

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MIREILLE MAROIS,
Appellant,
vs.
ALGERNON WHITE,
Respondent.

No. 85054-COA

FILED

AUG 30 2023

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

ORDER AFFIRMING IN PART AND DISMISSING APPEAL IN PART

Mireille Marois appeals from a post-judgment order in a child custody matter. Eighth Judicial District Court, Family Division, Clark County; Bryce C. Duckworth, Judge.

Following a child custody trial, Marois and respondent Algernon White were ordered to share joint physical and legal custody of their minor child, S.W., on a 4/3 timeshare, with Marois having custody 57 percent of the time and White having custody 43 percent of the time. Although White had requested in his pre-trial memorandum that the district court equally allocate the child dependency tax exemption (child tax credit), the court resolved the custody dispute without addressing White's request. Following entry of the custody order, White filed a post-judgment motion for equal division of the child tax credit and requested that he receive the credit in alternating years. Marois filed an opposition and countermotion for attorney fees.

After briefing, the district court indicated at the motion hearing that it was inclined to grant White's request to alternate the child tax credit. Marois requested an evidentiary hearing, and the district court granted Marois' request and allowed discovery. At the time set for the hearing, however, Marois objected to the proceedings and argued the court was without jurisdiction to take evidence or allocate the child tax credit. Noting that it was Marois who had requested the evidentiary hearing, the court acknowledged Marois' objection but proceeded with the hearing, and both parents testified as to their financial contributions to S.W. Following the evidentiary hearing, the district court entered an order that granted White's request to alternate the tax credit between he and Marois every other year and ordered Marois to execute an IRS waiver that would allow White to claim the credit. The order also concluded White was entitled to an award of attorney fees under NRS 18.010 and EDCR 7.60 and requested that White submit a proposed order "leaving a blank as to the amount to be determined by the [c]ourt." This appeal followed.

On appeal, Marois challenges the district court's order allocating the child tax credit to White every other year. She contends the district court was without jurisdiction to divest her of her federal tax rights. In the alternative, she argues that even if the court had jurisdiction, the district court abused its discretion when it allocated the child tax credit without considering the applicable presumptions or burdens and when it

failed to make the “requisite” factual findings. Marois lastly challenges the award of attorney fees under both NRS 18.010 and EDCR 7.60.

A district court’s order allocating the child tax credit is reviewed for an abuse of discretion. *Sertic v. Sertic*, 111 Nev. 1192, 1197, 901 P.2d 148, 151 (1995) (concluding that the district court “should have broad discretion” over allocating the child tax credit).

Marois first argues that the district court was without jurisdiction to award the child tax credit to White. She claims that because she is S.W.’s “custodial” parent, as defined under federal law, the district court lacked authority to allocate the child tax credit because the federal definition of a primary custodian preempts Nevada’s definition of a joint custodian.¹

Under 26 U.S.C. § 152(e)(4)(A), when a dependent child’s parents are divorced or separated, the child’s custodial parent is defined as “the parent having custody for the greater portion of the calendar year.”² However, while the custodial parent is *generally* entitled to claim the child

¹In Nevada, a joint custodian is generally a parent that has physical custody of the child for at least 40 percent of the time, or at least 146 days per year. *See Rivero v. Rivero*, 125 Nev. 410, 427, 216 P.3d 213, 225 (2009), *overruled on other grounds by Romano v. Romano*, 128 Nev. 1, 4, 501 P.3d 980, 982 (2022).

²The district court acknowledged, and the parties do not dispute, that even under their joint custodial arrangement, Marois had physical custody of S.W. for the majority of the calendar year and is thus the “custodial” parent under federal law.

tax credit, 26 U.S.C. § 152(e)(2) contains an express exception that permits the custodial parent to execute a waiver that allows the noncustodial parent to claim the child tax credit. *See also, Sertic*, 111 Nev. at 1197, 901 P.2d at 151 (“Although [§ 152] directs that the custodial parent should receive the exemption, it provides several exceptions to this rule. One exception is that the custodial parent may waive the right to the exemption for any given year.”).

In *Sertic*, the district court ordered the parents to share joint custody of their minor child but also ordered the child’s mother, the federally-defined custodial parent, to execute the IRS waiver form that permitted the father to claim the federal tax credit in alternating years. *Id.* at 1196, 901 P.2d at 151. On appeal, the mother “raised the issue of whether the district court erred by not giving her the child [tax credit] for federal tax purposes each year.” *Id.* The Nevada Supreme Court held that the district court did not err because federal tax law expressly provided for the waiver exception, and where the Sertics shared joint custody of their minor child, the district court has “broad discretion” over the child tax credit. *Id.* at 1197, 901 P.2d at 151. The court also concluded that ordering the custodial parent to execute the necessary documentation was not overly burdensome because the “custodial parent must execute the release only one time. Thereafter, the burden is on the noncustodial parent to attach the release to his return on each alternate year that he is eligible to claim the exemption.” *Id.*

In this case, Marois' contention that the district court lacked jurisdiction is directly at odds with *Sertic*. The court's order is virtually identical to the district court's decision approved in *Sertic*—namely, Marois and White share joint custody under Nevada law, and the district court ordered Marois, the federally-defined custodial parent, to execute the waiver that permits White, the federally-defined noncustodial parent, to claim the child tax credit for S.W. on alternating years. Marois attempts to distinguish *Sertic* by arguing that *Sertic* only addresses the district court's authority to order parties to execute documents, but is otherwise silent on jurisdiction. This argument is unpersuasive, as the Nevada Supreme Court could not conclude that allocating the child tax credit is within the district court's discretion if the district court is without jurisdiction to do so. See *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev 1430, 1435, 148 P.3d 710, 714 (2006) (“An abuse of discretion occurs if the district court's decision . . . exceeds the bounds of law or reason.”). In asserting that the district court is without jurisdiction to allocate the child tax credit, Marois is seeking to overrule binding Nevada Supreme Court precedent, which this court cannot do. 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”).

Marois argues in the alternative that if the district court did have jurisdiction to allocate the child tax credit, the district court still abused its discretion when it failed to consider applicable presumptions and

burdens to “dispossess” her of her federal tax rights. She also contends the district court failed to make “requisite” factual findings. In support of her argument, Marois cites to numerous extrajurisdictional authorities from other states that impose some or all of these requirements.

However, Marois’ contentions are again contrary to *Sertic*. *Sertic* held that allocation of the child tax credit is within the district court’s broad discretion, and it did not establish any presumptions, impose specific burdens, or require particular findings of fact. 111 Nev. at 1197, 901 P.2d at 151; *cf.* NRS 125C.0035(4) (requiring the district court to set forth “specific findings concerning” the best interest factors). While Marois cites to numerous persuasive authorities, the district court cannot abuse its discretion by failing to follow such nonbinding authorities when there are no comparable requirements under Nevada law. *Skender*, 122 Nev. at 1435, 148 P.3d at 714; *see also Persuasive Authority, Black’s Law Dictionary* (11th ed. 2019) (“Authority that carries some weight but is not binding on a court, often from a court in a different jurisdiction.”). Therefore, we conclude that the district court did not abuse its discretion when it ordered Marois to execute the appropriate IRS waiver that permits White to claim the child tax credit on alternating years and we affirm that determination.

Finally, with respect to Marois’ argument that the district court erred in granting White attorney fees and costs, we note that the district court has not yet entered any such award. Rather, the order requested White to submit a memorandum of fees and costs as well as a proposed order

with a “blank” for the court to fill in the appropriate amounts. Thus, to the extent Marois is challenging the award, her attempt to appeal that determination is premature. *See Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006) (“An order awarding attorney fees and costs is substantively appealable as a special order after final judgment.”); *see also Holmes v. Holmes*, No. 80565-COA, 2020 WL 815796 (Nev. Ct. App. Feb. 18, 2020) (Order Dismissing Appeal) (“To the extent appellant challenges the award of attorney fees and costs, the appeal is premature because the district court has directed the parties to submit [a] memoranda of costs.”). Therefore, this court lacks jurisdiction to consider her claim and we dismiss her appeal as to the attorney fees and costs challenge. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND DISMISS the appeal in part.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

³Insofar as the parties raise 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. Bryce C. Duckworth, District Judge, Family Division
Lansford W. Levitt, Settlement Judge
Hofland & Tomsheck
Kurt K. Harris, Esq., P.C.
Eighth District Court Clerk