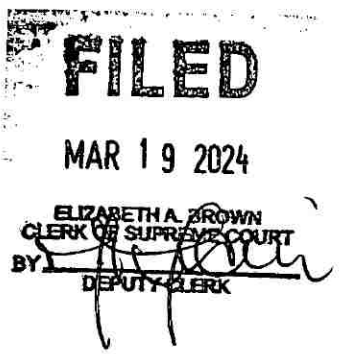
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JARED LINTON CLELAND,
Appellant,
vs.
RANDELL CLELAND,
Respondent.

No. 86558-COA



ORDER OF AFFIRMANCE

Jared Linton Cleland appeals from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Nadin Cutter, Judge.

Jared and Randell Cleland were married and share three minor children. Both parties initially resided in Nevada. However, the parties' marriage deteriorated and Jared subsequently moved to Utah and brought two of the children with him.

Randell filed a complaint for divorce and requested primary physical custody of the two youngest children. Randell contended that the oldest child was not subject to this matter because Jared was not that child's biological father. Jared filed an answer and counterclaim, in which he asserted that he had adopted the oldest child, and requested primary physical custody of the children so that they could reside with him in Utah. The court subsequently entered a temporary custody order permitting Jared to maintain primary physical custody of the two youngest children during the litigation of this matter and providing Randell with parenting time during each weekend.

24-091697

The district court thereafter conducted an evidentiary hearing concerning the custody matters and both parents testified at that hearing. Randell explained that she and Jared married in 2015 and that the marriage produced two children. Randell also explained that she had a child from a previous relationship but that she and Jared agreed to place Jared's name on that child's birth certificate. Jared later testified that he believed he had adopted that child and otherwise acted as if he was that child's father.

The parties acknowledged that they became separated in 2018 and moved into separate residences in the Las Vegas area. In June of 2022, Jared explained that he began the process of moving to Hurricane, Utah, because he believed it offered better work and life opportunities. Jared further acknowledged that he had a fiancé that resided in Hurricane and he began to move his belongings into her residence with the intent to later reside with her.

During this time, both parties acknowledged that they discussed their shared parenting time with the children and the logistics involved with transporting the children between the states. Randell testified that she agreed that the children could stay with Jared for most of the summer, but that she always intended for them to reside with her and attend school in Nevada. Jared disputed her testimony and said Randell had orally agreed that the two youngest children could reside with him and attend school in Utah. Jared specifically testified that there had been no written agreement concerning the youngest children's purported move to Utah but rather, that the parties had oral discussions concerning that issue.

Randell also discussed Facebook Messenger communications she had with Jared regarding the children and acknowledged that several

of these communications discussed the logistics involved with the children's travel to and from Utah. She again stated that the discussions only concerned Jared's summer parenting time with the children and did not include any agreement for the youngest children to move to Utah. However, Jared testified that he had believed those messages related to his move to Utah and were proof of Randell's agreement for the youngest children to move with him. Randell further acknowledged that she had deleted some of the messages but stated that they were messages she inadvertently sent while her phone was in her pocket or contained typos.

Jared also testified that he completed his move to Utah in August 2022. Jared acknowledged he moved into a two-bedroom apartment with his fiancé and her children in Utah and that Randell's home in Las Vegas had substantially more room for the children. Jared stated that, after he was served with the complaint for divorce, he was upset that Randell requested primary physical custody of the two youngest children and he did not bring those children to Las Vegas for Randell's previously agreed upon parenting time out of frustration with her request. However, both parties acknowledged that they had since followed the district court's temporary order concerning the parenting time schedule.

The parties subsequently presented arguments concerning their respective positions. Jared urged the district court to find that Randell had consented to the youngest children's move to Utah and that her testimony to the contrary was not believable. Jared also sought an order awarding him primary physical custody of the children based on the best-interest factors. Randell argued that it was clear that Jared did not have her written consent to move the youngest children to Utah and noted that Jared did not seek the court's permission prior to the relocation. Randell

urged the court to award her primary physical custody of the children based on the best-interest factors.

The district court ultimately issued an order denying Jared's request to relocate to Utah, awarding the parties joint legal custody of the children, and awarding Randell primary physical custody of the children. The court found that Jared signed voluntary acknowledgments of paternity pursuant to NRS 126.053(1) for all three children, including the oldest child, and as such, he was the legal father for all three children.

The district court also found that, pursuant to *Druckman v. Ruscitti*, 130 Nev. 468, 473, 327 P.3d 511, 515 (2014), Jared was not permitted to move to Utah with the youngest children over Randell's objection without a court order authorizing such a move. The court found that the language and context of the messages between the parties concerning Jared's move to Utah was ambiguous and that those ambiguities did not favor Jared's position that he had Randell's permission for the children to move to Utah with him. The court further concluded that Jared failed to prove that Randell agreed to permit the youngest children to move to Utah. The court considered the appropriate relocation factors and concluded that they did not favor relocation of the youngest children to Utah. In addition, the court expressly considered the required factors under NRS 125C.0035(4) concerning the best interest of the children. Based on its findings concerning the relocation factors and the best-interest factors, the court concluded that Randell should have primary physical custody of the children, subject to Jared's parenting time.

The district court also issued a parenting time schedule and awarded child support to Randell. Finally, the court distributed the community property and granted the parties' request for a divorce.

Jared subsequently filed a motion for reconsideration of the district court's custodial decision. The court conducted a hearing concerning the motion for reconsideration. At the hearing, Jared contended that the district court did not properly evaluate the importance of the deleted messages and argued that he should have received a rebuttable presumption pursuant to NRS 47.250(3) that the deleted messages were adverse to Randell such that they provided proof that she consented to the youngest children moving to Utah. Randell opposed Jared's contention and argued that he was not entitled to relief.

The district court entered a written order denying Jared's motion. The court found that the parties testified concerning the contents of the messages at the evidentiary hearing, the district court evaluated that testimony, and Jared did not demonstrate that the district court made errors in its evaluation. In addition, the court concluded that the previous order appropriately considered the relocation factors and that any information contained within the deleted messages had little bearing upon the court's conclusion that relocation was not appropriate. This appeal followed.

On appeal, Jared argues that the district court abused its discretion by denying his request to relocate the youngest children to Utah and awarding Randell primary physical custody of the children. In addition, Jared contends that he was entitled to a presumption pursuant to NRS 47.250(3) that the messages deleted by Randell were adverse to her interests such that the court should have presumed that she consented to Jared's relocation to Utah in those messages.

This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In

reviewing child custody determinations, this court will affirm the district court's factual findings if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. When 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). A court may award one parent primary physical custody if it determines that joint physical custody is not in the best interest of the child. NRS 125C.003(1). This court is not at liberty to reweigh the evidence or the district court's credibility determinations on appeal, *see Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal), and this court presumes that the district court properly exercised its discretion in determining the best interest of the child if it made substantial factual findings, *see Culbertson v. Culbertson*, 91 Nev. 230, 233-34, 533 P.2d 768, 770 (1975).

In addition, when a district court has not issued a custodial order and both parents have equal custody rights to their children, "one parent may not relocate his or her child out of state over the other parent's objection without a judicial order authorizing the move." *Druckman*, 130 Nev. at 473, 327 P.3d at 515.[1] When evaluating a request to relocate to

---

[1]Because the district court had not yet issued a custody order when Jared sought to relocate to Utah, NRS 125C.006(1), NRS 125C.0065(1), and NRS 125C.007 did not specifically apply to his request. However, we note that the factors identified in *Druckman* are substantially similar to those contained within NRS 125C.007(2), and a district court evaluating relocation prior to issuance of a custodial order refers to the statutory relocation framework "as a guide in instances where no custodial order exists and the parents dispute out-of-state relocation." *Id.* (citing NRS 125C.200 (1999)).

another state "and determining the parents' custodial rights, the court must decide whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada." *Id.* at 474, 327 P.3d at 515 (internal quotation marks omitted). To that end, the court must consider:

> (1) the extent to which the move is likely to improve the quality of life for both the child and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.

Id. (internal brackets omitted); *see also Shahrokhi v. Burrow*, Nos. 81978, 82245, & 83726, 2022 WL 1509740, at *3 (Nev. May 12, 2022) (Order of Affirmance (Docket Nos. 81978, 82245, & 83726) and Dismissing Appeal in Part (Docket No. 83726)) (explaining that the test for evaluating relocation requests set forth in *Druckman* applies in the absence of a court order finally establishing custody).

Here, the district court made detailed findings concerning the relocation factors and whether relocation was in the children's best interest. First, the district court found that relocation was not likely to improve the quality of life for the children and noted that Jared moved to Utah without adequate housing for the children. Second, the court found that Jared used

the relocation to Utah to frustrate Randell's parenting time after Randell filed the complaint for divorce. Third, the court found that both parents were likely to comply with any parenting time orders issued by the court. Fourth, the court found that Randell's motives in opposing relocation were honorable, she was justified in her concern as Jared did not fully explain the situation concerning his move to Utah, and there was no evidence she opposed relocation as a means to secure a financial advantage in the form of ongoing child support or otherwise. Fifth, the court found that there was a realistic opportunity for both parties to maintain a relationship with the children regardless of its decision as to relocation. Finally, the district court concluded that Jared relocated the youngest children to Utah without Randell's consent.

The district court also evaluated the required best interest factors from NRS 125C.0035(4) and found that several factors favored awarding Randell primary physical custody. First, the court found that Jared withheld the youngest children from Randell based on his desire to relocate to Utah. The court also found that the youngest children missed their older sibling and that Jared separated the youngest children from their older sibling due to his desire to relocate to Utah, which caused the children emotional pain.

The record supports the district court's detailed findings regarding the appropriate relocation factors, *see Druckman*, 130 Nev. at 473, 327 P.3d at 515, and the best interest factors set forth in NRS 125C.0035(4). Our review of the record demonstrates that the district court's findings are supported by substantial evidence. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242. This court will not second guess a district court's resolution of factual issues involving conflicting evidence or reconsider its

credibility findings. *See id.* at 152, 161 P.3d at 244; *Quintero*, 116 Nev. at 1183, 14 P.3d at 523. Accordingly, we discern no abuse of discretion by the district court in rejecting Jared's relocation request and awarding Randell primary physical custody of the children. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Jared further contends that he was entitled to a rebuttable presumption pursuant to NRS 47.250(3) that any missing message was evidence "willfully suppressed that would be adverse if produced" to Randell's position that she did not give him consent to relocate the youngest children to Utah. We review a trial court's decision regarding sanctions for the destruction or spoilation of evidence for an abuse of discretion. *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). In *Bass-Davis*, the Nevada Supreme Court, in addressing available spoliation sanctions, explained that "before a rebuttable presumption that willfully suppressed evidence was adverse to the destroying party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with intent to harm." *Id.* at 448, 134 P.3d at 107;

In this case, Jared only argued he was entitled to a rebuttal presumption for the deleted messages. The district court considered the facts and circumstances surrounding the deleted messages and found that Jared failed to meet his burden that he was entitled to a rebuttable presumption. Because this court is not at liberty to reweigh the evidence on appeal, *see Quintero*, 116 Nev. at 1183, 14 P.3d at 523, and there is sufficient support for the district court's determinations, we conclude that Jared failed to demonstrate that the district court abused its discretion by denying his spoliation claim. *See Nguyen v. Boynes*, 133 Nev. 229, 237-38, 396 P.3d 774, 781 (2017) (affirming a family court's rejection of a request

for a rebuttable presumption pursuant NRS 47.250(3) because there was inconclusive evidence to support a claim of spoilation of evidence). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Nadin Cutter, District Judge, Family Division
Theodore M. Medlyn
Randell Cleland
Eighth District Court Clerk