IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL SCHAEFER,
Appellant,
vs.
ROBYN WHITE,
Respondent.

No. 87866-COA

ORDER OF AFFIRMANCE

Michael Schaefer appeals from a district court order establishing child custody. Eighth Judicial District Court, Clark County; Gregory G. Gordon, Judge.

Schaefer and Robyn White were never married but have one minor child, M.S., who is currently six years old.[1] Schaefer and White coparented without a court order for most of M.S.'s life. From the time of his birth, M.S. primarily lived with White due in part to Schaefer working in North Dakota for about nine months in 2018 as well as Schaefer's struggles with substance abuse in 2019 and 2020. In 2022, the parenting time schedule was sporadic, and Schaefer would primarily see M.S. on weekends. However, amid growing tensions between Schaefer and White's new boyfriend, Schaefer filed a complaint for custody in March 2023, and in his amended complaint sought sole legal and sole physical custody of M.S. White filed an answer and counterclaim seeking the same.

In June 2023, the district court entered a temporary custody order that gave each parent joint legal and joint physical custody of M.S. on a week on/week off basis. Additionally, as M.S. was approaching kindergarten, the district court temporarily ordered that M.S. would attend

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

Roger M. Bryan Elementary School, the public school located in Schaefer's school zone.[2]

An evidentiary hearing on the custody dispute took place in November 2023. Schaefer testified that he earned $7,985.79 per month working as an AC/HVAC technician and that he wanted M.S. to remain enrolled at Roger M. Bryan Elementary School. White testified that she primarily took care of M.S. while Schaefer was away for work, and she previously had physical custody of M.S. during the weekdays while Schaefer had M.S. during the weekends without issue. She further testified that Roger M. Bryan Elementary School was about a 25 to 30-minute drive from her home and requested that M.S. attend the school in her school zone, Aggie Roberts Elementary School. White also stated that she was unemployed at the time of trial because she was pregnant and that she previously worked as a bartender before quitting her job in June 2023.

Following the hearing, the district court entered an order containing findings of fact, conclusions of law, and a decree of custody granting the parties joint legal and joint physical custody of M.S. The court ordered that Schaefer would exercise his parenting time from Fridays after school (or 5:00 p.m. if there is no school on that day) until Mondays at school drop-off (or 9:00 a.m. if there is no school that day). White was to have physical custody of M.S. the second weekend of each month that school is in session, as well as Mondays after school (or at 9:00 a.m. if there is no school that day) until Fridays before school (or until 5:00 p.m. if there is no school that day). The district court further ordered that M.S. attend the school located in White's school zone, Aggie Roberts Elementary School.

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[2]At a hearing prior to trial, the court advised the parties that its temporary order regarding school selection "was essentially (not literally) a coin flip decision and as such would be re-visited at trial."

On the issue of child support, the district court ordered that Schaefer pay White $1,118 per month but did not order White to pay anything. The court declined to impute income to White, finding that at the time of the evidentiary hearing, White was unemployed due to being seven or eight months pregnant, that her prior position as a bartender was not suitable for someone in the final stages of a pregnancy, and that she was not unemployed without good cause.

Schaefer timely appealed.[3] He argues that the district court abused its discretion in determining the joint physical custody schedule, in ordering M.S. to attend Aggie Roberts Elementary School, and by finding that White was not willfully unemployed.

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[3]The same day that Schaefer filed the notice of appeal, White filed a motion to modify the school that M.S. was ordered to attend. Although White had testified that she lived in the attendance zone for Aggie Roberts Elementary School, she actually lived in the attendance zone for Cox Elementary School, which is located about 1,500 feet away from Aggie Roberts. In January 2024, the district court ordered M.S. to attend Cox, finding a sufficient emergency basis to protect the child's welfare under *Mack-Manley v. Manley*, 122 Nev. 849, 856, 138 P.3d 525, 530 (2006).

Additionally, the district court's order certified its intent to amend the custody decree to adjust the custodial times but noted that it did not have jurisdiction to amend the decree while the matter was on appeal. *See Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978). However, Schaefer did not seek to remand this matter to the district court for the limited purpose of amending the custody decree. Therefore, to the extent that Schaefer raises issues pertaining to the district court's January 2024 order, those arguments are not properly before this court. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981) (stating that an order that is not identified in the notice of appeal generally is not considered by the appellate court); *cf. Mack-Manley*, 122 Nev. at 855-56, 138 P.3d at 530; *see also* NRAP 12A (noting the procedure for a remand by the appellate court after an indicative ruling by the district court on a motion for relief that is barred by a pending appeal).

The district court did not abuse its discretion in determining the joint physical custody parenting time schedule

Relying on *Rivero v. Rivero*, 125 Nev. 410, 426, 216 P.3d 213, 224 (2019), Schaefer first argues that the district court's parenting time schedule is not truly a "joint" physical custody schedule because Schaefer has parenting time with M.S. for less than 40 percent of the year. This court reviews the district court's child custody determinations for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). This court will not set aside the district court's factual findings so long as those findings 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 241-42.

When determining child custody arrangements, the district court's primary consideration must be the child's best interest. *Bluestein v. Bluestein*, 131 Nev. 106, 109, 345 P.3d 1044, 1046 (2015); *see also* NRS 125C.0035(1) ("In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child."). In *Rivero*, the Nevada Supreme Court held that an arrangement where each parent has physical custody of a child at least 40 percent of the calendar year generally constitutes joint physical custody. *Rivero*, 125 Nev. at 426, 216 P.3d at 224. However, in *Bluestein*, the supreme court clarified that *Rivero's* 40-percent figure was a guideline, not a rigid bright-line rule. *Bluestein*, 131 Nev. at 113, 345 P.3d at 1049. Instead, the supreme court emphasized that the 40-percent guideline is a tool that a district court may use to evaluate what custody arrangement is in a child's best interests, but it is not a dispositive, mathematical rule. *Id.*

Here, Schaefer argues that he was not actually granted "joint" physical custody because he exercised parenting time less than 40 percent of the year. However, as noted above, *Rivero's* 40-percent figure is a

guideline, not a rule. *Id.* Rather, the relevant inquiry is whether the custodial timeshare was in M.S.'s best interest. *Id.* In this case, the district court engaged in a thorough analysis of the statutory best-interest factors before concluding that joint physical custody was in M.S.'s best interest, and Schaefer does not argue that this determination was an abuse of discretion or unsupported by substantial evidence. *Ellis*, 123 Nev. at 149, 161 P.3d 241-42. Therefore, the district court did not abuse its discretion in crafting a joint custodial timeshare.

The district court did not abuse its discretion in ordering M.S. to attend Aggie Roberts Elementary School

Schaefer next argues that the district court improperly relied solely on the length of the commute and other logistical concerns to determine which school M.S. would attend rather than evaluating all of the required factors under *Arcella v. Arcella*, 133 Nev. 868, 872-73, 407 P.3d 341, 346 (2017). Because White had parenting time with M.S. during the school week, the district court ordered M.S. to attend the elementary school located in White's school zone, or Aggie Roberts Elementary School.

This court reviews a district court's best-interest determination regarding a minor child's education for an abuse of discretion. *Id.* at 870, 407 P.3d at 344 (citing *Mack v. Ashlock*, 112 Nev. 1062, 1065, 921 P.2d 1258, 1261 (1996)). In *Arcella,* the Nevada Supreme Court articulated illustrative factors for a district court to consider when evaluating which school placement is in a child's best interest. *Id.* at 872-73, 407 P.3d at 346-47. These factors are:

> (1) The wishes of the child, to the extent that the child is of sufficient age and capacity to form an intelligent preference;
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> (2) The child's educational needs and each school's ability to meet them;

> (3) The curriculum, method of teaching, and quality of instruction at each school;
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> (4) The child's past scholastic achievement and predicted performance at each school;
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> (5) The child's medical needs and each school's ability to meet them;
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> (6) The child's extracurricular interests and each school's ability to satisfy them;
>
> (7) Whether leaving the child's current school would disrupt the child's academic progress;
>
> (8) The child's ability to adapt to an unfamiliar environment;
>
> (9) The length of commute to each school and other logistical concerns;
>
> (10) Whether enrolling the child at a school is likely to alienate the child from a parent.

Id. at 872-73, 407 P.3d at 346 (footnote omitted). The supreme court further clarified that determining which school placement is in the child's best interest is a "broad-ranging and highly fact-specific inquiry, so a court should consider any other factors presented by the particular dispute, and it should use its discretion to decide how much weight to afford each factor." *Id.* at 873, 407 P.3d at 347.

Here, Schaefer argues that the district court erroneously only considered factor nine—the length of the commute and other logistical concerns. However, the district court's order contained specific findings regarding each *Arcella* factor, finding most of the factors neutral. Further, the district court noted that, at the evidentiary hearing, neither party provided any evidence as to any practical or meaningful difference between Aggie Roberts Elementary School and Roger M. Bryan Elementary School aside from the length of the commute and logistical concerns. As noted above, White testified that the school in Schaefer's school zone, Roger M. Bryan Elementary School, was located approximately 25-30 minutes away

from her home. Further, the district court found that several factors (such as factors one, seven, and eight) were inapplicable due to M.S. being only five years old at the time and in kindergarten. Therefore, the district court properly considered each *Arcella* factor and did not abuse its discretion in ordering M.S. to attend the school in White's school zone, particularly given that White exercises her parenting time with M.S. during the school week. *Arcella*, 133 Nev. at 870, 407 P.3d at 344.

The district court did not abuse its discretion in calculating child support

Schaefer contends that the district court abused its discretion in calculating child support because it failed to impute income to White, who was not working due to her pregnancy. The court's order also found, in pertinent part, that "if [White] is able to stay home and not work, whether temporarily or permanently, [M.S.] will benefit from her greater availability and accessibility to him as a parent, which is a good faith endeavor" and that "[i]n the event [White] goes back to work in the future, that would be a basis to modify and re-calculate support."

This court reviews child support orders for an abuse of discretion. *Edgington v. Edgington*, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003); *see also* NAC 425.115(3) (requiring the district court to determine the child support obligation of each party based on the schedule set forth in NAC 425.140 if the parties have joint physical custody of a child). We will not disturb the factual findings underlying a child support order if they are supported by substantial evidence. *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018).

The district court may impute income to a parent if the court first determines the parent is underemployed or unemployed without good cause. NAC 425.125(1); *Rosenbaum v. Rosenbaum*, 86 Nev. 550, 554, 471 P.2d 254, 256-57 (1970) (holding that a district court may impute income to

a party that "purposefully earns less than [their] reasonable capabilities permit"). The key issue is the good faith of the parent. *Rosenbaum*, 86 Nev. at 554, 471 P.2d at 257.

At the evidentiary hearing, Schaefer requested that the district court impute to White her prior income that she earned as a bartender before quitting her job in June 2023 due to her pregnancy. White testified that she was seven or eight months pregnant at the time of trial, and the district court found that her late-stage pregnancy made it unsuitable to return to work as a bartender at that time. White's testimony provided substantial evidence for the district court to conclude that she had good cause for not working as a bartender at the time due to her pregnancy.[4] Accordingly, the district court did not abuse its discretion by finding that White had good cause for her unemployment and declining to impute income to her under NAC 425.125.

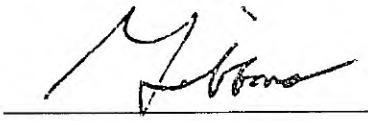
Schaefer also argues the district court abused its discretion in finding that White's decision to stay home with M.S., even if permanently, is a "good faith endeavor" and will benefit M.S. He interprets these findings as encouraging White to refrain from working and asserts that they amount to a determination that she can never be willfully unemployed or underemployed without good cause, or alternatively, that Schaefer cannot seek to modify child support unless White returns to work. We disagree. White's ability to stay home and care for M.S. is only one aspect to consider in evaluating willful unemployment or underemployment. *See* NAC 425.125. Further, nothing in the district court's order precludes Schaefer from seeking to modify child support if there is a change of circumstances

[4]We note that Schaefer also concedes on appeal that it was "understand[able]" for the district court to find good cause for White not working as a bartender during her pregnancy.

and the modification is in the child's best interest. *See Romano v. Romano*, 138 Nev. 1, 7, 501 P.3d 980, 985 (2022) ("A district court may modify a child-support order if there has been a change in circumstances and the modification is in the child's best interest."), *abrogated on other grounds by Killebrew, Tr. of Killebrew Revocable Tr. v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167 (2023). Therefore, we conclude that the district court did not abuse its discretion in finding that White's decision to stay home with M.S. was a good faith endeavor. *Edgington*, 119 Nev. at 588, 80 P.3d at 1290.[5]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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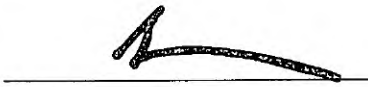

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Gregory G. Gordon, District Judge
The Law Offices of Frank J. Toti, Esq.
Nicolas M. Bui, Ltd.
Eighth District Court Clerk

[5]Insofar as Schaefer raises other arguments not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.