

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELISSA LOMBARDO, N/K/A
MELISSA SHER,
Appellant/Cross-Respondent,
vs.
JOSEPH LOMBARDO,
Respondent/Cross-Appellant.

No. 81807-COA

FILED

AUG 19 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Melissa Lombardo (now known as Melissa Sher) appeals the district court's order denying relocation with the parties' minor child and awarding Joseph Lombardo primary physical custody when Melissa is no longer able to maintain joint physical custody. Joseph Lombardo cross-appeals the district court's order denying attorney fees. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Melissa Lombardo and Joseph Lombardo divorced in 2018.¹ Their divorce decree established joint physical custody of their child, M.L., born May 2014. Melissa and Joseph had a "week on and week off" custody schedule. Melissa and Joseph both work for U.S. Immigration and Customs Enforcement (ICE). In February 2020, ICE informed both Melissa and Joseph that they were reassigned to Washington D.C. and that they had to relocate by May 2020 (later extended to August 2020 due to the COVID-19 pandemic) or else they would be terminated from employment. Melissa accepted her reassignment and moved to Virginia in August. Joseph

¹We recount the facts only as necessary for our disposition.

declined to relocate, choosing instead to retire, continue living in Henderson, and pursue litigation against ICE.

In March 2020, Melissa petitioned to modify custody to relocate with the child to Virginia. Joseph filed his opposition and counter-motion for sanctions in April. The court held an evidentiary hearing in August. During the hearing, Melissa testified that her job, the child's school, and the living environment would all be better in Virginia. She testified that she was not concerned about the rating of the Virginia school, explaining that she chose the location of her Virginia home because it is close to the school and the community is safe, and she felt it would provide the child with a better quality of life. Melissa also testified that Joseph had suggested tutoring for the child in the past but that she refused because it was unnecessary. Joseph presented evidence that, if M.L. was relocated, he would attend a school of inferior quality compared to his current school in Las Vegas. This evidence consisted of a website's ratings of the two schools.

Joseph testified at the evidentiary hearing that he is seeking disability retirement because he suffered a back injury, has PTSD, and has a rare blood disorder. Joseph asserted, however, that his conditions would not interfere with his ability to parent the child. He further testified that his family resides in Las Vegas, the child's friends are in Las Vegas, and that Melissa does not have any family in Virginia. Joseph's family members, including his sister and mother, testified that Joseph is a caring father who goes out of his way to ensure the child's educational needs are met.

The district court issued its Findings of Fact, Conclusions of Law and Order in September 2020. The order applied each factor within NRS 125C.007, the relocation statute. The district court found Melissa

satisfied NRS 125C.007(1)(a), because she had a good faith reason to relocate and it was not intended to deprive Joseph of parenting time. However, the district court concluded Melissa did not meet her burden under NRS 125C.007(1)(c), because although she showed that relocation presented an advantage to her, she “did not establish that the child would benefit from an actual advantage as a result of the relocation.”

The district court applied the best interest factors from NRS 125C.0035(4) to evaluate NRS 125C.007(1)(b) and determine whether relocation was appropriate. The district court concluded that NRS 125C.0035(4)(f), which considers the mental and physical health of the parents, weighed neutrally despite Joseph’s testimony that he suffered a back injury, had PTSD, and had a blood disorder. The district court concluded factor (g), concerning the physical, developmental, and emotional needs of the child, weighed in favor of Joseph, because he is more focused on the child’s educational needs. Factor (g) was the only factor in the district court’s NRS 125C.0035(4) analysis that did not weigh neutral.

The district court then proceeded to address all of the NRS 125C.007(2) relocation factors, notwithstanding its conclusion that Melissa failed to satisfy the threshold factors of NRS 125C.007(1). The court concluded Melissa did not satisfy the relocation factors of NRS 125C.007(2) either.

The district court denied Melissa’s petition to relocate and awarded primary physical custody of M.L. to Joseph, which would take effect when Melissa could no longer maintain the current joint physical custody arrangement due to her move to Virginia. The court ordered, “it is in the best interest of the child that the parties maintain joint physical custody and, once Melissa is no longer able to exercise joint physical custody

as a result of her move, Joseph shall be granted primary physical custody of the minor child in Las Vegas.” The district court further ordered that each party would bear its own attorney fees and costs.

At the time of the district court’s order, Melissa had already relocated to Virginia and had been flying to Las Vegas to exercise her parenting time under the existing joint physical custody arrangement. Melissa testified that she was only able to do so because she had been working remotely. Melissa testified that, once COVID-19 subsides, she will have to work at her D.C. office in person and her “job will not give [her] the opportunity to come back here and be teleworking from [Nevada] . . . every other week. That’s just not feasible.”

On appeal, Melissa challenges the district court’s order on two grounds: (1) the district court abused its discretion in concluding that relocation would not result in an actual advantage to the child under NRS 125C.007(1)(c), and (2) the district court abused its discretion because its order is impermissibly indeterminate, and the evidence does not support a change of custody under the best interest factors provided in NRS 125C.0035. Joseph cross-appeals the district court’s denial of his request for attorney fees. We conclude the district court acted within its sound discretion on all issues.

First, Melissa argues that the district court abused its discretion when it concluded that relocation would not result in an actual advantage to the child. Melissa contends that the district court’s findings were not sufficiently specific, and that the district court was required to define “actual advantage,” but failed to do so. Melissa further contends that the district court overlooked that the advantages of relocation to her are “intertwined” with the child’s quality of life. Melissa cites *Jones v. Jones* for

the proposition that she did not need to show “a substantial advantage but one based on a sincere and genuine desire of the custodial parent to move and a sensible good faith reason for the move.” 110 Nev. 1253, 1261, 885 P.2d 563, 569 (1994) (quoting *Cooper v. Cooper*, 491 A.2d 606, 613 (N.J. 1984)).

Joseph answers that Melissa failed to meet her burden to show that “an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded.” *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1271 (1991). According to Joseph, evidence presented at the evidentiary hearing shows that relocating to Virginia would result in a disadvantage to the child. Joseph elaborates that the child would attend a school of lower quality in Virginia and lose relationships with his friends and family in Nevada by moving to Virginia (noting that Melissa only has friends in Virginia and that her family lives in Texas).

This court reviews a district court’s decision regarding relocation for abuse of discretion. *See Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). However, this court conducts a de novo review of the district court’s conclusions of law. *Id.* The district court’s interpretation and construction of a statute presents a question of law. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (stating that this court reviews issues of statutory construction de novo).

NRS 125C.0065 provides, “[i]f joint physical custody has been established . . . and one parent intends to relocate . . . to a place outside of this state . . .” with the child, then the relocating parent must attempt to obtain written consent from the non-relocating parent or petition the court

for primary physical custody in order to relocate if consent is not given. NRS 125C.007 governs petitions for relocation. NRS 125C.007(1) provides the threshold factors that a relocating parent must satisfy before the district court must consider the relocation factors in NRS 125C.007(2). NRS 125C.007(1)(c) requires the parent seeking relocation to show “[t]he child and the relocating parent will benefit from an actual advantage as a result of the relocation.”

The district court’s NRS 125C.007 findings were sufficiently specific. In its order, the district court recited NRS 125C.007(1)(a)-(c) and (2)(a)-(f) and applied each subsection and its constituent factors to the facts of this case. In its NRS 125C.007(1)(c) analysis, the district court summarized Melissa’s argument that relocation would provide an actual advantage to the child and concluded that Melissa failed to meet her burden because she only showed that *she* would benefit from relocation. Melissa does not explain *how* any of the district court’s NRS 125C.007 findings are not sufficiently specific; therefore, we need not address her argument. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of relevant authority).

Likewise, Melissa does not cite authority to support her claim that the district court was required to specifically define “actual advantage” in applying NRS 125C.007(1)(c), and we have found none. See *id.* Melissa’s challenge thus narrows to whether the district court abused its discretion by concluding the advantages of relocation to Melissa did not equate to an actual advantage to the child.

We need not consider whether the district court misapplied NRS 125C.007(1)(c), however, because Melissa does not dispute the district court's NRS 125C.007(2) analysis. The factors of NRS 125C.007(1), including the actual advantage factor, serve as a threshold to the factors of NRS 125C.007(2) ("If a relocating parent demonstrates to the court the provisions set forth in subsection 1, the court must then weigh" the factors in NRS 125C.007(2)). Here, despite its conclusion that Melissa failed to meet the threshold factors, the district court applied the NRS 125C.007(2) factors and concluded Melissa did not satisfy them. Melissa does not dispute the adequacy of the district court's NRS 125C.007(2) findings. See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present."). Accordingly, even if the district court erred in the application of NRS 125C.007(1)(c), the district court did not abuse its discretion in concluding that Melissa failed to meet her burden to relocate, because she does not challenge the conclusion that she failed to satisfy the relocation factors under NRS 125C.007(2).

Second, Melissa argues the district court abused its discretion because its custodial order "was indeterminate, with no end." Melissa further contends that the child's circumstances will necessarily be different when custody is automatically modified in favor of Joseph, and that the

order gave Joseph the power to “refuse any and all of [her] suggested interstate joint physical custody schedules.”²

Melissa’s argument fails for lack of cogency because she does not cite any authority prohibiting “indeterminate order[s].” See *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Even so, the district court’s order is not indeterminate.

The order provides that the parties will maintain joint physical custody until Melissa is “no longer able to exercise joint physical custody *as a result of her move*,” at which point Joseph will become primary physical custodian. Melissa testified that she will no longer be able to exercise joint physical custody when the COVID-19 pandemic subsides because she will be required to work in person at her D.C. office. Thus, although the order does not specify a date when Melissa will no longer be able to maintain joint physical custody, the record clearly implies that Joseph will acquire primary physical custody when Melissa can no longer work remotely for

²Melissa did not argue below that Joseph will not agree to her “interstate joint physical custody schedules,” so this court need not address her argument. 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.”); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are “deemed to have been waived and will not be considered on appeal”). In any case, the order does not provide that the parties must or even may alter their joint physical custody arrangement. It follows that the parties were expected to maintain the “week on and week off” joint physical custody arrangement until Melissa can no longer work remotely, at which point Joseph would obtain primary physical custody. Therefore, the order has sufficient particularity. See NRS 125C.010.

ICE.³ See *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.”), *disapproved of on separate grounds in Sandy Valley Assocs. v. Sky Ranch Estates Owner’s Ass’n*, 117 Nev. 948, 956 n.7, 35 P.3d 964, 969 n.7 (2001). Accordingly, Melissa’s argument that the order is indeterminate is unpersuasive.⁴

Third, Melissa claims that the district court abused its discretion because its best interest factors findings were not sufficiently specific or supported by substantial evidence. In particular, Melissa claims the court found in favor of Joseph on NRS 125C.0035(4)(g), the physical, developmental, and emotional needs of the child, based on Joseph’s testimony alone, which was not substantial. Melissa also disputes the district court’s finding of neutrality on NRS 125C.0035(4)(f), concerning the physical and mental health of the parents. According to Melissa, factor (f) weighed in her favor because Joseph admitted he is seeking disability retirement and suffers from back issues, PTSD, and a blood disorder.

Joseph counters that the district court’s findings were supported by substantial evidence. Regarding factor (g), Joseph emphasizes Melissa’s testimony that she refused tutoring for the child, whereas

³There may be other scenarios that would be sufficient to render Melissa “unable” to exercise joint physical custody, such as when the child begins school; however, it is sufficient for our purposes that there is at least one determinate set of circumstances under which Joseph will gain custody.

⁴Melissa also filed a motion during the pendency of this appeal requesting that her case be remanded for the district court to clarify its custody order. The Nevada Supreme Court denied the motion, reasoning that the motion in effect sought modification of custody rather than clarification. See *Lombardo v. Lombardo*, Docket No. 81807 (Order Denying Motion and Reinstating Briefing, Feb. 10, 2021).

Joseph's family testified that Joseph is involved in the child's education. Joseph adds that he presented evidence that Melissa's relocation to Virginia would result in the child attending a school of lower quality. Joseph does not address factor (f).

"The trial court enjoys broad discretionary powers in determining questions of child custody. This court will not disturb the trial court's determinations absent a clear abuse of discretion." *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Nevertheless, "substantial evidence must support the court's findings." *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). "Substantial evidence 'is evidence that a reasonable person may accept as adequate to sustain a judgment.'" *Id.* (citing *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007)). A district court abuses its discretion if it modifies a joint physical custody arrangement and designates a primary physical custodian without making specific findings as to why the modification and designation are in the best interest of the child. *Bluestein v. Bluestein*, 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015). "On appeal, this court may imply findings of fact and law if the record clearly supports the lower court's ruling." *Michelsen*, 110 Nev. at 30-31, 866 P.2d at 1143; *see also* NRCP 52.

The district court's best interest findings and conclusions are sufficient. In its order, the district court recited each of the factors within NRS 125C.0035(4) and applied them to the parties' circumstances.⁵ All of

⁵In general, Melissa's Fast Track Statement and reply allege that the district court's findings were inadequate in a conclusory fashion with scant citations to the record. We evaluate her arguments regarding factors (g) and (f) because they are the only factors that Melissa cogently challenges. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (explaining that

the court's findings are sufficiently specific and, even if they are underdeveloped, the record clearly supports the district court's conclusions.

Melissa's argument regarding the court's assessment of NRS 125C.0035(4)(f) (the mental and physical health of the parents) is unavailing. While Joseph suffers from psychological and physical conditions, the finding in the order explains that "Joseph denie[d] that [these] issues affect his parenting ability." The implication of this statement, and the district court's finding, is that Joseph's testimony was sufficiently credible to prevent factor (f) from weighing in Melissa's favor. *See Michelsen*, 110 Nev. at 30-31, 866 P.2d at 1143. A reasonable person would accept Joseph's testimony regarding his health as adequate to support the district court's determination that factor (f) weighed neutrally. Moreover, this court "will not reweigh the credibility of witnesses on appeal; that duty rests within the trier of fact's sound discretion." *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004). Thus, the district court acted within its discretion in determining factor (f).

Melissa's challenge to the district court's assessment of factor (g), the physical, developmental, and emotional needs of the child, is likewise unavailing. We note that, in *Ellis v. Carucci*, the Nevada Supreme Court affirmed a district court's order modifying custody based on the child's educational needs. *See Ellis*, 123 Nev. at 153, 161 P.3d at 244. Thus, although the district court here found every other best interest factor to be neutral, it was permitted to modify custody and deny relocation based on the child's educational needs alone.

this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Furthermore, the district court's conclusion for factor (g) was supported by substantial evidence. The district court heard Joseph's testimony regarding tutoring and received exhibits comparing the child's current school to that which he would attend in Virginia. *See Castle*, 120 Nev. at 103, 86 P.3d at 1046. The district court also heard Melissa testify that she had no reason to be concerned about the quality of the Virginia school. Melissa does not dispute her own testimony or the school rankings exhibits. Accordingly, although slight, substantial evidence supports the district court's assessment of factor (g).

The district court's findings as to factor (g) also satisfy the specificity requirement. In its order, the court specifically explained that "Joseph is more focused on the child's educational needs" and concluded the factor favors Joseph. Joseph's and Melissa's testimonies, which we will not reevaluate on appeal, and the exhibits showing the quality of schools clearly support this conclusion. *See Michelsen*, 110 Nev. at 30-31, 866 P.2d at 1143; *Castle*, 120 Nev. at 103, 86 P.3d at 1046. Thus, the district court acted within its sound discretion in determining factor (g).

In sum, the district court's best interest findings were specific and supported by substantial evidence. Therefore, the district court acted within its discretion in applying the best interest factors to conclude Melissa failed to meet her burden under NRS 125C.007(1)(b) to show relocation is in the child's best interest.

Lastly, Joseph argues in his cross-appeal that the district court manifestly abused its discretion when it refused to award him attorney fees because the court instructed Melissa that she was required to demonstrate relocation would result in an actual advantage for the child, but she failed to do so. Melissa responds that she met her burden to show relocation

presented an actual advantage, so the district court properly denied Joseph attorney fees.

“The award of attorney’s fees resides within the discretion of the court. Moreover, in the absence of a manifest abuse of discretion, the court’s decisions on the issue will not be overturned.” *Clark County. v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006).

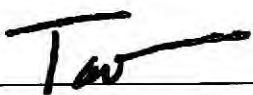
“[T]he court may make an allowance of attorney’s fees to a prevailing party . . . when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.” NRS 18.010(2)(b). The court may award attorney fees to a *relocating parent* if the non-relocating parent refuses to consent without reasonable grounds or to harass the relocating parent. NRS 125C.0065(2).

The district court did not manifestly abuse its discretion in denying Joseph attorney fees. Joseph concedes in his briefing that Melissa provided at least *some* evidence that relocation would provide the child an actual advantage: “Melissa provided *little to no evidence* in her initial motion” (Emphasis added.) Thus, Melissa did not flout her obligation to prove an actual advantage as Joseph suggests. Further, Joseph does not dispute that the district court correctly found that Melisa had a sensible, good faith reason to relocate and that she did not intend to deny Joseph his parenting time. Moreover, Melissa showed that her employment would be terminated if she did not relocate, but that she would receive an increase in

salary if she did relocate, which potentially could provide her with more money to support M.L. Melissa further testified that her belief that the child would receive a better education in Virginia was based on the Nevada education system's low rank of 45 out of 50. Thus, the district court did not exceed the bounds of law or reason in concluding that Melissa's showing, even if thin, was not so deficient as to warrant an award of attorney fees to Joseph under NRS 18.010(2)(b). Accordingly, we

ORDER the district court's relocation and custody order and denial of attorney fees AFFIRMED.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Rosenblum Law Offices
Radford J. Smith, Chartered
Eighth District Court Clerk

⁶Having reviewed Melissa's and Joseph's remaining arguments, we conclude that they either do not provide a basis for relief or need not be reached given our disposition.