

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA ROWBERRY,
Appellant,
vs.
TRISHA ROWBERRY,
Respondent.

No. 81118-COA

FILED

AUG 18 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Joshua Rowberry appeals from a district court order granting Trisha Rowberry's motion to relocate. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Brown, Judge.

Trisha filed for a divorce from Joshua.¹ They have two minor children together: A.R. (born 2008) and T.R. (born 2004). Trisha filed a motion for default because Joshua failed to answer. The district court granted the motion and issued a divorce decree that awarded, among other things, joint legal custody and primary physical custody to Trisha.

Joshua moved to set aside the default divorce decree. The district court partially granted the motion and issued an order that modified the parenting-time schedule so that Joshua would have the children on Monday and Tuesday during the school year (and drop them off at school Wednesday mornings), and from Monday to Wednesday during summer break. Notably, however, the district court did not modify its decision to grant Trisha primary physical custody.

Trisha later filed a motion to relocate after remarrying a United States Air Force officer stationed in Phoenix, Arizona. At the time of the motion, Trisha was pregnant and sought to relocate for prenatal and birthing

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

care near her husband and for better educational opportunities for her children. She noted that it would be extremely difficult to give birth in Las Vegas, as she had no close relatives in the area and needed help raising her newborn child. She also alleged that she would give birth during the summer, but her job as a private school teacher provided no maternal benefits and she would not have any income during the summer break, which made her living situation untenable. Alternatively, if she relocated to Phoenix, she would be a stay-at-home mother and be able to care for her newborn child and provide more attention to her children. Joshua opposed the motion and filed a countermotion to modify custody.

The district court held a hearing on Trisha's motion for relocation. At the hearing, Joshua explained that he wanted an evidentiary hearing to determine Trisha's motion for relocation, which the district court set.

During the evidentiary hearing, Trisha testified that Joshua would frequently not show up to pick up the children, show up late without notice, and show up three hours early for drop-off. She also testified that she solely took the children to doctor and dentist appointments and to parent/teacher conferences.

Further, she noted that T.R. struggled academically. She had frequent meetings with the school to discuss T.R.'s academics and ways to help, but Joshua never attended nor helped. According to her, Joshua often would not bring the children to school, and she would email him about it. For instance, in one email message, he explained that he chose not to take the children to school because they woke up late. In another message, he said that he had a pinched nerve so he could not take them to school. On another day, he kept the children home so they could swim in a pool with their cousins.

Further, Trisha sought to introduce evidence of T.R.'s progress reports for the current semester at the evidentiary hearing. Joshua testified that he was up to date with T.R.'s progress reports, but he objected to the evidence, alleging that Trisha did not produce it during discovery. The district court admitted the evidence because both parties had equal access to the progress reports. The progress reports demonstrated that T.R. was not performing well academically. Despite this, Joshua testified that he took T.R. to a hockey game during final exams.

Additionally, Trisha claimed that she took the children to all their extracurricular activities. She testified that Joshua never came to any of the children's games or ever brought the children to their activities. She also testified that part of the reason she sought to relocate was for better educational opportunities; she and her new husband found a house near a well-performing high school.

After the evidentiary hearing, the district court issued an order granting Trisha's motion to relocate and denying Joshua's countermotion to modify physical custody. Under NRS 125C.007(1)(a), the district court found Trisha had a good-faith reason to relocate, and that the relocation was not intended to deprive Joshua of parenting time, as she credibly wanted to be with her husband and newborn child in Phoenix. The district court also found that relocation served the children's best interests under NRS 125C.007(1)(b) because Trisha and her husband could not financially maintain two separate households.

Further, the district court found under NRS 125C.007(1)(c) and NRS 125C.007(2)(a) that relocation would improve both Trisha and her children's quality of life because the relocation provided better educational opportunities and a financially stable home. Moreover, under NRS 125C.007(2)(b) and (c), it found that she was not requesting relocation to

frustrate or defeat Joshua's parenting-time rights, and that she would cooperate with any ordered parenting-time schedule. The district court also found under NRS 125C.007(2)(e) that Phoenix was close enough to Las Vegas such that Joshua would maintain a realistic opportunity to adequately foster and preserve his relationship with his children. Additionally, it denied Joshua's counter-motion to change primary physical custody, summarily finding that he failed to demonstrate a substantial change of circumstances and that it would serve the children's best interests.

Joshua appeals from this order and advances three arguments.² First, he claims the district court erred because it applied the standard for relocation in primary physical custody cases, when he believes that the parties shared joint physical custody. Second, he claims the court abused its discretion when it admitted evidence that Trisha disclosed after discovery closed. Finally, he argues the court abused its discretion because it did not adequately address the best-interest factors.

First, Joshua claims that the district court erred when it determined that Trisha had primary physical custody. He contends that the parties shared joint physical custody (despite a district court order granting Trisha primary physical custody) because Joshua had the children for three days a week, which is more than 40 percent of the time. Joshua further

²Joshua also argues that the district court erred when it granted the evidentiary hearing because it should have required Trisha to establish adequate cause for the evidentiary hearing and because her motion to relocate may have been defective, as it did not cite NRS 125C.007 and address the children's best interests. However, we need not consider the argument as Joshua invited the alleged error when he asked for an evidentiary hearing. See *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994) (concluding that a party cannot complain of an error that he or she invited).

argues that this testimony was uncontroverted, and thus, is substantial evidence demonstrating joint physical custody. So, Joshua concludes, the district court abused its discretion by granting relocation because Trisha must first obtain primary physical custody before asking for relocation, and she failed to do so below.

We review child custody matters for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). The district court must support its findings with substantial evidence. *Id.* Substantial evidence is evidence that a reasonable person may accept as adequate to support the judgment. *Id.* “[A] modification 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.” *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). “[T]he party seeking a modification of custody bears the burden of satisfying both prongs.” *Id.* at 151, 161 P.3d at 242-43. However, a party seeking modification of custody when the parties share joint physical custody need only meet the second prong of *Ellis*. *Id.* at 151-52, 161 P. 3d at 243.

To constitute joint physical custody, each parent must have at least 40 percent of the time with the child. *Rivero*, 125 Nev. at 425-26, 216 P.3d at 224. The district court should calculate the time over one calendar year, which is 146 days per year. *Id.* at 427, 216 P.3d at 225. Further, the district court should look at the number of days a party supervised the child but should ignore the exact number of hours the parent spent with the child. *Id.* However, the timeshare calculation is only a guideline and not the sole factor in deciding physical custody. *Bluestein v. Bluestein*, 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015). In contrast, primary physical custody centers on the child’s residence and which party has the primary responsibility for

maintaining the child's residence and providing for the child's basic needs. *Rivero*, 125 Nev. at 428, 216 P.3d at 226.

Here, the district court did not abuse its discretion when it rejected Joshua's argument that he was a joint physical custodian (and thus applied the correct standard to Trisha's motion for relocation) because Joshua failed to meet his burden to prove de facto joint custody.³ Because Trisha had primary physical custody, she only needed to move for relocation. NRS 125C.006(1) ("If primary physical custody has been established pursuant to an order, judgment or decree of a court and the custodial parent intends to relocate his or her residence to a place outside of this State," the parent shall "petition the court for permission to relocate with the child.")⁴ The district court correctly applied NRS 125C.006(1) and Trisha was not required to obtain primary physical custody as Joshua argues. Therefore, the district court did not err or abuse its discretion in applying the primary physical custody standard.

³We conclude Joshua's argument is unpersuasive that the district court should have applied the joint physical custody standard to Trisha's motion for relocation. The district court impliedly found that Joshua failed to prove de facto joint physical custody and applied the correct legal standard because Trisha had primary physical custody by prior court order. *See Bd. of Gallery of History, Inc. v. Dates Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (explaining that the absence of a ruling by the district court on a motion constitutes a denial of the motion); *see also Michelsen v. Harvey*, 110 Nev. 27, 30-31, 866 P.2d 1141, 1143 (1994) ("On appeal, this court may imply findings of fact and law if the record clearly supports the lower court's ruling.").

⁴NRS 125C.0065(1)(b), which provides that "[i]f joint physical custody has been established pursuant to an order, judgment or decree," the relocating parent shall "petition the court for primary physical custody for the purpose of relocating," does not apply in this case.

Second, Joshua avers the district court abused its discretion when it admitted Trisha's exhibits 4, 7, and 10 because she disclosed them after the close of discovery, which created a trial by ambush.⁵

We generally review a district court's decision to admit or exclude evidence for an abuse of discretion. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). "The purpose of discovery rules 'is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.'" *DeChambeau v. Balkenbush*, 134 Nev. 625, 627, 431 P.3d 359, 361 (Ct. App. 2018) (quoting *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968)).

Additionally, even if the district court abuses its discretion in admitting or excluding evidence, we review the error under the harmless error doctrine, which requires the complaining party to prove that the error affected his or her substantial rights. *Cf.* NRCP 61; *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). An error affects a party's substantial rights when, but for the district court's error, "a different result might reasonably have been reached." *Wyeth*, 126 Nev. at 465, 244 P.3d at 778. The inquiry is fact-dependent; thus, this court reviews the entire record to evaluate the error. *Id.*

Here, the district court did not abuse its discretion when it admitted the evidence. Discovery deadlines purport to remove surprise from

⁵Joshua also asserts that the district court erred in admitting Exhibit 11, but he stipulated to Exhibit 11's admission and waived his objection; thus, we need not consider it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

trials or evidentiary hearings, but that policy concern was not evident here because the exhibits were evidence that Joshua had in his possession or had access to. The exhibits he complains of are (1) of his own conversations with Trisha or (2) T.R.'s grades that the school published shortly before trial, which Joshua testified that he regularly checked. Thus, the district court did not abuse its discretion when it admitted the exhibits.

Finally, Joshua argues that the district court abused its discretion when it granted Trisha's motion for relocation because she failed to prove that it was in the children's best interests. He further contends that she failed to support all the best-interest factors, as her only claim was about educational opportunities, which she supported with hearsay.⁶ He avers that the children's relationship with their father is a stronger factor to consider than the children relocating with their newborn half-sibling.

We review a district court's decision to grant or deny a motion for relocation for an abuse of discretion. *Pelkola v. Pelkola*, 137 Nev., Adv. Op. 24, at *2-3, 487 P.3d 807, 810 (2021). NRS 125C.007(1) lists several threshold factors that the district court must consider before granting relocation.

Here, the district court did not abuse its discretion in granting Trisha's motion for relocation because it made explicit findings on each of the factors under NRS 125C.007(1) and (2). *See Pelkola*, 137 Nev., Adv. Op. 24, 487 P.3d at 811. First, while Trisha may not have identified the NRS 125C.007 factors in her opening motion, she listed the factors later and supplied sufficient evidence to meet her burden under NRS 125C.007(3) to show it was in the children's best interest to relocate. The district court found

⁶Joshua failed to object at the district court; thus, we will not consider the hearsay issue on appeal. *Old Aztec*, 97 Nev. at 52, 623 P.2d at 983.


her testimony credible on this issue. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007). (“[W]e leave witness credibility determinations to the district court and will not reweight on appeal.”).


Next, Joshua argues that the district court failed to consider all of the best interest factors from NRS 125C.0035(4). However, Joshua fails to identify which factors, if any, favored denial of the relocation motion other than the sibling relationships, which actually supported relocation. Therefore, he has not demonstrated that his substantial rights were affected by the failure to make comprehensive best interest findings. *Cf.* NRCP 61. The district court made findings that the three threshold factors were satisfied, and then considered all of the factors in NRS 125C.007(2), which also affect the children’s welfare. The district court found that these factors favored relocation, which further supports the best interest findings because the factors overlap each other.


Therefore, the district court did not abuse its discretion because it explicitly considered all of the relocation factors and supported its findings with substantial evidence.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District
Dept. T, Family Court Division, Eighth Judicial District
Law Offices of F. Peter James, Esq.
Robert W. Lueck, Ltd.
Eighth District Court Clerk