

IN THE COURT OF APPEALS OF THE STATE OF NEVADA


IN THE MATTER OF THE JOINT
PETITION OF DIVORCE OF:

JOSE ZIRATE,
Appellant,
vs.
BLANCA M. SALAZAR,
Respondent.

No. 86416-COA

FILED

FEB 08 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jose Zirate appeals from a district court post-divorce decree order regarding child custody. Eighth Judicial District Court, Family Division, Clark County; Nadin Cutter, Judge.

Zirate and respondent Blanca M. Salazar filed a joint petition for divorce, and pursuant to the terms of their petition, the district court entered a divorce decree in April 2022 that awarded Salazar primary physical custody of the parties' three minor children subject to Zirate's parenting time. After remarrying and suffering deteriorating financial circumstances, in part due to Zirate's failure to pay his child support obligation under the divorce decree, Salazar moved in August 2022 for permission to relocate to Kansas with the children so she and the children could reside with her new husband. Zirate opposed that motion and moved for primary physical custody.

At the subsequent evidentiary hearing, Salazar indicated that, although she still desired to relocate to Kansas with the parties' youngest

child, who was four years old at the time, she was abandoning her request to relocate with the parties' two older children, who were approximately 16 and 17 years old at the time and preferred to remain in Nevada. During the hearing, the district court also heard extensive testimony from the parties as well as the two older children.

Following the hearing, the district court entered an order that, among other things, established a split custody arrangement in which the court preserved Salazar's status as the primary physical custodian of the youngest child, granted her request to relocate to Kansas with that child, and modified the physical custody arrangement for the two older children to primary physical custody in Zirate's favor. As relevant to the youngest child, who is the subject of the present appeal, the district court supported its decision by concluding that permitting Salazar to relocate with the youngest child was appropriate under NRS 125C.007's framework for evaluating relocation requests. In doing so, the district court heavily emphasized its finding that Zirate committed acts of domestic violence against the two older children, which the court determined triggered NRS 125C.0035(5)'s presumption against Zirate having joint or sole physical custody being in the youngest child's best interest and warranted the split custody arrangement to protect the child from Zirate. Moreover, the district court also essentially determined that the school selection factors set forth in *Arcella v. Arcella*, 133 Nev. 868, 872-73, 407 P.3d 341, 346 (2017), favored permitting the youngest child to attend Salazar's preferred school in Kansas rather than his existing school in Nevada. This appeal followed.

On appeal, Zirate challenges the district court's decision to permit Salazar to relocate to Kansas with the youngest child.¹ This court reviews the district court's child custody determinations, including its resolution of requests to relocate with a minor child, for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007); *Flynn v. Flynn*, 120 Nev. 436, 440 n.6, 92 P.3d 1224, 1227 n.6 (2004). We will not disturb the court's factual findings unless they are clearly erroneous or unsupported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence is that which a reasonable person may conclude is adequate to sustain a judgment. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. In making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). We presume the

¹In his opening brief, Zirate also indicates that he seeks relief from the portions of the challenged order that established the parties' parenting time schedules and child support obligations. However, Zirate does not present any argument concerning those decisions and has waived his challenge to their propriety as a result. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an appellant waives issues by failing to raise them in his or her opening brief).

Additionally, because Salazar abandoned her request to relocate with the two older children during the underlying proceeding and did not file a cross-appeal to challenge any aspect of the district court's resolution of the parties' competing motions, the only issues that are before this court are raised by Zirate in connection with his challenge to the order granting Salazar's motion to relocate with the parties' youngest child. See *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) (“[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal.”).

district court properly exercised its discretion in determining the child's best interest. *Flynn*, 120 Nev. at 440, 92 P.3d at 1226-27.

A primary physical custodian who wishes to relocate his or her residence outside the state of Nevada and to take the child with him or her without the noncustodial parent's written consent must petition the district court for permission to relocate with the child. NRS 125C.006(1). In evaluating such petitions, the district court must first determine whether the relocating parent has established that there is a sensible, good faith reason for relocating, which is not intended to deprive the non-relocating parent of parenting time; that the best interest of the child is served by allowing the relocation, and that the relocation will result in an actual advantage benefiting the child and relocating parent. NRS 125C.007(1). If this threshold standard is met, the district court must then consider the following: (1) whether the move will likely improve the quality of life for the child and relocating parent, (2) whether the relocating parent's motives are to frustrate the non-relocating parent's parenting time, (3) whether the relocating parent will comply with parenting time orders, (4) whether the non-relocating parent's opposition to the move is honorable, and (5) whether there is a realistic opportunity for the non-relocating parent to maintain a parenting time schedule that preserves and fosters the non-relocating parent's relationship with the child. NRS 125C.007(2).

Here, in granting Salazar's motion to relocate to Kansas with the youngest child, the district court made specific findings as to all of the factors enumerated in NRS 125C.007(1) and (2), which included a full analysis of the best interest factors set forth in NRS 125C.0035(4) for the best interest component of NRS 125C.007(1)'s threshold test. *See Davis*,

131 Nev. at 452, 352 P.3d at 1143 (providing that, when making custody determinations, the district court must make specific findings and provide an adequate explanation for its decision since “[w]ithout them, [Nevada’s appellate] court[s] cannot say with assurance that the custody determination was made for appropriate legal reasons”); *see also Monahan v. Hogan*, 138 Nev. 58, 65-67, 507 P.3d 588, 594-95 (Ct. App. 2022) (explaining that, although the district court is not required to evaluate all of NRS 125C.0035(4)’s best interest factors when considering a primary physical custodian’s request to relocate with a child, it should still consider any factors that are relevant to the facts of the case).

To challenge the foregoing, Zirate raises several broad arguments concerning whether the district court properly considered various issues and whether its findings were supported by substantial evidence. First, Zirate contends that the district court failed to properly consider the fact that Salazar moved to Kansas before the court granted her motion to relocate. However, Salazar did not take the youngest child with her when she initially relocated to Kansas. Indeed, as Zirate testified at trial, Salazar temporarily left all three children in his care when she relocated to Kansas pending resolution of her request for the youngest child to relocate with her, which is not prohibited under Nevada law. *See* NRS 125C.006(1) (requiring a primary physical custodian to obtain the noncustodial parent’s written consent or permission from the court before relocating outside of Nevada *with the child*); *Rowberry v. Rowberry*, No. 85076-COA, 2023 WL 5541649, at *3-4 (Nev. Ct. App. Aug. 28, 2023) (Order of Reversal and Remand) (discussing NRS 200.359(5), which provides that a primary physical custodian commits a category D felony by relocating

pursuant to NRS 125C.006 without first obtaining the nonrelocating parent's written consent or the permission of the district court, and concluding that a relocating parent did not violate NRS 200.359(5), in part, because the children were with the noncustodial parent when she relocated). Thus, relief is unwarranted in this respect.

Second, Zirate argues that the district court placed undue weight on its finding that clear and convincing evidence demonstrated that he committed domestic violence against the two older children, such that NRS 125C.0035(5)'s domestic violence presumption was triggered, which the district court described as "a huge factor in this case" and identified as one of the reasons for concluding that Salazar satisfied each of the subparts of NRS 125C.007(1) threshold test and that NRS 125C.007(2)'s relocation factors favored granting her motion to relocate. In particular, Zirate contends that the district court's reasoning in this respect was improper because there was no evidence to show that he committed domestic violence against the youngest child.

However, for purposes of the best interest subpart of the threshold test, the district court was required to consider whether Zirate committed domestic violence against any member of the youngest child's household. See NRS 125C.0035(4)(k) (explaining that, when the district court evaluates the best interest of the child, it must consider whether a parent committed domestic violence against "the child, a parent of the child or *any other person residing with the child*" (emphasis added)); NRS 125C.0035(5) (providing that, if the same is established by clear and convincing evidence, a rebuttable presumption arises that it is not in the best interest of the child for the perpetrator of domestic violence to have

joint or sole physical custody). And because the youngest child's best interest overlaps with the questions of whether there was a sensible, good faith reason for the relocation, whether the child would realize an actual advantage from the relocation, and whether the relocation factors favored granting Salazar's motion, the district court properly considered the domestic violence issue in evaluating these components of NRS 125C.007. *See Monahan*, 138 Nev. at 63, 507 P.3d at 592 (recognizing that some of the factual and policy considerations underlying NRS 125C.0035(4)'s best interest factors, which are used to determine custody of minor children, overlap with the factual and policy considerations relevant to relocation); *see also* NRS 125C.007(2)(f) (providing that, in considering the relocation factors, the district court may consider "[a]ny other factor necessary to assist the court in determining whether to grant permission to relocate").

Zirate further argues that, while the two older children testified extensively concerning incidents in which Zirate struck them or otherwise used physical force against them, their testimony did not constitute substantial evidence to support the district court's domestic violence finding because Salazar manipulated them. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704; *Ellis*, 123 Nev. at 149, 161 P.3d at 242. However, the record is devoid of any evidence to suggest that Salazar manipulated either child's testimony. We recognize that, when the oldest child testified regarding a letter that he drafted, which Salazar submitted to the district court, the oldest child mentioned that he sent the letter to Salazar's new husband at some point for an unspecified reason. But the oldest child also specifically testified that the words in the letter were his own and that nobody told him to add or subtract from the letter. The district court's finding that Zirate

committed domestic violence against the two older children demonstrates that it was persuaded by this testimony, and we do not reweigh the evidence or the district court's credibility determinations. *See Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh the evidence on appeal); *see also Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal). Thus, for the foregoing reasons, we conclude that Zirate failed to demonstrate that the district court's domestic violence findings were unsupported by substantial evidence, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704, or that the court improperly placed heavy emphasis on these findings as one of its bases for concluding that Salazar satisfied NRS 125C.007(1)'s threshold test and that NRS 125C.007(2)'s relocation factors weighed in favor of granting her motion to relocate.²

Zirate next argues that the district court failed to properly consider whether it would be better for the youngest child to attend a school in Kansas or Nevada, emphasizing that he was attending a private school in Nevada with a 10:1 student-teacher ratio while Salazar proposed to have

²Insofar as Zirate also argues that the district court could not properly consider evidence of domestic violence predating the divorce decree in evaluating Salazar's motion to relocate, his argument lacks merit. Indeed, the supreme court has explained that the doctrines of claim and issue preclusion do not prevent "parties from introducing evidence of domestic violence that was unknown to . . . the court when the prior custody determination was made." *See Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (addressing evidence of past domestic violence presented in the context of a request to modify custody). And here, the only custodial order preceding the challenged order was the divorce decree that was entered without a hearing based on the parties' joint petition, which made no mention of domestic violence.

the child attend a public school in Kansas. Even if there was an error in the court's analysis of the schools, Zirate fails to demonstrate that he was prejudiced. See *Wyeth v. Rowatt*, 126 Nev, 446, 465, 244 P.3d 765, 778 (2010) (providing that a prejudicial error is one that "affects [a] party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"); cf. NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Although the district court relied, in part, on its finding that Salazar's preferred school in Kansas was the better school in concluding that she satisfied the actual advantage component of NRS 125C.007(1)'s threshold test and that NRS 125C.007(2)'s relocation factors weighed in her favor, it was not the court's only basis for doing so. Indeed, the district court's conclusions that Salazar satisfied each element of the threshold test and that the relocating factors favored granting Salazar's motion were also based on its domestic violence finding. And given the emphasis that the district court repeatedly placed on the domestic violence issue, it is readily apparent that the court would have granted Salazar's motion regardless of which school was better. Thus, we discern no basis for relief in this respect.

Zirate further argues that the district court failed to properly consider the emotional and psychological consequences of separating the youngest child from the two older children. However, in applying the best interest subpart of NRS 125C.007(1)'s threshold test, the district court specifically addressed NRS 125C.0035(4)(i), which required the court to consider "[t]he ability of the child to maintain a relationship with any sibling." In doing so, the district court recognized that permitting Salazar

to relocate with the youngest child would separate the siblings, but concluded that the factor nevertheless favored relocation since protecting the youngest child from domestic violence was much more important than keeping the child together with his siblings, who were approximately 12 and 13 years older than the youngest child and had teenage interests. Moreover, the district court reasoned that the siblings would be able to preserve their relationship based on the parenting time schedule it established, which provided for all three children to be together with one parent or the other during school breaks. Because a reasonable judge could reach a similar conclusion under the same circumstances, we discern no abuse of discretion in this respect. *See Matter of Guardianship of Rubin*, 137 Nev. 288, 294, 491 P.3d 1, 6 (2021) (providing that “[a]n abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances” (alteration in original) (internal quotation marks omitted)).

Lastly, Zirate asserts that there was no evidence to show that he prevented Salazar from communicating with the two older children. However, the district court did not find that Zirate prevented Salazar from communicating with the two older children. But in applying the best interest component of NRS 125C.007(1)’s threshold test, the district court did address NRS 125C.0035(c), which required the court to consider “[w]hich parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.” In particular, the court found that the factor favored Salazar because Zirate was requiring Salazar’s parenting time to occur in Nevada, but had ceased paying child support, such that it was difficult for her to do so.

To the extent that Zirate's argument is directed at this finding, his argument is unavailing. The parties' testimony at the evidentiary hearing demonstrated that Zirate ceased paying his child support obligation, that Salazar suffered financial hardship as a result, and that she only had an opportunity to have parenting time with the children in Nevada on a few occasions during the approximately six months between the date that she relocated to Kansas and the date of the evidentiary hearing. Moreover, Salazar testified that Zirate tricked her into believing that the divorce decree prohibited her from removing the child from Nevada for even a visit without his express permission³ and that, after she secured his permission to take the youngest child to Kansas on one occasion, Zirate prevented her from doing so by removing the child from the state himself at the time the child was scheduled to travel to Kansas. And, when the court questioned Zirate as to what his preference would be for Salazar's parenting time if the court were to deny her motion to relocate and grant his countermotion for primary physical custody, Zirate testified that he would permit Salazar to see their children anytime in Nevada, provided that she did so at her own expense. The foregoing constituted substantial evidence to support the district court's finding that NRS 125C.0035(4)(c) weighed in Salazar's favor, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704; *Ellis*, 123 Nev. at 149, 161 P.3d at 242, and we therefore discern no basis for relief in this respect.

³Salazar testified at trial with the assistance of an interpreter and apparently was not a proficient English speaker.

Given the foregoing, Zirate has not established that the district court abused its discretion by granting Salazar's motion to relocate with the youngest child. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241; *Flynn*, 120 Nev. at 440 n.6, 92 P.3d at 1227 n.6. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Nadin Cutter, District Judge, Family Division
Law Offices of Mont E. Tanner
Blanca M. Salazar
Eighth District Court Clerk

⁴We remind the district court that, upon determining that NRS 125C.0035(5)'s domestic violence presumption has been triggered, the court is required to set forth "[f]indings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child." However, we do not reach the sufficiency of the district court's findings in this respect because Zirate does not address them and Salazar did not file a cross-appeal to challenge them. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3; *see also Ford*, 110 Nev. at 755, 877 P.2d at 548.