IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY TODD ASKEW,
Appellant,
vs.
MONIKA ASKEW,
Respondent.

No. 84315-COA

ORDER OF AFFIRMANCE

Troy Todd Askew appeals from a decree of divorce involving child custody. Eighth Judicial District Court, Family Division, Clark County; Stacy Michelle Rocheleau, Judge.

Troy and Monika Askew were married in December 2006 and have one child, I.A., born in June 2009. Throughout the marriage, Troy was employed as a firefighter and had both a PERS retirement account and a deferred compensation account. Monika was a professional photographer with her own photography business, but following I.A.'s birth, the parties agreed that Monika would limit her time working to stay at home full time with I.A.

In March 2020, there was a domestic violence incident wherein Monika slapped Troy and Troy hit her in return. I.A. was present during this altercation. Monika was arrested for domestic violence, and the next day, Troy obtained a temporary protective order against her. At a subsequent hearing to determine whether the protective order would be extended, the parties stipulated to dissolve the protective order and were

granted temporary joint custody of I.A., with Troy having custody for four days per week and Monika for three days.

On March 25, 2020, Monika filed a complaint for divorce and requested the court issue a Joint Preliminary Injunction (JPI) regarding the parties' assets. In his answer and counterclaim, Troy requested that the district court "jointly restrain the parties" according to the terms of the JPI that was issued. In August 2020, the family court formally ordered temporary joint legal and physical custody consistent with the existing 4/3 timeshare and ordered Troy to pay temporary child and spousal support based on need.

In September 2020, Troy discontinued his deferred compensation plan. He withdrew the balance of $98,672 and deposited it into a separate account. He then wired $65,000 to his mother, later claiming that $35,000 was to repay her for a loan and the other $30,000 was for his mother "to hold for him."

That same month, I.A. was hospitalized after disclosing suicidal ideations. She told first responders that she was having problems due to the divorce and that her mother had hit her four months ago. When I.A. was later transferred to a treatment facility, she told medical providers that her mother had hit her one year ago. In her discovery responses disclosed during the divorce proceedings, Monika admitted that she once used a hanger to "swat" I.A. for not listening.

Following I.A.'s release from the hospital, Troy filed for another protective order, this time on I.A.'s behalf. Upon receiving the temporary protective order, Troy was granted sole physical custody of I.A. However,

at the later extension hearing, the district court noted that the application contained no new or recent allegations of violence and only cited the prior hanger incident. As a result, the protective order was not extended, and the parties reverted back to the previous 4/3 joint custody timeshare.

Trial was held over five days from August 2021 to January 2022. The divorce decree was filed in February 2022. By the time the decree was entered, Troy owed $10,706 in arrears for child and spousal support.

The decree ordered the parties to share joint legal and physical custody of I.A. The district court found that the presumption in favor of joint custody under NRS 125C.0025(1)(b) had been established because both parties demonstrated an intent to establish a meaningful relationship with I.A. However, the court also determined that the domestic violence presumption against joint physical custody under NRS 125C.003(1)(c) applied against Monika. The district court found, by clear and convincing evidence, that both parties engaged in an act of domestic violence against each other in the March 2020 incident, but Monika was the primary physical aggressor.

The district court then noted that the presumption under NRS 125C.003(1)(c) is rebuttable, and as part of its rebuttal analysis, the court analyzed the best interest factors set forth in NRS 125C.0035(4)[1] and found

---

[1]These non-exhaustive best interest factors include:

> (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.

that factors (c), (d), and (e) favored Monika, factors (a), (f), (h), and (j) favored Troy, and factors (b), (g), (i), (k), and (l) were neutral or inapplicable. Notably, as to factor (j), which favored Troy, the district court found that there "was evidence of corporal punishment by Monika when she hit [I.A.]

> (b) Any nomination of a guardian for the child by a parent.
>
> (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
>
> (d) The level of conflict between the parents.
>
> (e) The ability of the parents to cooperate to meet the needs of the child.
>
> (f) The mental and physical health of the parents.
>
> (g) The physical, developmental and emotional needs of the child.
>
> (h) The nature of the relationship of the child with each parent.
>
> (i) The ability of the child to maintain a relationship with any sibling.
>
> (j) Any history of parental abuse or neglect of the child or a sibling of the child.
>
> (k) Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
>
> (l) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.

NRS 125C.0035(4).

with a hanger, but this was approximately 2 years ago, and there have been no incidents reported since . . . . The court finds the hanger incident, although an isolated incident, rises to the level of abuse." However, the district court also emphasized that factor (d), regarding the level of conflict between the parents, favored Monika because of Troy's numerous attempts to obtain primary physical custody despite the court's joint custody order, including his second application for a protective order on I.A.'s behalf which contained no new allegations of domestic violence since the first TPO was dissolved by stipulation.

The district court also found that Monika needed to develop techniques to manage her anger, but there was little likelihood of future injury. Thereafter, the court concluded that "the domestic violence presumption has been rebutted, and the court can make custody arrangements and exchanges that will adequately protect both the minor child and the parties, and that it is in the child's best interest that the parties have joint physical custody." The district court ordered that the parties have rotating custody of I.A. so that she spent three days with Monika followed by three days with Troy.

With regard to the parties' assets and debts, the district court found that Troy's withdrawal from his deferred compensation account "was a misappropriation of community assets made in an attempt to deprive Monika of these funds, and provides a compelling reason for an unequal disposition of community property." The court also found that the withdrawal violated the JPI which, "although not properly served on Troy, . . . was acknowledged by him and he requested to be bound by it in

his Answer and Counterclaim." Troy was awarded his pre-marriage balance from the account as his separate property, and the court determined the remaining community share, had it not been dissipated, would have been $51,007. Monika was awarded half of this amount, or $25,504. The district court further ordered that Troy would be solely responsible for a $35,000 credit card debt because "all charges were made by Troy" after the complaint for divorce. Further, the court determined that Troy improperly encumbered the community with debt by failing to pay the credit card balance each month.

However, while the district court determined that there were compelling reasons to unequally distribute the parties' property, the court ultimately divided their community property equally. Monika was awarded approximately $100,000 more than Troy, but she was also ordered to pay Troy an offset of $50,010 to equalize the distribution. Lastly, the court awarded Monika alimony of $800 per month for 72 months. Troy timely appealed.

On appeal, Troy raises three issues. He contends that the district court abused its discretion by (1) awarding the parties joint physical custody; (2) finding a "compelling reason" to make an unequal distribution of community property; and (3) awarding Monika alimony.

The district court did not abuse its discretion in awarding the parties joint physical custody of I.A.

District courts have broad discretion to determine child custody cases and we review the district court's determinations for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007).

Thus, we will not disturb the district court's factual findings if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment. *Id.* at 149, 161 P.3d at 242. Pursuant to NRS 125C.0035(1), the best interest of the child is the *sole* consideration of the court in determining physical custody issues. On appeal, we presume the district court properly exercised its discretion in determining the best interest of the child. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

Additionally, although the Nevada Legislature has indicated a preference for an award of joint physical custody in some cases, *see* NRS 125C.0025(1)(b), the converse is true if the district court finds by clear and convincing evidence that either parent has committed one or more acts of domestic violence against the child or the other parent, NRS 125C.003(1)(c). In that case, there is a rebuttable presumption that joint custody of the child by the perpetrator of domestic violence is not in the child's best interest. Should a district court find the presumption against joint custody in NRS 125C.003(1)(c) applies, it must set forth findings of fact supporting its determination that an act of domestic violence occurred, and that the custody order adequately protects the child and parent. NRS 125C.0035(5). Notably, pursuant to NRS 125C.0035(10)(b), "domestic violence" is defined as "any act described in NRS 33.018."

In this case, the district court found the presumption against joint custody due to domestic violence in NRS 125C.003(1)(c) applied. The court first found that both Monika and Troy had committed acts of domestic violence against each other in March 2020 by clear and convincing evidence,

but then determined that Monika was the primary aggressor. As a result, the district court applied the presumption in NRS 125C.003(1)(c) against Monika. But after assessing I.A.'s best interest under the factors set forth in NRS 125C.0035(4), the court determined the presumption was rebutted and that joint custody was in I.A.'s best interest. Troy challenges the district court's decision to award the parties joint physical custody of I.A. under these circumstances. Specifically, Troy contends that the district court ignored Monika's act of domestic violence against I.A. in its analysis of the best interest factors, and thus the court erroneously found that the presumption had been rebutted.

Here, the district court did not consider Monika's admission that she used a hanger to "swat" I.A. as a separate act of domestic violence. The district court found by clear and convincing evidence that Monika committed an act of domestic violence against Troy, but did not address whether the hanger incident also qualified as a separate act of domestic violence against I.A. The district court specifically found that the hanger incident "rises to the level of abuse" against I.A. in its best interest analysis, and the incident was established by clear and convincing evidence based on Monika's admission to the incident in her discovery responses. While the district court considered the hanger incident in making its physical custody determination, the court did not reference this as a separate act of domestic violence for purposes of the presumption against joint custody. This was potentially an error. *See Hayes v. Gallacher*, 115 Nev. 1, 7, 972 P.2d 1138, 1141-42 (1999) (reversing and remanding because it "[did] not appear that

the district court gave any consideration to the issue of domestic violence" when it ordered a change in custody).

However, in this case, we conclude that any potential error was harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that "[a]n error is harmless when it does not affect a party's substantial rights" and harmless error does not warrant a reversal); *cf.* NRCP 61. Per NRS 125C.0035(5), the court still applied the presumption against Monika due to her act of domestic violence against Troy, notwithstanding its failure to make specific findings whether the hanger incident was a distinct act of domestic violence. Unlike in *Hayes*, where the district court did not give "any consideration" to the domestic violence issue, 115 Nev. at 7, 972 P.2d at 1141, here the district court considered the hanger incident and made specific related findings when evaluating the best interest factors. Notably, the district court found that the hanger incident was isolated, remote in time, and that there have been no further reported incidents of abuse. In addition, the district court found that the joint custody arrangement would adequately protect *both* Troy and I.A. Thus, the divorce decree reflects that the hanger incident was still considered as part of the presumption's rebuttal analysis, which is decided based on the totality of the evidence. *See Castle v. Simmons*, 120 Nev. 98, 102-03, 86 P.3d 1042, 1045-46 (2004) (explaining that the district court analyzes NRS 125C.0035(5)'s rebuttable presumption based on a totality of the evidence).

Therefore, while the court failed to use the exact language required in NRS 125C.0035(5) in discussing the hanger incident, under

these circumstances, reversal is not warranted. *See Alvarado v. Alvarado*, No. 62794-COA, 2015 WL 6830758, at *2 (Nev. App. Nov. 5, 2015) (Order of Affirmance) (concluding that although the "district court erred in failing to use the exact language . . . that the custody order 'adequately protects the child and the parent,'" the error was harmless because "the court still properly considered the best interest of the children and made several findings pursuant to [statute] in favor of granting [the mother] primary physical custody").

Troy further argues that the district court's best interest analysis "minimized" Monika's acts of domestic violence and was "against the overwhelming evidence," but this court does not reweigh evidence or credibility on appeal. *See Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010) (explaining that under an abuse of discretion standard, "we will not substitute our judgment for that of the district court"). Here, the district court made detailed findings as to the best interest factors pursuant to NRS 125C.0035(4). Although Troy challenges the findings regarding nearly all of the best interest factors—including those that favored him—the court's best interest analysis is supported by substantial evidence in the record. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. And contrary to Troy's assertions, the district court expressly considered the hanger incident, and found that factor (j), regarding parental abuse or neglect, favored Troy. Nonetheless, after weighing the remaining factors, the district court ultimately found that an award of joint physical custody was in I.A.'s best interest. *Id.* Therefore, the district court did not abuse its discretion in awarding the parties joint physical custody.

The district court did not abuse its discretion when it disposed of the parties' community property

Next, Troy argues the district court abused its discretion when it unequally divided the community property. Specifically, he argues that his deferred compensation withdrawal was improperly used to punish him. Troy also contends that the court erroneously found a compelling reason to unequally distribute the property on the basis that he violated the JPI, even though he was not served with that injunction and therefore was not bound by it.

A district court must make an equal disposition of community property in a divorce unless there is a "compelling reason" to make an unequal disposition. NRS 125.150(1)(b). Financial misconduct or dissipation can constitute a compelling reason for an unequal disposition of community property. *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) ("[I]f community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property . . . ."). The district court's disposition of community property is reviewed for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019).

In this case, the district court did not abuse its discretion in finding that Troy's withdrawal from his deferred compensation account was an intentional misappropriation of community funds. *Lofgren*, 112 Nev. at 1283, 926 P.2d at 297. Troy asserts that the district court used his purported misconduct to award Monika more than her community share of

the deferred compensation account. However, contrary to Troy's argument, the record shows that the court only awarded Monika $25,504, which represented her half of the community share of the misappropriated funds after Troy received his pre-marriage balance as his separate property. Thus, Troy is not entitled to relief on this basis.

Troy also argues that Monika was awarded a financial windfall because she received over $100,000 more than him in community assets. Although Monika was awarded assets worth $102,260 more than those awarded to Troy, Monika was also ordered to pay approximately $51,000 to Troy as an offset. Thus, while the court found that Troy's misappropriation of funds was a compelling reason to unequally distribute the parties' property, the court ultimately awarded Monika her community share of the dissipated funds and ordered Monika to pay an offset to equalize the distribution of the remaining community property. Because the district court equally distributed the parties' community property, Troy is not entitled to relief.

Further, it does not appear that the district court relied on the JPI as a separate "compelling reason" to unequally divide the community property, as Troy argues, but rather simply noted that Troy's deferred compensation withdrawal also violated the JPI. While Troy was not served with the JPI, he acknowledged it in his answer and counterclaim, and so the lack of service was harmless. *See Conley v. Eldorado Resorts Corp.*, Nos. 78486-COA & 78856-COA, WL 5558009, at *6 (Nev. App. Sept. 16, 2020) (Order of Affirmance) (finding the failure to serve a motion for summary judgment was harmless because the unserved party had actual notice of the

motion). Additionally, insofar as Troy himself requested that both parties be bound by the JPI, it would have been effective immediately. EDCR 5.703(c) ("The JPI is automatically effective against the party requesting it at the time it is issued and effective upon all other parties upon service."). Therefore, to the extent the district court did rely on Troy's violation of the JPI, doing so was not an abuse of discretion.

The district court did not abuse its discretion in awarding Monika alimony

Lastly, Troy challenges the alimony award to Monika as an abuse of discretion. He argues that the award was not "just and equitable" because it compared Troy's gross monthly income to Monika's net monthly income. He also contends the district court did not properly analyze the alimony factors under NRS 125.150(9) because, aside from the 15-year duration of the marriage and Monika's contributions as a homemaker, "[a]ll other alimony factors weighed in Troy's favor."

"Alimony is financial support paid from one spouse to the other whenever justice and equity require it." *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000); *see also* NRS 125.150(1)(a) (providing that the alimony award must be "just and equitable"). When determining if alimony is just and equitable, a district court must consider the 11 factors listed in NRS 125.150(9). *See generally Devries v. Gallio*, 128 Nev. 706, 712, 290 P.3d 260, 264-65 (2012).

Alimony may be awarded "based on the receiving spouse's need and the paying spouse's ability to pay." *Kogod*, 135 Nev. at 68, 439 P.3d at 401. Alternatively, alimony may "be awarded to compensate for economic loss as the result of a marriage and subsequent divorce, particularly one

spouse's loss in standard of living or earning capacity." *Id.* at 70, 439 P.3d at 403. A district court has broad discretion in deciding whether to award alimony. *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

In this case, the district court noted Troy's gross monthly income was $8,858. The court also found that Monika had an earning capacity of $2,700 per month.[2] The district court did not specify whether Monika's earning capacity was her imputed gross or net income. However, even if the court did compare Troy's gross income with Monika's net income, Troy did not argue that the alimony award would have been different even if the district court had imputed a slightly higher "gross" amount for Monika's earning capacity. And given that this income comparison was also only one of the alimony factors, assuming the district court did err in comparing the parties' respective incomes, any such error was harmless. *Wyeth*, 126 Nev. at 465, 244 P.3d at 778; *see also Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970) (concluding that the district court is not bound by "mathematical certainty" in determining alimony awards).

As to the remainder of the district court's alimony analysis, the court did not abuse its discretion as to either the amount or duration of the alimony awarded to Monika, as the district court properly considered all of the necessary factors pursuant to NRS 125.150(9) and made detailed

---

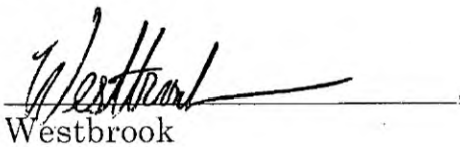
[2]The district court found that Monika "could net" approximately $1,500 per month from her photography business, but found that she could also earn an additional $700 per month from cleaning houses. The court then added $500 per month in rents she collects from rental properties in the Czech Republic, resulting in a total earning capacity of $2,700.

findings in its decree. Thus, we conclude that the court's decision to award Monika alimony was just and equitable and supported by substantial evidence. *Buchanan*, 90 Nev. at 215, 523 P.2d at 5. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Bulla



_____, J.
Westbrook

cc: Hon. Stacy Michelle Rocheleau, District Judge, Family Division
Pecos Law Group
Kelleher & Kelleher, LLC
Mario D. Valencia
Eighth District Court Clerk

---

[3]Troy also argues that the credit card debt, which was deemed his separate obligation, "should have been deemed community in nature minus any attorney's fees Troy charged." However, Troy only asserts a bare claim of error and does not provide any citations or authority to support his contentions. Because he failed to present any cogent argument, he is not entitled to relief. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Insofar as Troy has raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.