IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 85076-COA



*ORDER OF REVERSAL AND REMAND*

Trisha Rowberry appeals the district court's final post-hearing order and a decision and order denying her motion for child relocation and granting primary physical custody to Joshua Rowberry. Eighth Judicial District Court, Family Division, Clark County; Nadin Cutter, Judge.

Trisha and Joshua Rowberry divorced in 2012. Trisha was awarded primary physical custody and joint legal custody of their two children, T.R. and A.R.[1] with weekly parenting time awarded to Joshua.

In 2019, Trisha married Trevyn. Trevyn is a career United States Air Force officer who was stationed near Phoenix, Arizona, at the time the couple married. After marrying Trevyn, Trisha filed a motion to relocate the children to Arizona, and Joshua filed a countermotion for a change of

[1]T.R. was 17 years of age at the time of the hearing in 2022 and A.R. was 13. The children are now 18 and 15 years old, respectively. Appellant stated at oral argument that she is not challenging the district court's ruling as to T.R. as he is now 18 years old. Based on this, and as T.R. has attained the age of majority, we limit our discussion regarding T.R. to the extent it is relevant to the court's relocation and custody determination regarding A.R. and deem the appeal as to T.R. moot. *See Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015) ("A child custody determination, once made, controls the child's and the parents' lives until the child ages out . . . .").



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physical custody. The district court granted Trisha's motion and denied Joshua's countermotion in March 2020, and the parties were referred to Family Mediation Center (FMC) to design a holiday and vacation parenting time schedule for Joshua. Joshua elected not to participate in the mediation purportedly based on his attorney's advice that any potential agreement could be used against Joshua on appeal. A holiday and vacation schedule was nonetheless implemented, and Joshua appealed the relocation order. This court affirmed the district court's order granting Trisha's motion for relocation.[2]

On July 27, 2020, while the children were with Joshua in Nevada for the summer, Trevyn received reassignment orders to report to an Air Force base near San Antonio, Texas, by August 31, 2020. Trisha and Trevyn moved to Texas shortly thereafter. Trisha notified Joshua about her move via email on August 20, 2020, telling him that the children would be starting their online classes for their new schools in Texas in four days. Joshua expressed his disagreement with the relocation to Texas, and Trisha filed an emergency motion for a pickup order to retrieve the children from Joshua. The district court heard Trisha's emergency pickup motion in September 2020, but Joshua had apparently relented and returned the children to Trisha in Texas, which rendered the motion moot.

After the children moved to Texas, Trisha filed a motion to modify Joshua's parenting time and child support, arguing, among other things, that Nevada law did not require a second relocation motion. Joshua did not file an opposition, so the district court granted Trisha's motion and

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[2]*Rowberry v. Rowberry*, No. 81118-COA, 2021 WL 3701857 (Nev. Ct. App. Aug. 18, 2021) (Order of Affirmance).

issued a formal order modifying the parenting time schedule and increasing Joshua's child support obligation.

In December 2020, Joshua filed a motion for rehearing to set aside the district court's order granting Trisha's motion to modify parenting time and child support.[3] After the district court granted his motion, Joshua opposed Trisha's motion to modify and filed a countermotion seeking primary physical custody of the children in Nevada, modification of child support, and an award of attorney fees and costs. Trisha opposed the countermotion.

Notably, the district court directed Trisha to file a second motion for relocation at the March 2021 hearing on Trisha's motion to modify parenting time. Trisha challenged that order in the supreme court via a writ of mandamus, which this court denied in light of the supreme court's recent decision in *Pelkola v. Pelkola,* 137 Nev. 271, 487 P.3d 807 (2021) (determining that a second relocation motion is required when a parent desires to move from a location outside of Nevada). Trisha then filed a motion seeking permission to relocate from Arizona to Texas in July 2021. Joshua filed an opposition to Trisha's motion for relocation. The district court held an evidentiary hearing in May 2022 to hear Trisha's motion to relocate and Joshua's countermotion for modification of child custody.

During the May 2022 hearing, the district court heard testimony from Trisha, Joshua, and Trevyn—including testimony regarding alleged incidents of domestic violence that occurred in Texas involving Trisha, Trevyn, and T.R.—which were investigated by the Texas Department of

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[3]The original district court judge hearing this case retired at the end of 2020 and District Court Judge Nadin Cutter presided over all hearings, thereafter, including the rehearing motion.

Family and Protective Services (CPS), local law enforcement, and the United States Air Force.[4] Further, T.R. was interviewed by the Family Mediation Center (FMC) in Las Vegas where he presented his accounts of domestic violence in Trisha's Texas home and stated his preference to live with Joshua. The FMC's report of its interview with A.R. was also submitted to the district court, in which A.R. expressed a preference to live with her mother in Texas.

The district court asked Trisha and Joshua what they thought about having the children split up and their thoughts on the children expressing different preferences on where they wanted to live. Joshua responded that he had not considered splitting the children up. In response to what he thought about the children's divergent preferences, he stated his belief that T.R. wanted to live with him, and that A.R was too young to understand that her decisions now could change the outcome of her life. Trisha stated that she had observed changes in T.R. after his summer visit with Joshua, and that she believed that Joshua would often speak badly about her to the children, which soured her relationship with T.R. The following exhibits, among others, were admitted during the hearing: T.R.'s

[4]The investigation by CPS resulted in a finding of "unable to determine," meaning that there was "insufficient information to conclude whether the alleged abuse or neglect did or did not occur" as to the altercation between Trevyn and T.R. The Air Force also conducted its own internal review following the CPS investigation and concluded that the allegation of child physical maltreatment of T.R. by Trevyn did not meet the criteria for physical maltreatment. Local law enforcement did not file any charges either.

and A.R.'s report cards from schools in Las Vegas and Texas;[5] police and CPS reports related to the alleged domestic violence incident involving T.R., Trisha, and Trevyn; T.R.'s sealed interview with the FMC specialist from 11 months prior; and A.R.'s interview. The court, at the parties' request, allowed for closing briefs to be submitted rather than issue an oral decision at the hearing. The court also restricted counsel to cite only admitted exhibits. Finally, the district court directed counsel to simultaneously submit proposed findings and conclusions.

Following the hearing, the district court issued a 28-page final, post-hearing order that included findings of fact and conclusions of law, though this document did not contain the court's formal order.[6] Shortly thereafter, the district court issued a formal decision and order denying Trisha's motion to relocate to Texas. The final decision and order found, among other things, that Trisha "relocated from Arizona to Texas without permission" from Joshua or the court, which was a "violation of the [parenting time] orders" and effectively violated NRS 200.359. The final decision and order also excluded Trisha's evidence generated from the relocation from Arizona to Texas. The court's order further found that "it is in the best interest of the children for [Joshua] to have primary physical custody . . . notwithstanding that he would have primary physical custody anyway as [Trisha] failed to prevail on her request to relocate." Finally, the court found that Trisha "should have the same [parenting time] schedule she

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[5]Although the district court excluded evidence of the children's grades in Texas in the court's final order post-trial, the evidence was considered before and during the May 2022 hearing.

[6]Joshua submitted a draft of the final order to the district court. The court adopted Joshua's draft nearly in its entirety.

requested [Joshua] to have" in the November 2020 order. Trisha and Joshua continued to exercise joint legal custody of the children. Though Trisha was not ordered to pay child support, she was ordered to reimburse Joshua for child support overpayments of $95.51 per month from September 24, 2020, through July 15, 2022.

Trisha appealed from both the district court's final order containing the findings of fact and conclusions of law and the formal decision and order, arguing that the district court: (1) applied an illegal theory of child custody law when it changed custody based on Trisha's failure to prevail on her relocation request to move to Texas; (2) abused its discretion in excluding Trisha's evidence following relocation from Arizona to Texas; (3) abused its discretion in concluding that T.R. was the victim of domestic violence; and (4) made factual findings and legal conclusions unsupported by substantial evidence. Finally, she argues (5) that *Pelkola*'s application to subsequent relocations should be limited as to military service members' families who are forced to move when a reassignment order is given following an order granting an initial relocation. We address each issue in turn.

*Standard of Review*

Appellate courts "will not disturb the district court's 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 decision regarding relocation is also reviewed for abuse of discretion. *See Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). "An abuse of discretion occurs when a district court's decision is not supported by substantial evidence or is clearly erroneous." *Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). Further, this court "must also be satisfied that the district court's determination was made for appropriate reasons." *Rico v. Rodriguez*,

121 Nev. 695, 701, 120 P.3d 812, 816 (2005). Moreover, a district court's factual findings will be upheld so long as "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. An abuse of discretion also occurs when the district court disregards controlling law. *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

*The district court determination that Trisha violated NRS 200.359(5) was clearly erroneous*

Trisha argues that no Nevada law exists to support the district court's decision changing primary physical custody. She also contends that the district court incorrectly found that she unlawfully relocated the children under the criminal statute, NRS 200.359(5),[7] and then improperly excluded her post-relocation evidence. Trisha observes that Nevada law was unclear whether consent or a court order was needed for a secondary relocation from one out-of-state residence to another because the relocation statutes use language only about moving out of Nevada without mentioning subsequent relocations. Joshua responds that NRS 200.359(5) and NRS 125C.006(1)[8] require a parent seeking to relocate to obtain either the other parent's

[7]NRS 200.359(5) states: "A parent who has primary physical custody of a child pursuant to an order, judgment or decree of a court shall not relocate with the child pursuant to NRS 125C.006 without the written consent of the non-relocating parent or the permission of the court."

[8]NRS 125C.006(1) requires a parent with primary physical custody intending to relocate their residence to a place outside of Nevada and desiring to take a child with them to, before relocating, "(a) Attempt to obtain the written consent of the noncustodial parent to relocate with the child; and (b) If the noncustodial parent refuses to give that consent, petition the court for permission to relocate with the child."

written consent or the court's permission. We agree with Trisha that the district court misapplied NRS 200.359(5).

The district court's change of custody was based in part on its denial of Trisha's motion for relocation, which it necessarily analyzed first. NRS 125C.007(1) sets forth three threshold requirements that a relocating parent must demonstrate in order to obtain permission to relocate:

> "(a) there exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time; (b) the best interests of the child are served by allowing the relocating parent to relocate with the child; and (c) the child and the relocating parent will benefit from an actual advantage as a result of the relocation."

NRS 125C.007(1)(a)-(c).

The district court found that two of the three threshold requirements under NRS 125C.007 were in favor of denying Trisha's petition to relocate to Texas. These findings were that the children's best interests were not served by allowing Trisha to relocate with them to Texas, and that relocating to Texas would give the children neither any educational nor actual advantages. The district court incorporated its findings as to the best interest of the children from the portion of the order discussing Joshua's countermotion to modify physical custody. Therefore, we briefly address those findings here.

Notably, the district court applied NRS 200.359(5), the criminal statute regarding wrongful relocation, against Trisha for improperly relocating the children when she moved to Texas. Trisha, however, did not have physical custody of the children. When Trisha moved, the children were with Joshua in Las Vegas. Although Joshua was belatedly notified of her move to Texas, he had the opportunity to contest the children's move

when Trisha filed the emergency motion for a pickup order. Joshua initially intended to challenge that motion, but he apparently relented and let the children go to Texas, where they were subsequently enrolled in school. Thus, both Joshua and the district court were informed of Trisha's relocation to Texas before the children were actually relocated. Additionally, the district court had previously found—albeit inaccurately—in November 2020 that no permission was necessary for a secondary relocation.[9] Therefore, the findings regarding Trisha's violation of NRS 200.359(5) are clearly erroneous.[10]

*The district court abused its discretion when it excluded evidence pursuant to NRS 125C.0075(1)*

Trisha argues that the district court erred by excluding her evidence in support of her motion for relocation. Specifically, Trisha argues that the court should not have excluded the post-relocation evidence she presented regarding the children's education, grades, and extracurricular activities after moving to Texas. Joshua replies that the district court expressly found that Trisha did not comport with NRS 125C.006(1), and thus violated NRS 200.359(5), when she failed to obtain Joshua's or the court's permission before relocating to Texas; thus, NRS 125C.0075[11] made

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[9]The district court's order stated that it concurred "that a secondary relocation for substantial reasons after the first relocation out of the state of Nevada has been granted is permissible under Nevada law and by Nevada Supreme Court precedent."

[10]The district court also concluded that the exclusionary rule in NRS 125C.0075 applied because Trisha improperly relocated the children to Texas without permission, thus violating NRS 200.359, yet she relocated without the children.

[11]NRS 125C.0075(1) states that the "court shall not consider any post-relocation facts or circumstances regarding the welfare of the child or the

exclusion of any post-relocation facts or circumstances proper. Trisha argues in response that NRS 200.359(5) does not apply here because she had a "compelling excuse" for relocating the children. She also avers that NRS 125C.0075 applies only to criminal child abduction or kidnapping.

A district court's decision to exclude evidence is reviewed for abuse of discretion. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). An abuse of discretion occurs when a district court makes an obvious error of law. *See Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979).

Here, the district court concluded that because Trisha relocated the children to Texas without permission, in violation of NRS 200.359(5), NRS 125C.0075(1)'s evidentiary exclusion applied. As previously explained, Trisha did not violate the criminal statute because the children were with Joshua when she relocated. The children moved to Texas only after notice to Joshua and when he relinquished physical custody. Further, the district court granted implicit permission for the relocation. Because Trisha did not violate NRS 200.359(5), we conclude that the district court erroneously excluded this evidence.

*The district court improperly analyzed the evidence when comparing the children's living situation in Texas to Nevada*

The district court's findings of fact and conclusions of law indicate that it would have reached the same conclusion even if it had admitted and considered the post-relocation evidence. Problematically, however, the district court engaged only in a review of the grades in Texas compared to those in Nevada but failed to compare the grades in Arizona to

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relocating parent in making any determination" if a parent with primary physical custody relocates in violation of NRS 200.359.

the grades in Texas or any other advantage that would be attained by relocation. Of course, this case is different than most relocation cases because the children had already relocated before the final hearing was held. In most cases the district court will be evaluating the advantages as viewed between relocating from the second state to the third state and applying any pertinent findings made in the original relocation order.

Here, in 2020, the district court evaluated the educational advantages in moving from Nevada to Arizona and found that evidence favored relocation. We recited some of the district court's findings in our 2021 order of affirmance and concluded that the court did not abuse its discretion. Yet, the new district court judge revisited, and seemingly rejected, some of the 2020 findings. This was improper.[12] *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same" and "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." (internal quotation marks omitted)).

In *Pelkola*, the supreme court held that "NRS 125C.006(1)(b) applies not only to relocation from Nevada to a place outside of Nevada, but

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[12]We note that the district court's findings that the children's grades were not shown to improve while in Texas, and that they would have no educational advantages in Texas, do not appear to be supported by substantial evidence. Although Trisha presented limited evidence, the evidence suggested the children were performing well and thriving in their Texas schools. In contrast, the evidence at the 2020 relocation hearing and subsequent findings about the children's performance in the Las Vegas schools suggested the children were struggling in Nevada and Joshua was not involved in nurturing their academic progress.

also from *a place outside* of Nevada to *another* place outside of Nevada." *Pelkola*, 137 Nev. at 275, 487 P.3d at 811 (emphasis in original). The court in *Pelkola* did not address the type of evidence a court may consider when evaluating a second relocation. We conclude that under *Hall*, the findings from the first hearing must not be relitigated. Because it is unclear whether the district court would have reached the same conclusion if it had examined only the current and applicable evidence and not reweighed the school related evidence that was admitted at the first relocation hearing, we reverse and remand for a new hearing as to A.R.'s custody. This conclusion is further supported by the district court's improper application of the criminal statute and exclusionary rule in its relocation decision, as well as its failure to analyze whether the move from Arizona to Texas would benefit A.R. by keeping the family together because Trevyn was forced to move to Texas while Trisha could have remained in Arizona with children. *See In re Guardianship of B.A.A.R.*, 136 Nev. 494, 500, 474 P.3d 838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it applied the correct [legal] standard . . . , we must reverse the district court's decision and remand for further proceedings.").[13]

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[13]As for Trisha's argument that she had a compelling excuse for an illegal relocation to Texas, the issue is moot based on our conclusion that the criminal statute should not have been applied in these circumstances. Nevertheless, we note that Trevyn's military reassignment order was received just four months after Trisha's motion to relocate to Arizona was granted, it was received on short notice, and there was no option for Trevyn to object to the reassignment.

*The district court's findings of fact and conclusions of law are not supported by substantial evidence as to A.R.*

Trisha argues that the district court's final post-hearing order contains many false statements and conclusory findings and therefore lacks substantial evidence. She specifically challenges the following four findings: (1) that she is not likely to comply with visitation orders; (2) that she refused to file a relocation motion; (3) that she violated NRS 200.359(5); and (4) that Joshua did not refuse to consent to Trisha's relocation to Texas in an attempt to harass Trisha or gain a financial advantage. Joshua responds that the district court's findings are supported by substantial evidence, and that Trisha failed to make a complete appellate record because she did not include T.R.'s second child interview and did not include all of Joshua's exhibits, all of which should be construed to support the district court's decision. We agree with Trisha in part.

A district court's factual findings will be upheld so long as "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. A district court abuses its discretion when it makes a factual finding not supported by substantial evidence. *See Real Estate Div. v. Jones*, 98 Nev. 260, 264, 645 P.2d 1371, 1373 (1982). An abuse of discretion can also occur when a district court makes an obvious error of law or when its decision is clearly erroneous. *See Bautista*, 134 Nev. at 336, 419 P.3d at 159; *Franklin*, 95 Nev. 559, 598 P.2d 1147.

Trisha's challenges to three of the district court's findings are persuasive because the findings are not supported by substantial evidence. First, Trisha challenges the district court's finding under NRS

125C.007(2)(c)[14] that she would not comply with any substitute visitation orders issued by the court. The district court based this finding on its determination that Trisha relocated illegally to Texas without the court's permission, refused to give Joshua parenting time during Father's Day 2020, and violated court orders for Joshua's telephonic parenting time with the children. Trisha argues that Joshua admitted during the May 2022 hearing that he had plenty of time to speak with the children.

As previously explained, Trisha never relocated illegally with the children—she moved there while the children were physically with Joshua. Moreover, the findings relied upon to reach the conclusion about Trisha's alleged interference with Joshua's Father's Day parenting time were shown, at worst, to be only isolated incidents that were later resolved. There is no allegation in the record that Trisha failed to substantially comply with parenting time orders from 2020 to 2022. As a result, we conclude that the district court's finding is not supported by substantial evidence in the record.

Second, Trisha argues that the district court's finding that she refused to file a relocation motion is also not supported by substantial evidence. Joshua contends that the district court ordered Trisha to file a relocation motion several times, and that she continually delayed filing it. However, Trisha's April 2021 supreme court writ petition clearly demonstrates that she reasonably believed that she was not legally obligated to file a second relocation motion. Trisha seemingly relied on the district court's November 2020 order granting her motion to modify parenting time,

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[14]The factor evaluated under NRS 125C.007(2)(c) asks "[w]hether the relocating parent will comply with any substitute visitation orders issued by the court if permission to relocate is granted."

which suggested that a second relocation—without the court's permission—was permissible after a first relocation had already been granted. Importantly, Trisha filed the motion to relocate within six weeks of the publication of the *Pelkola* opinion. Thus, we conclude that the district court's finding is clearly erroneous because it is not supported by the record.

Third, the district court's finding that Trisha violated criminal statute NRS 200.359(5) is also not supported by the record, as previously explained. Though Joshua equates Trisha's violation of NRS 125C.006(1) as an effective violation of NRS 200.359(5), his argument is undermined by the district court's finding that Trisha's relocation to Texas did not constitute a criminal act under the "abduction" best interest factor. *See* NRS 125C.0035(4)(l).[15]

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[15]Examples of the district court's other erroneous findings include:

(1) an alternative visitation schedule between Las Vegas and Texas could not be fashioned when direct flights exist between San Antonio and Las Vegas. *See generally* NRS 125C.007(2)(e);

(2) that the ability of the child to maintain a relationship with any sibling factor was neutral when Joshua has no other children and Trisha had two minor children in addition to T.R. and A.R. *See* NRS 125C.0035(4)(i);

(3) that NRS 125C.0035(4)(l) favored Joshua (whether a parent seeking physical custody "has committed any act of abduction against the child or any other child"). Here, Trisha was not seeking custody as she already had it. Further, the district court found that no abduction occurred, yet still concluded that this factor favored Joshua;

(4) that acts of alleged abuse or domestic violence by Trevyn were grounds to award Joshua primary custody. *See* NRS 125C.0035(4)(j) and (k). The district court applied the statutory subsections to acts by

To the extent Trisha challenges the district court's finding, under NRS 125C.007(2)(d),[16] that Joshua's refusal to consent to a relocation was not meant to harass Trisha or gain a financial advantage, Trisha's challenge is unpersuasive. Specifically, the court's finding is supported by substantial evidence and Joshua was not seeking child support. Trisha's argument that Joshua should not have been filing serial motions requesting custody after he lost during the parties' litigation in 2020 has some appeal, but it is not properly developed. We conclude that Joshua's later refusal to consent to relocation and subsequent countermotion for physical custody was not baseless and it was substantially strengthened by allegations of

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Trevyn when the plain language states it applies to parents, not step-parents; and

(5) that Trisha's parenting time should be the same as she proposed for Joshua. *See* NRS 125C.007(2)(e) ("Whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship between the child and the non-relocating parent."). The district court did not attempt to address this statute regarding the parental relationship when it changed custody and awarded primary physical custody to Joshua. Nor did it consider A.R.'s best interest when setting Trisha's parenting time schedule. Instead, the court appeared to retaliate against Trisha by imposing a schedule she proposed for Joshua but that was never adopted because the rehearing was granted regarding the November 2020 order. Further, Joshua had refused to participate in mediation to set his original schedule. Therefore, his actions should not be imputed to Trisha, who was never given an opportunity for mediation, and she had been the parent with primary physical custody of both children since 2012, had a close relationship with A.R., and Joshua had never been the primary custodian.

[16]The factor evaluated under NRS 125C.007(2)(d) is "[w]hether the motives of the non-relocating parent are honorable in resisting the petition for permission to relocate or to what extent any opposition to the petition for permission to relocate is intended to secure a financial advantage in the form of ongoing support obligations or otherwise."

domestic violence involving T.R. and T.R.'s later stated custody preference to live with Joshua. Finally, any financial benefit to Joshua from the district court's change of custody was merely the result of the court's award of primary physical custody; thus, the district court could reasonably conclude that Joshua was not seeking to intentionally benefit financially in opposing the relocation.

*The district court's findings as to A.R.'s custodial preference were erroneous*

The district court's findings regarding A.R.'s custody preference, as well as the court's decision to evaluate the children's living situations concurrently, were clearly erroneous and not supported by substantial evidence. The court improperly conflated T.R.'s situation with A.R.'s and combined many of its findings, even though T.R.'s situation differed from A.R.'s in material respects. We discuss these findings in detail because they will need to be considered again on remand.

In discussing the "wishes of the child" factor under NRS 125C.0035(4)(a) ("The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody"), the district court's findings were unduly harsh and arbitrary. At the time A.R. was interviewed by the FMC in January 2022, she was nearly 13 and one-half years old, but the court found her not of sufficient age and capacity to form an intelligent preference and disregarded her preference to stay in Texas and live with Trisha. In its final order, the court stated that A.R. "expressed a desire to continue residing in Texas" and that she stated she liked her school and the weather in Texas. A.R. further rated her relationship with Trisha as a 9 or 10 on a scale of 1 through 10.

However, the district court inexplicably determined that A.R.'s age and maturity were not sufficient to merit consideration of her wishes. The court based this conclusion on A.R.'s responses when asked what she

would wish for if she could have three wishes. When asked this question, A.R. responded that she wished to stop having migraines and for superpowers to read minds. The court concluded that her responses demonstrated she lacked sufficient age and capacity to form an intelligent custody preference. The court labeled her responses immature without probing into why A.R. was having migraines or attempting to understand why A.R. would want to know what people were thinking. A.R. also stated she liked the weather and her school in Texas, which drew comment in the court's order as insufficient bases for a relocation because the reasons had nothing to do with the parents. However, A.R. also stated that she and her mother would always spend time together, talk, go to the store, watch television, and that she would not change anything about her mother. Despite this evidence, the district court's order was dismissive of A.R. for not giving information that pertained to a relocation.

The district court incorrectly applied the legal standard in its analysis of A.R.'s wishes under NRS 125C.0035(4)(a). The best interest statute requires the court to consider the wishes of the child as to custody if the child is of sufficient age and maturity. The child is not required to articulate and justify the basis for relocation under NRS 125C.007 but only express his or her wishes. A child can testify by alternative means, as A.R. did, through the FMC interview. *See* NRS 50.015 (stating that every person is competent to be a witness unless provided otherwise); NRS 50.530 (defining a "child witness" as a child under 14 that has been or will be called as a witness); NRCP 16.215(b)(3) (stating a "third-party outsourced provider" interviews "a child outside the presence of the court for the purpose of eliciting information from the child for the court"). The district court's findings were insufficient to justify excluding consideration of A.R.'s wishes. *See* NRCP 16.215(a) ("The court must use these procedures and

considerations in child custody proceedings . . . . [T]he court should find a balance between protecting the child, the statutory duty to consider the wishes of the child, and the probative value of the child's input . . . .").

Additionally, the district court improperly combined its analysis as to both children when discussing the relocation factors under NRS 125C.007(1)(b)-(c) because A.R.'s interests were different than T.R.'s. A.R. was nearing age 14 at the time of the court's evidentiary hearing and is now 15, and there was no allegation of domestic violence directly affecting A.R. as there was with T.R. *Cf.* NRS 125C.0035(4)(a). Finally, we conclude that the district court erred when it found that under NRS 125C.0035(4)(h) (the nature of the relationship of the child with each parent), that T.R.'s and A.R.'s relationships with each parent were different, and A.R. had a closer relationship with Trisha than Joshua, yet the court still found this factor favored Joshua without making individualized findings. Due to these errors, and the other errors previously explained, we reverse and remand for a determination regarding Trisha's motion to relocate with A.R. and Joshua's countermotion for primary custody, consistent with this order.[17]

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[17]Regarding the district court's finding that domestic violence occurred, we note that NRS 125C.0035(5) creates a domestic violence rebuttable presumption and requires "a determination by the court after an evidentiary hearing and finding by clear and convincing evidence." NRS 125C.0035(5). Here, though, the district court's order only specifically refers to NRS 125C.0035(4)(j) and (k), not NRS 125C.0035(5). Thus, no rebuttable presumption was applied against Trisha. The district court merely found that domestic violence occurred in Trisha's household based on the FMC interviews where T.R. reported potential domestic violence between Trisha and Trevyn and an instance of domestic violence between T.R. and Trevyn and used the findings, although partially erroneous as previously explained, in its overall best interest determination. Nevertheless, although there was substantial evidence supporting the district court's overall finding, we note that the court only made summary findings about domestic violence. For

*Pelkola will remain undisturbed as applied to subsequent relocations*

Trisha lastly argues that *Pelkola* unfairly burdens military families because reassignment orders are unavoidable and that she lost custody only because she had to suddenly move to Texas with her spouse and other minor children. Joshua responds that Trisha's argument is unsupported because her sudden move to Texas was not the reason why the district court denied relocation. Rather, Joshua argues that it was due to Trisha's failure to meet the required threshold factors for relocation, as well as Joshua winning primary physical custody, that the district court denied relocation. Joshua also states that Trisha's argument that *Pelkola* burdens military families is unsupported, and that Trisha is asking this court to determine custody of the children based on a non-parent's interest. Finally, Joshua responds that any of Trisha's issues with *Pelkola* could have been solved by a motion for relocation before moving to Texas and, if needed, an order shortening time so that a temporary relocation order could have been granted. *See* NRS 125C.007(2)(f) (stating that a court may consider "[a]ny other factor necessary to assist the court in determining whether to grant permission to relocate").

We decline to limit the decision in *Pelkola* because this court is bound by the Nevada Supreme Court's interpretation and holding. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis "applies a fortiori to enjoin lower courts to follow the decision of a higher court"); *People v. Solorzano*, 63 Cal. Rptr.

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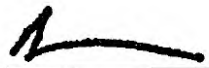
example, it never determined if Trevyn used physical force to restrain T.R. in order to defend other members of the household. We also note that while any finding of domestic violence is important, it is of lesser impact as to A.R.'s custody because she was not involved in any alleged domestic violence, nor did she report witnessing any.

3d 659, 664 (Ct. App. 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of [the California Supreme Court]."). Though we sympathize with the circumstances leading to Trisha's relocation to Texas, *Pelkola* is a recent decision that clarified NRS 125C.006's meaning. The supreme court concluded that the statute's plain language requires a relocating parent to obtain permission from the other parent or the court before moving from a place outside of Nevada to some other place outside of Nevada, and that is the law. *Pelkola*, 137 Nev. at 273, 487 P.3d at 810. Any change for military families will have come from the Nevada Legislature, Congress, the United States Supreme Court, or the Nevada Supreme Court.

Accordingly, we

ORDER the judgment of the district court REVERSED and REMANDED.[18]

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Nadin Cutter, District Judge, Family Division
Robert W. Lueck, Ltd.
Law Offices of F. Peter James, Esq.
Eighth District Court Clerk

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[18]Insofar as the parties have raised 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.