

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HEAVENLY HOPE ELMORE,
Appellant,
vs.
BRYCE DREW HERRIN,
Respondent.

No. 86191-COA

FILED

JAN 30 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Heavenly Hope Elmore appeals from a district court order establishing child custody. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Elmore and respondent Bryce Drew Herrin are the parents of two minor children, J.H. and A.H.¹ The parties were never married. After Elmore and Herrin separated, Elmore relocated from Nevada to Kansas with the children in April 2022, with Herrin's permission. In May 2022, Herrin filed a complaint seeking sole legal and sole physical custody of the children. Elmore filed an answer and counterclaim, also seeking sole legal and sole physical custody. After a case management conference, the district court issued an interim custody order, awarding the parties joint legal custody and Elmore primary physical custody, subject to Herrin's parenting time, which consisted of three video calls per week and one "four-day continuous visit" with the children.

At the custody trial in January 2023, Elmore and Herrin stipulated to joint legal custody and indicated that they would each seek primary, not sole, physical custody of the children, then ages three and one. The court heard testimony from Herrin, Elmore, Herrin's sister, and Herrin's

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

father. Herrin testified that after Elmore relocated to Kansas, he had “very little contact with the children.” He added that “all contact was blocked with me, my entire family through phone calls, texts, all social media platforms,” and Elmore would not answer his phone calls or reply to his text messages.

Elmore testified that when the children returned from parenting time with Herrin, A.H.’s diaper “was not changed,” he “was covered in pee,” and J.H. was wearing unwashed clothes. She also claimed that J.H. did not want to hug Herrin or say goodbye to him at the end of his parenting time and did not want to speak with Herrin over the phone. In addition, she stated that she regularly showed the children a picture of Herrin and talked with J.H. “every day about who his dad is.” Elmore acknowledged that she “cut off communication” with Herrin after she moved to Kansas, but she claimed that she did so because she was fearful that Herrin would “come and take the kids.”

Following trial, the district court issued a final custody order awarding Herrin primary physical custody. After briefly addressing the statutory best interest factors, the court gave a three-sentence explanation for its custody award:

It is clear that both parties care deeply for their children. It is also clear that neither party has behaved perfectly in their interactions with the other and that conflict between the parties is high. Based on a consideration of all the best-interest factors, the [c]ourt finds by a preponderance of the evidence that it is in the best interest of the children that the parties share joint legal custody and that [Herrin] be awarded primary physical custody, subject to [parenting time] by [Elmore.]

Specifically, the court permitted Elmore to exercise parenting time for seven weeks each summer, for one weekend per month during the school year, and on alternate holidays. This appeal followed.

On appeal, Elmore argues that the district court abused its discretion by failing to properly explain how its custody arrangement was in the best interest of the children and by failing to tie its best interest findings to the custody determination.

The district court has “broad discretionary power” in determining child custody. *Hayes v. Gallacher*, 115 Nev. 1, 4, 972 P.2d 1138, 1140 (1999). A child custody determination will not be overturned on appeal “absent a clear abuse of discretion.” *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). Factual findings will not be set aside “if they are supported by substantial evidence, which is evidence that a reasonable person might accept as adequate to sustain a judgment.” *Id.* at 149, 161 P.3d at 242 (footnote omitted). In making a custody determination, the sole consideration of the court is the best interest of the child. NRS 125C.0035(1). In determining the best interest of the child, the court must consider and set forth specific findings concerning the factors set forth in NRS 125C.0035(4)(a)-(l):

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to her physical custody.

(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.

While our review is deferential, we do not defer “to legal error or to findings so conclusory that they may mask legal error.” *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). The custody order “must tie the child’s best interest, as informed by specific relevant findings” respecting these statutory factors. *Id.* at 451, 352 P.3d at 1143. The court may not “simply . . . process[] the case through [these] factors” and announce a ruling. *Id.* Without specific findings and an adequate explanation for the custody determination, this court cannot determine whether the custody award was made for appropriate reasons. *Id.*

Here, the court found that factors (a), (b), (g), and (l) were not implicated. The court summarized testimony relevant to factors (c), (f), (h), (j), and (k), but it did not specify whether those factors favored either party.

In its analysis of factors (d) and (e), the court concluded that “the conflict between the parties is high” and that “the parties’ ability to cooperate is quite low,” but it did not explain how these conclusions led to its decision to award primary physical custody to Herrin. Finally, for factor (i), the district court determined that giving one parent primary physical custody of both children would serve the children’s best interest, but the court’s order again failed to explain why it decided to award primary physical custody to Herrin.

This analysis falls short of that required by NRS 125C.0035(4) and *Davis*. While the district court recounted much of the testimony given at trial, it did not specify which factors favored each parent and failed to provide an adequate explanation of the reasons for the custody determination. The court’s order did not tie the children’s best interest, as informed by specific, relevant findings respecting the statutory factors, to the custody determination. The court merely summarized the trial testimony and issued a ruling without explicitly addressing the best interest of the children. As a result, this court cannot determine whether the district court’s conclusions were made for appropriate reasons.² Therefore, we conclude that

²At oral argument Herrin took the position that reversal is unwarranted because, on remand, the district court is likely to make the same custody determination, albeit with more elaborate findings. As a result, Herrin argued that this court should affirm, and noted that Elmore was free to again move to modify custody. However, as Elmore pointed out in rebuttal, adequate findings are necessary because, without them, she will be unable to establish the “substantial change in circumstances” necessary to obtain a modification. *See Davis*, 131 Nev. at 452, 352 P.3d at 1144 (“A parent cannot reasonably be expected to show that ‘a substantial change in circumstances’ as to the child’s best interest warrants modification of an existing child custody determination unless the determination at least minimally explains the circumstances that account for its limitation and terms.”).

the district court abused its discretion when it awarded Herrin primary physical custody, as it did so without providing an adequate explanation as to how its custody determination was in the children's best interest. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMANDED.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Thomas L. Stockard, District Judge
Ballard Spahr LLP/Las Vegas
Law Office of Christopher P. Burke
Churchill County Clerk

³Pending further proceedings on remand, we leave in place the current custody arrangement. *See Davis*, 131 Nev. at 455, 352 P.3d at 1146 (leaving certain provisions of a custody order in place pending further proceedings on remand). To the extent that Elmore requested at oral argument that we order the district court to hold a new evidentiary hearing prior to making its findings, we conclude that the district court will have discretion to determine if such a hearing is necessary on remand.