IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IDA JEANNETTE ARZOLA, Appellant, vs. ALFONSO ESTRADA, Respondent.	No. 83251-COA
IDA JEANNETTE ARZOLA, Appellant, vs. ALFONSO ESTRADA, Respondent.	No. 83941-COA

ORDER AFFIRMING IN PART AND REVERSING IN PART (DOCKET NO. 83251-COA), REVERSING (DOCKET NO. 83941-COA) AND REMANDING

Ida Jeannette Arzola appeals from a district court decree establishing child custody and support of a minor child. Ida also appeals from a post-decree order awarding attorney fees and costs. Eighth Judicial District Court, Family Court Division, Clark County; Dedree Smart Butler, Judge.

Alfonso Estrada, an attorney living in Los Angeles, met Ida in 2017 at a Las Vegas strip club where she worked as a dancer.[1] A relationship formed, and Alfonso visited with Ida whenever he returned to Las Vegas. During one of those visits, a child was conceived. The child, A.E., was born in May 2019. Following the child's birth, the relationship between the parties soured and their interactions became contentious.

Alfonso filed a complaint for primary physical custody. He did not seek child support in his complaint, nor any time thereafter. Ida counterclaimed for primary physical custody and did seek child support. The

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

parties agreed to joint legal custody through mediation. As to physical custody, the district court issued temporary orders establishing joint physical custody with exchanges to occur in Barstow, California each week. By this time, Ida had returned to work as a food server, making approximately one-tenth of Alfonso's salary. She also began nursing school. The district court awarded temporary child support to Ida in the amount of $1,583 per month and attorney fees in the amount of $5,000.

Conflict remained high between the parties, and they could not reach settlement on the issue of physical custody. Following a two-day trial, the district court entered an order awarding primary physical custody to Alfonso via a three-week-on-two-week-off schedule, with two additional weeks given to Alfonso to use during the calendar year. A.E.'s habitual residence was ordered to remain in Nevada, and the court ordered a status check in advance of the child starting school to reevaluate where A.E. should attend school and how it will affect the custodial timeshare. The court also ordered Ida to pay $400/month in child support to Alfonso. The court found that "no adjustment evidence was provided pursuant to NAC 425.150" that would have allowed the court to reduce the amount of required child support. It closed the order by granting Alfonso attorney fees without citing its legal basis for doing so, merely noting that Alfonso was the prevailing party. The district court directed Alfonso to submit a memo of attorney fees and costs.

Alfonso provided the memo to the district court, asking for $48,217 in attorney fees and $2,138.77 in costs. In his memo, Alfonso cited NRS 18.010(2) and NRS 125C.250 as the legal basis for attorney fees. He also included an affidavit to satisfy the *Brunzell*[2] factors. However, the

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[2]*Brunzell* factors relate to the reasonableness of attorney fees, which requires the trial court to consider: (1) the quality of the advocate; (2) the

memo did not address the income disparity between the parties. Time lapsed, and Alfonso moved for a ruling regarding attorney fees. As was the case in his memo, his motion did not address the income disparity between the parties, but Ida's opposition raised the issue with the court.

During oral argument on the motion, the district court reminded Alfonso he earns substantially more than Ida, so he could consider waiving attorney fees. If he chose not to waive the fees, the court directed Alfonso to resubmit the memo, along with a prepared order with a blank line that the court could fill in with the appropriate amount. Alfonso did not waive the fees. He drafted an order for the court that did not include the legal or factual basis for the order. The court entered the order for Ida to pay Alfonso $40,000 in combined attorney fees and costs. The order does not specify what amount of the award was designated as attorney fees and what amount was costs.

Ida appealed, arguing the district court erred when it: (1) granted Alfonso primary physical custody; (2) relocated A.E. to California without considering statutory relocation factors; (3) failed to consider the income disparity between the parties in its grant of child support; and (4) abused its discretion in granting Alfonso attorney fees. We disagree with Ida as to the custodial decree and affirm as to custody, but agree as to child support and the attorney fees and costs order and thus reverse and remand on these issues. We address each issue in turn.

We review a district court's child custody order for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Likewise, this court reviews decisions regarding child support and

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character of the work to be done; (3) the work actually performed; and (4) the results. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

relocation for an abuse of discretion. *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 985 (2022) (providing the standard of review for child support); *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004) (providing the standard of review for relocation). An award or denial of attorney fees is also reviewed for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

Factual findings of the district court will not be set aside if supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). It is not within the purview of this court to weigh conflicting evidence or to assess witness credibility. *See id.* at 152, 161 P.3d at 244.

The district court did not abuse its discretion when it awarded primary physical custody to Alfonso

Ida argues principally four reasons why it was error for the district court to grant Alfonso primary physical custody. First, because Ida had A.E. most of the time before the district court entered its temporary orders, she had de facto primary custody and Alfonso needed to meet the burden to modify custody. Second, the holding in *Bluestein*[3] allows for the designation of joint physical custody in this case, despite the custodial time awarded to Alfonso being slightly more than 60 percent. Third, the district court erred in failing to consider joint physical custody, even though neither party sought it. Finally, the court misapplied the facts of the case to the best interest of the child factors found under NRS 125C.0035(4). Each of Ida's

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[3]*Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015).

arguments are either legally or factually insufficient to show the district court abused its discretion.

Ida's first argument, that this was a modification of custody, fails for two reasons. First, Ida did not raise this argument to the district court, thus it is waived. *See 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"). Second, even if we consider it, NRS 125C.0015(2) provides that "[i]f a court has not made a determination regarding the custody of a child, each parent has . . . joint physical custody of the child until otherwise ordered by a court of competent jurisdiction." *See Rosie M. v. Ignacio A.*, 138 Nev., Adv. Op. 49, 512 P.3d 758, 763 (2022) (concluding that a parent who did not discover that he was the father of a child until several years after the child had been born did not need to seek a modification of custody since there was no existing custodial order between the parents). The plain language of the statute controls, so Alfonso was not required to seek a modification for an initial custodial determination.

Ida's second argument is that the bright line rule of 60 percent parenting time to establish primary physical custody was eliminated under *Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015), and therefore custodial arrangements where one party receives less than 40 percent of custodial time, such as the one in this case, can still be considered joint physical custody. While Ida is correct that *Bluestein* allows a court to exercise discretion when designating custody as it relates to the percentage of each parent's custodial time, the holding directs district courts to primarily consider the best interest of the child factors found under NRS 125C.0035(4). Percentage of time is now merely a consideration in the court's analysis. *See Bluestein*, 131 Nev. at 109, 345 P.3d at 1046 (holding that the best interest of the child must be the primary consideration and the 40-percent guideline

"shall serve as a tool" in determining what custody arrangement is right for the child).

Here, the district court weighed each of the best-interest-of-the-child factors and found that Alfonso having primary custody of A.E. was in A.E.'s best interest. The district court also gave Alfonso two extra weeks of custodial time, showing it considered the apportionment of time in its order. Ida has not demonstrated how the court committed error under *Bluestein*. Thus, the district court did not abuse its discretion in applying the holding in *Bluestein*.

Ida's third argument is that it was error for the district court to fail to consider awarding joint physical custody just because neither party asked for it, especially since the parties had been exercising joint physical custody up until trial. This argument fails for two reasons. First, Ida invited this supposed error by failing to seek joint physical custody as an alternative. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (finding that when a party's affirmative conduct induces the error that he or she now complains of on appeal, the invited error doctrine means that the party's complaint of the error will not be considered). Furthermore, the court found that the parties specifically requested the court award one parent primary physical custody. Under these circumstances, Ida invited any error and her argument need not be considered. *Id.*

Second, while the district court did emphasize that it was persuaded by "the specific request from the parties to award one parent primary physical custody," it was not the only basis for its decision. The court also considered the parties' locations and conducted "an analysis of the NRS 125C.0035 factors, [where it found] it is in the best interest of the child to award Alfonso primary physical custody." Even if Ida had raised joint physical custody as an alternative, Ida has not demonstrated that the

ultimate outcome of this case would be different because multiple factors support the district court's conclusion—not merely Ida's failure to seek joint physical custody.

Finally, Ida argues the court misapplied the facts of the case to the best interest of the child factors found under NRS 125C.0035(4). Here, the district court provided a detailed analysis and made extensive findings and conclusions on the best interest of the child factors found under NRS 125C.0035(4) that are well supported by substantial evidence. The court specifically found that four of the factors highly favored or favored Alfonso. *See* NRS 125C.0035(4)(c) (allowing frequent associations), (d) (less parental conflict), (e) (ability to cooperate), and (f) (mental health of the parents). Plus, the court found factor NRS 125C.0035(4)(g), relating to the needs of the child, to be neutral but leaning slightly in favor of Alfonso. The court did not find that any of the factors favored or leaned towards Ida. The court also found that some testimonial evidence presented by Ida lacked credibility, and we do not reweigh evidence or credibility on appeal. *Ellis*, 123 Nev. at 152, 161 P.3d at 244.

We conclude that Ida has not shown how any alleged factual error would have changed the district court's individual findings or overall custody decision had the error not been made. *Cf.* NRCP 61 (providing that errors not affecting substantial rights shall be disregarded). Accordingly, there is sufficient evidence in the record to support the district court's custodial order, and no abuse of discretion occurred.

Ida did not raise her relocation argument below, cited no authority to support her argument, and has not shown that a relocation analysis would change the outcome of this case

Ida argues that by granting Alfonso primary physical custody, the district court improperly relocated A.E. outside Nevada. Ida's argument fails for three reasons. First, she did not identify in the record where she

raised this argument to the district court before, during, or after trial, thus it is waived. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Second, the plain language of the statute that directs a court's analysis on relocation, NRS 125C.007, states that it applies to a relocating *parent*. Ida has not cited any authority to show that this statute applies to solely a relocating child when an already out-of-state parent, who has been exercising joint physical custody under temporary orders, seeks an initial custodial determination. *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 appellate argument that is not supported by relevant authority). Ida also does not address how the district court's order for Nevada to remain the habitual residence of A.E. affects her relocation argument.

Finally, assuming without concluding that this was a relocation, a district court must weigh relocation factors in addition to custodial factors to establish relocation is in a child's best interest. *See* NRS 125C.007; *see also Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1270 (1991) ("Removal of minor children from Nevada by the custodial parent is a separate and distinct issue from the custody of the children."). While a distinct analysis, many of the relocation factors overlap the best interest of the child factors found under NRS 125C.0035(4). *See* NRS 125C.007; *see also Monahan v. Hogan*, 138 Nev., Adv. Op. 7, 507 P.3d 588, 592 (Ct. App. 2022). So, even if Ida is correct that the district court should have considered relocation factors in this case, she has not shown what factor would have changed the result. Thus, Ida has not demonstrated that the district court abused its discretion by not considering relocation factors before awarding Alfonso primary physical custody.

The district court abused its discretion in granting Alfonso child support without considering the factors in NAC 425.150.

Ida argues that the district court should have taken the disparity of income into account and made a downward deviation before ordering Ida to pay $400/month to Alfonso in child support. In Nevada, both parents have a duty to provide for a child's maintenance. *See* NRS 125B.020. Nevada's child support regulations provide that a parent of a single child pay 16 percent of his or her gross income (or more, depending on income) to the custodial parent. NAC 425.140. A downward deviation from the set amount is at the discretion of the court under NAC 425.150(1). There are multiple factors for a court to consider under the code; relevant here: (1) the cost of transportation of the child to and from parenting time; (2) the relative income of both households; and (3) the obligor's ability to pay. NAC 425.150(1)(e), (f), (h). Each one of these factors could favor a downward deviation in the child support obligation for Ida.

Here the district court raised this issue in its order and found that "no adjustment evidence was provided pursuant to NAC 425.150." Yet, the court's own findings indicate otherwise: Alfonso is "presently a partner at his current law firm"; "Alfonso earns approximately $250,000 annually"; Alfonso does not have to pay for child care while working because "his family support[s] him . . . by caring for child while he is working"; Ida is "currently enrolled at [community college]"; Alfonso's "income is markedly greater than that of Ida, so much so that in the past he was capable of providing support for both [Ida] and child in excess of what would have been required by law";

and that Alfonso makes sufficient income that he could "choose[ ] to waive Ida's child support."[4]

According to the record, Ida's expenses exceed her income. The district court's child support order means that Ida will have even less resources to support her and A.E. while A.E. is in her care. Also, Ida will have less resources to travel lengthy distances for custody exchanges. Ida's ability to pay will need to be addressed in the context of NAC 425.150.

In sum, based on the district court's findings, ample evidence was introduced to support consideration of the "adjustment evidence" and a deviation from the indicated percentage. To not do so was an abuse of discretion. We therefore reverse the child support order and remand to the district court to apply the deviation factors to determine if any adjustment should be made to the child support order.

The award of attorney fees to Alfonso was an abuse of discretion

Ida's final challenge is to the district court order for her to pay $40,000 to Alfonso for the fees and costs he incurred in litigation. She argues that the court abused its discretion by failing to consider the income disparity between the parties and because her claims were reasonable and not brought to harass Alfonso. In the decree, the district court stated only that it was awarding Alfonso his attorney fees and costs based on him being the prevailing party.

Attorney fees are only available when authorized by rule, statute, or contract. *Henry Prods., Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). A district court must make specific findings and provide an adequate explanation for appellate review. *See Davis v. Ewalefo,*

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[4]Parties may stipulate to alternative child support orders outside of what the regulation requires. *See* NAC 425.110.

131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015) (requiring "specific findings and an adequate explanation . . . for appellate review" (internal quotation marks omitted)); *see also Henry Prods.*, 114 Nev. at 1020, 967 P.2d at 446 (holding that a "failure of a district court to state a basis for the award of attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion"). When a district court orders an award of attorney fees in a family law case, it must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), along with any disparity in the parties' income pursuant to *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). *Miller*, 121 Nev. at 623, 119 P.3d at 730.

Alfonso's memo for attorney fees and costs was deficient. He argued he was entitled to attorney fees under NRS 125C.0075 and NRS 18.010(2). NRS 125C.0075 is inapplicable because it allows attorney fees to the non-relocating parent if certain wrongful or criminal activity occurs, which was not alleged here. NRS 18.010(2)(b) allows fees if the district court makes specific findings that the opposing party brought or maintained a claim "without reasonable ground or to harass the prevailing party." Such findings were not made here, and both cited legal bases are inapplicable.

Alfonso did cite and correctly provided an analysis of the *Brunzell* factors. However, he failed to cite or analyze *Miller*. In family law cases, *Miller* establishes a burden not only to the district courts, but to litigants seeking attorney fees to "support their fee request with affidavits or other evidence that meets the factors in *Brunzell* and *Wright*." *Miller*, 121 Nev. at 623-24, 119 P.3d at 730 (concluding a party must address the disparity in income when seeking attorney fees). On review of both Alfonso's memo and motion, he did not address the income disparity between him and Ida, despite Ida raising *Miller* in her opposition. Accordingly, Alfonso failed to meet his burden to prove to the district court how this award satisfied

Miller. This omission is particularly important in this case because of the enormous disparity in income. Moreover, whatever the basis for this award was, the district court did not cite in its post-trial order any legal basis for the award of attorney fees and costs. Nor did it state that it considered the *Brunzell* factors or the mandate from *Wright* to consider disparity in income, *see Miller*, 121 Nev. at 623, 119 P.3d at 730, nor did it provide any relevant findings regarding the factors in NRS 18.010(2)(b).

On appeal, Alfonso defends the district court order by arguing findings were not necessary in light of the evidence showing Ida's unreasonable actions and harassment. Even if true, the district court is required to make specific findings under NRS 18.010(2)(b), and the award of fees is still discretionary, not mandatory, even with the findings. NRS 18.010(2) ("[T]he court may make an allowance of attorney's fees to a prevailing party . . . ."). Furthermore, while the award of costs is mandatory under NRS 18.020 (providing that "[c]osts must be allowed . . . to the prevailing party" in certain cases), the statute only applies in certain types of enumerated cases, none of which appear to be applicable here. Additionally, the district court did not apportion the award of attorney fees and costs, and this court cannot meaningfully review the order without knowing how much was awarded for each.[5]

Nevertheless, Alfonso argues that a district court can base its award for fees on NRS 125C.250, which allows reasonable fees of counsel and other costs to be awarded in a physical custody action, such as the one in this

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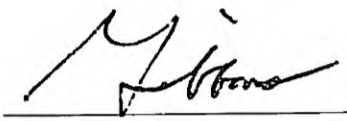
[5]"Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation." *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) (explaining why deferential review does not mean no review or require adherence to the district court's decision).

case. However, he did not make this argument below, so it is waived. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Regardless, even if we chose to apply this statute, Alfonso has not cogently argued why the requisites of *Miller* regarding the disparity of income need not be met. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Therefore, we choose not to consider this new argument.

In sum, because of the deficiencies within Alfonso's filings with the district court, and the district court's decree and order, we are unable to fully evaluate the parties' arguments concerning the propriety of the attorney fees and costs award. We necessarily reverse the award of attorney fees and costs.

Accordingly, we

AFFIRM the custodial judgment of the district court in Docket No. 83251-COA, REVERSE and REMAND the award of child support in Docket No. 83251-COA for proceedings consistent with this order, and REVERSE and REMAND the order granting Alfonso attorney fees and costs in Docket No. 83941-COA for proceedings consistent with this order.[6]



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Gibbons

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Tao

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[6]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Dedree Smart Butler, District Judge, Family Court Division
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