

James argues the district court abused its discretion when it did not modify physical custody because he presented overwhelming evidence to support modification. He contends the district court applied the incorrect standard of proof and that its order contravenes its findings. Kimberly responds that a parent's use of alcohol is not alone determinative in custody decisions and the court correctly found that modification of custody was not in the children's best interest.

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717, 729 (2005) (reviewing attorney fee awards for an abuse of discretion). James argues he was entitled to fees as a prevailing party under NRS 18.010(2)(b) because the district court found that his motion was justified. However, James does not explain how he is a prevailing party when his custody motion was denied, other than that the court admonished Kimberly and concluded he was justified in *filing* his motion. Further, even if James was the prevailing party, he could not recover attorney fees under NRS 18.010(2)(b) unless the district court found that Kimberly's defense was "maintained without reasonable ground or to harass the prevailing party." The court made no such finding, and therefore, we can find no abuse of discretion.

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. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). 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." *Id.* at 149, 161 P.3d at 242 (footnote omitted). Nevada has acknowledged that custodial stability promotes "the developmental and emotional needs of children," and therefore, "courts should not lightly grant applications to modify custody." *Id.* However, no deference is owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

Nevada policy promotes "that minor children have frequent associations and a continuing relationship with both parents" after divorce. NRS 125C.001(1). The district court's sole consideration when making a physical custody determination is the best interest of the child. NRS 125C.0035(1). There is a preference that joint physical custody is in a child's best interest if the parents have agreed to joint physical custody. NRS 125C.0025(1)(a). The district court may modify an order for joint physical custody if the moving parent shows modification is in the best interest of the child. NRS 125C.0045(2). When making a custody determination, the district court must set forth specific findings concerning the best interest of the child, looking to each of the factors set forth in NRS 125C.0035(4) and other factors that may apply.

In this case, the district court did not clearly abuse its discretion by denying James's motion to modify physical custody. The court applied the correct burden of proof. The preponderance of the evidence standard applies to civil matters, including child custody determinations. *See Mack*



*v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996) (holding that a preponderance of the evidence standard applies absent clear legislative intent to the contrary). While the district court commented that there was no conclusive proof of the level of Kimberly's intoxication at any of the alleged alcohol-related incidents, the court did not specifically require such evidence. Rather, the district court treated the lack of evidence of Kimberly's level of intoxication as one of many pieces of evidence that it considered when determining whether modification would be in the best interest of the children, and the court did not explicitly require proof of the best interest factors beyond a preponderance of the evidence. Further, despite the lack of conclusive evidence as to the blood alcohol level, the court still concluded that Kimberly was under the influence at the soccer match, so the district court did assign some weight to this evidence.<sup>4</sup> Likewise the court found the testimony that Kimberly had consumed alcohol at or before school and when meeting with their daughters' teacher to be credible. The court further noted that Kimberly exercised extremely poor judgment and that Kimberly's own conduct warranted the proceedings.

Additionally, the district court's decision was based on substantial evidence in the record. The court's order thoroughly details its findings as to all of the relevant best interest factors, and the court considered all of the evidence in the record before it. While James contends he presented overwhelming evidence to support modification, much of his evidence focused on one specific incident. The district court ultimately concluded that while some of Kimberly's behavior was troubling, the

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<sup>4</sup>There is no indication from the record that if there had been evidence that Kimberly's blood alcohol level had exceeded the legal limit for drivers, that custody would have been changed.

evidence did not establish that a change of custody was warranted at that time.

The district court made additional findings that support its decision: Kimberly does not have a criminal history related to alcohol consumption; despite the incidents at Kimberly's workplace, she remains employed there and is rated a highly effective teacher; she successfully completed SCRAM monitoring; and James asked her to care for the children during his custodial time, notwithstanding his concerns about the children's safety. The court also emphasized that following the soccer match, there were no allegations or evidence presented that Kimberly consumed alcohol during her custodial time over the 13 months the case was pending. The district court expressly noted its concerns about Kimberly's behavior in its admonishment and orders that she not consume alcohol while caring for the children and that she participate in an alcohol assessment and related counseling, which suggests the court will take action if further incidents occur.

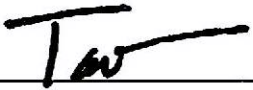
We will not reweigh evidence on appeal. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). We recognize that district courts often have to make difficult custody determinations, like the one in this case, and even though other courts may have made a different decision under the same facts, such differences alone do not constitute an abuse of discretion. As the district court saw the parties at numerous hearings and reviewed all the evidence in the record, it was in the best position to make the custody determination in this case. Because the district court applied the correct burden of proof and thoroughly considered all of the relevant



factors, it did not clearly abuse its discretion when it did not modify physical custody, despite the risk factors that were readily apparent. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division  
Pecos Law Group  
Candelaria Law Group  
Eighth District Court Clerk