IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC NHAN TRAN,
Appellant,
vs.
ROSA DANH TRINH,
Respondent.

No. 90510-COA

FILED
MAR 05 2026
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ERIC NHAN TRAN,
Appellant,
vs.
ROSA DANH TRINH,
Respondent.

No. 90909-COA

ORDER AFFIRMING (DOCKET NO. 90510-COA) AND REVERSING AND REMANDING (DOCKET NO. 90909-COA)

Eric Nhan Tran brings consolidated appeals from district court orders establishing a custody arrangement, denying a motion to enforce a parenting agreement, and awarding attorney fees. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Tran and respondent Rosa Danh Trinh are the parents of Z.T., born in May 2023. The parties separated in March 2024 and filed competing complaints for custody with Tran seeking joint legal and physical custody and Trinh seeking joint legal and primary physical custody. The district court held a case management conference in May 2024 where Tran represented he had recently lost his job as an attorney. The court entered a temporary custody order (the May 2024 order) that awarded Tran parenting time from Friday morning until Sunday evening. Further, the court noted that based on Tran's prior employment his child support

obligation would have been $1,150 but in light of his recent unemployment, the court would not impose a child support obligation. Instead, the court ordered Tran to contact Trinh's counsel as soon as he secured a new job so that they could calculate his child support obligation. The court then set an evidentiary hearing for September 17, 2024.

The parties appeared for a calendar call on September 10, 2024, and indicated they were attempting to settle this matter. Trinh's counsel stated that "we think the clients are in agreement now to do joint physical custody" but further stated the parties had not agreed on a parenting time schedule and that the main issue to resolve was the custody arrangement. Following the hearing, Trinh's counsel filed an amended pre-trial memorandum that stated Trinh was now seeking joint physical custody. However, Trinh subsequently retained new counsel, who filed a second amended pre-trial memorandum. Trinh's new counsel explained that following the calendar call, Trinh terminated her prior counsel because she had never agreed to joint physical custody and was unhappy with his statements at the hearing. The second amended pre-trial memorandum asserted Trinh still sought primary physical custody.

The parties then appeared for the evidentiary hearing. When questioned on whether there was an agreement, Trinh asserted she had not stipulated to joint physical custody and wished to proceed with the hearing. Tran countered that because he believed there was an agreement as to joint physical custody, he and his counsel assumed the evidentiary hearing would discuss only child support and they were thus not prepared for a custody hearing. Trinh contended that the parties had not agreed to a custody designation nor had they discussed a timeshare arrangement and thus Tran

should have been prepared for a custody hearing. Ultimately, the district court concluded it would move forward with a hearing.

During the hearing, Tran maintained that Trinh's request for primary physical custody was motivated by her desire to eventually relocate to Washington state with Z.T. Trinh maintained that Tran's request for joint physical custody was motivated by his desire to reduce his child support obligation. During the hearing, Trinh testified that Tran had physically abused her and that the parties struggled to cooperate because Tran enjoyed tormenting her during custody exchanges. Further Trinh testified that she was Z.T.'s primary caregiver and that she believed the temporary custody order should be made permanent because it minimized the number of custody exchanges and minimized the time Z.T. spent in daycare. While Trinh indicated she may wish to move to Washington in the future, she was not currently seeking relocation. Trinh further stated she believed Tran would be a good father when he was not tormenting her.

Tran testified that the couple separated after Trinh assaulted him and he denied ever assaulting Trinh. Tran claimed that following the separation, Trinh had withheld Z.T. for nearly 42 days but admitted that Trinh had complied with the May 2024 order. Tran also admitted to one instance in which Trinh had agreed to provide him with additional parenting time and that Tran failed to return Z.T. as agreed, resulting in Trinh calling the police. Tran further denied he harassed Trinh during custody exchanges, but his testimony was contradicted by video recordings of two custody exchanges. These recordings showed Tran grabbing at or near Trinh's buttocks during exchanges, searching her vehicle, taunting her, and laughing at her. Tran admitted to grabbing at Trinh but claimed that he did so because Trinh had his cell phone in her pocket and he needed

the phone as evidence in a separate civil suit he filed against Trinh. When asked whether it was appropriate to laugh at Trinh in front of Z.T., Tran responded that he was allowed to laugh. Tran also admitted his nickname for Trinh was scumbag and that they struggled to cooperate because he believed she had defrauded him of nearly $230,000. Tran stated if Trinh returned the money, he would be willing to cooperate with her regarding Z.T. Tran stated that he was requesting a 2-2-3 schedule because it would ensure Z.T. saw him more frequently than the current schedule and that Z.T. would not need daycare because Tran's parents would watch him. Tran further indicated he was concerned about Trinh receiving primary physical custody because he was aware that Trinh had previously been accused of abducting two of her minor children from a prior relationship from their paternal grandparents. Tran further conceded that despite the May 2024 order, he had never informed Trinh's counsel of his new job and had not paid any child support since the parties' separation.

The district court subsequently entered a custody decree awarding the parties joint legal custody, providing Trinh with primary physical custody, and awarding Tran parenting time from Friday evening to Sunday evening. The court noted that based on the timeshare arrangement, the order was properly designated as primary physical custody and set Tran's child support obligation at $1,575 per month. The court considered the best interest factors and concluded they were either inapplicable, neutral, or favored Trinh and thus Trinh was entitled to primary physical custody. Further, the court determined that Tran failed to demonstrate Trinh was intentionally misrepresenting her income and found that Tran's testimony was not credible and that he was instead

motivated in seeking joint physical custody by his belief that Trinh defrauded him.

Following the decree, Tran filed a motion to enforce a parenting time agreement, claiming that Trinh had stipulated to joint physical custody during the calendar call and had further agreed to joint physical custody in her first amended pre-trial memorandum. Tran argued the district court erred by allowing Trinh to withdraw her agreement, which resulted in trial by ambush because he and his counsel were unprepared for a custody hearing. Tran further argued the court failed to consider his testimony and evidence and over credited Trinh's claims.

Trinh filed an opposition and after a hearing, the district court determined that there was no enforceable agreement to a joint physical custody designation and that it could not enter a joint physical custody order after determining primary physical custody was in Z.T.'s best interest. The court then ordered Trinh's counsel to submit a *Brunzell* affidavit and memorandum of costs because it was inclined to award fees pursuant to NRS 18.010(2)(b). Tran then appealed the custody determination and denial of his order to enforce the stipulation in Docket No. 90510-COA.

Following Tran's notice of appeal, the district court entered an order awarding Trinh attorney fees pursuant to NRS 18.010(2)(b), finding that she was the prevailing party. Tran then appealed this order in Docket No. 90909-COA. The supreme court subsequently consolidated the appeals.

Docket No. 90510-COA

On appeal, Tran argues the district court should have enforced the parties' alleged agreement to a joint physical custody designation because they had an enforceable agreement and Trinh was then judicially estopped from withdrawing her agreement. We disagree.

In Nevada, "[m]atters of custody and support of minor children of parties . . . rest in the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused." *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004) (quoting *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975)). A settlement agreement is a contract, and "its construction and enforcement are governed by principles of contract law." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). While this court reviews contract interpretation de novo, "the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Id.* at 672-73, 119 P.3d at 1257. "Parties in family law matters are free to contract regarding child custody and such agreements are generally enforceable if they are not unconscionable, illegal, or in violation of public policy." *Mizrachi v. Mizrachi*, 132 Nev. 666, 671, 385 P.3d 982, 985 (Ct. App. 2016) (internal quotation marks omitted).

We conclude substantial evidence supports the district court's factual finding that the parties did not have an agreement to a joint physical custody designation. Notably, the statements Tran relies upon indicate only that counsel believed his client was agreeable to a joint physical custody designation and do not establish that the parties had come to an agreement. Further, Tran's own motion concedes the parties had not agreed to a material term, namely, the timeshare agreement. Indeed, this concession is fatal to Tran's argument. A contract cannot exist when the parties have not agreed to all material terms. *May*, 121 Nev. at 673-74, 119

P.3d at 1258 (holding an enforceable agreement does not exist when the parties have not agreed to the material terms).[1]

Tran next argues several of the district court's best interest findings are not supported by substantial evidence and that the court used the custody arrangement to punish him for his alleged failure to comply with the May 2024 order. Tran argues that contrary to the custody order's finding, he did provide examples of his relationship with Z.T. because he testified about planning Z.T.'s birthday party, taking him to other birthday parties, and taking him to Dave and Buster's. Similarly, Tran objects to the district court's finding that Tran refused to pay child support following the separation and that Tran's immaturity made cooperation difficult.

In evaluating whether the district court abused its discretion in resolving child custody, *see Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007), this court looks to whether the district court's decision is supported by substantial evidence and not clearly erroneous, *see Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). This court does not reweigh evidence or reevaluate witness credibility on appeal. *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).

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[1]Even assuming the parties had reached an enforceable agreement to designate their custody agreement as one for joint physical custody, the district court is not bound by such an agreement if it determines the stipulated custody agreement is not in the child's best interest. *See Mizrachi*, 132 Nev. at 677 n.11, 385 P.3d at 989 n.11 (collecting cases discussing that even in light of a stipulated parenting agreement, the child's best interest is still the sole consideration of the court).

Having reviewed the record we determine that substantial evidence supports the district court's conclusion that the best interest factors favored Trinh. Notably, Tran's own testimony supports the district court's conclusion that he makes cooperation difficult, as Tran testified his nickname for Trinh is "scumbag," he mocks her in front of their child, and he previously refused to return Z.T. as agreed upon, which resulted in Trinh contacting law enforcement. Similarly, Tran's testimony supports the district court's finding that he failed to provide any financial support for Z.T. despite earning a substantial salary. This, combined with Tran's testimony that he would be willing to co-parent once Trinh repaid him money allegedly owed supports the district court's finding that Tran was motivated primarily by financial motives. Finally, while Tran contends the district court failed to consider his testimony that he planned Z.T.'s birthday and took him on regular outings, the record reflects the court considered this before finding that Z.T.'s best interest would be served by awarding Trinh primary physical custody. And because substantial evidence supports the district court's determination, we affirm its ruling.

Docket No. 90909-COA.

In Docket No. 90909-COA, Tran challenges the district court's decision to award attorney fees pursuant to NRS 18.010(2)(b). We review an order awarding attorney fees for abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014); *see also Roe v. Roe*, 139 Nev. 163, 182-83, 535 P.3d 274, 293 (Ct. App. 2023) (discussing the recovery of attorney fees in child custody actions). To award fees pursuant to NRS 18.010(2)(b), a district court must make findings that the claims or defenses were either unreasonable or intended to harass. *Id.* at 183-84, 535 P.3d at 293-94.

Tran argues the district court failed to find that his post-decree motions were either unreasonable or intended to harass. We agree. Here, the court's order noted that NRS 18.010(2)(b) required a finding that the motion was brought or maintained without reasonable ground or to harass the prevailing party. However, the court did not make the required finding that Tran's motion was frivolous or harassing and instead found that Trinh was the prevailing party and thus granted attorney fees pursuant to NRS 18.010(2)(b). We therefore reverse the award of attorney fees and costs and remand for the district court to determine whether Tran's post-decree filings were harassing or frivolous as required by NRS 18.010(2)(b).[2]

Accordingly, we

ORDER the district court's custody award (Docket No. 90510-COA) AFFIRMED and ORDER the district court's attorney fee award (Docket No. 90909) REVERSED and REMAND for further proceedings consistent with this order.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

[2]Insofar as Tran raises additional arguments challenging the orders on appeal, we have considered them and conclude they lack merit.

cc: Hon. Charles J. Hoskin, District Judge, Family Division
Elisabeth S. Flemming, Chtd.
Eric Tran Law
Hofland & Tomsheck
Eighth District Court Clerk