IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DIEGO MARIO GALIETTI,
Appellant,
vs.
RUTH DE LA TORRE,
Respondent.

No. 76027-COA

FILED

JUN 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Diego Mario Galietti appeals from a district court order denying a motion to modify child custody, denying modification of child support, and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.[1]

Galietti and Ruth De La Torre have one minor child together and were never married.[2] In 2014, the district court awarded De La Torre sole legal custody of the child for medical, dental, and educational decisions, but awarded the parties joint legal custody on all other matters. Additionally, the district court's 2014 order gave the parties joint physical custody with a 60/40 timeshare in favor of De La Torre. In 2017, Galietti moved for modification of the custody order, requesting joint legal custody for all matters and a 50/50 timeshare. He also requested child support from De La Torre. De La Torre then filed an opposition and a countermotion. After two hearings, the district court denied Galietti's motion to modify custody, and denied his request for child support. Furthermore, the district

[1]Judge Duckworth ruled on all relevant motions with the exception of the final reconsideration motion, which was considered by Judge Hoskin.

[2]We do not recount the facts except as necessary to our disposition.

court accepted the terms of the parties' mutual behavior agreement and ordered compliance therewith; and it awarded De La Torre attorney fees. Galietti filed a motion for reconsideration, which the district court entertained; however, the court made no substantive changes to its order after the reconsideration hearings.[3]

On appeal, Galietti argues that the district court abused its discretion by (1) denying modification of the custody order; (2) denying modification of the child support order; (3) ordering the parties to comply with a mutual behavior order;[4] and (4) awarding De La Torre attorney fees.

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[3]At oral argument, De La Torre raised the issue of whether this court has jurisdiction to review this matter. We conclude, however, that this argument lacks merit. Because Galietti's reconsideration motions were in writing, timely filed, stated with particularity, and requested substantive changes to the order, the issues were tolled and this appeal is therefore within this court's jurisdiction. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010) (holding that "so long as a post-judgment motion for reconsideration is in writing, timely filed, states its grounds with particularity, and request[s] a substantive alteration of the judgment, . . . there is no reason to deny it NRCP 59(e) status, with tolling effect under NRAP 4(a)(4)(C)" (internal quotation marks omitted)).

[4]We are not persuaded by Galietti's argument regarding the mutual behavior order, as it is not supported by any authority. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that claims not supported by relevant authority need not be considered). The record indicates that in open court Galietti and De La Torre stipulated to the terms of the behavior order detailing a protocol for custodial exchanges and other restrictions designed to prevent conflict between the parties. The district court subsequently reduced the parties' agreement to a written order. Therefore, the district court did not abuse its discretion in ordering the parties to comply with the behavior agreement because the parties consented to the stipulation. Accordingly, we affirm the district court's ruling on this issue.

Modification of the Custody Order

Galietti argues that the district court abused its discretion because it failed to conduct an evidentiary hearing on his motion seeking modification of the existing custody order. De La Torre counters that an evidentiary hearing was not required because Galietti failed to show adequate cause.

This court reviews a district court's decision regarding child custody for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). A district court has the discretion to deny a motion to modify a custody order, and it need not hold an evidentiary hearing on the request unless the moving party demonstrates adequate cause. *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993). To establish adequate cause, the moving party must present a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. A prima facie case exists where the movant shows that "(1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.*

For clarity, we address the legal custody and physical custody issues separately.

Legal Custody

Turning first to the legal custody issue, we conclude that the district court did not abuse its discretion when denying modification of the legal custody order because the district court correctly concluded Galietti failed to establish adequate cause. Nevertheless, we recommend that the district court revisit this issue and clearly articulate the true nature of the custodial arrangement.

"Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing." *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009) (citing *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing, J., concurring)). Joint legal custody can exist irrespective of the physical custody arrangement. *Id.* at 421, 216 P.3d at 221. Further, "the parents need not have equal decision-making power in a joint legal custody situation." *Id.*

Here, the district court stated that De La Torre was to maintain sole legal custody related to the child's medical, dental, and educational decisions, but that the parties would continue to have joint legal custody related to all other issues. In other words, the district court has created a hybrid arrangement—i.e., part sole legal custody, part joint legal custody. While Nevada law recognizes that "parents need not have equal decision-making power in a joint legal custody situation," *id.*, whereby one parent could have decision-making authority related to certain areas or activities, it does not recognize granting a parent an amalgam of both sole legal custody and joint legal custody, which appears to be the case here. Accordingly, upon remand of this matter, we recommend that the district court clarify the true nature of the legal custody arrangement. Specifically, the district court should articulate whether Galietti and De La Torre share joint legal custody of the child with De La Torre having decision-making authority regarding medical, dental, and educational matters, or whether De La Torre has sole legal custody.

Physical Custody

Next, we address the physical custody arrangement. According to the district court's 2014 custody order, Galietti is to have physical custody

of the child 40 percent of the time, whereas De La Torre is to have physical custody 60 percent of the time. Under Nevada law, a 60/40 timeshare constitutes joint physical custody. *Id.* at 425-26, 216 P.3d at 224 (holding "that each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody"). Thus, under the 2014 order, Galietti and De La Torre share joint physical custody of the child.

In 2017, Galietti moved the district court to modify the custodial timeshare arrangement from a 60/40 split to a 50/50 split, which the court denied. In denying the motion for modification of the custodial timeshare, the district court determined that an evidentiary hearing was not warranted because Galietti had not met his burden pursuant to *Rooney*. On appeal, Galietti argues that the district court abused its discretion by failing to hold an evidentiary hearing.

Based on our review of the record, we conclude the district court correctly determined that Galietti did not establish adequate cause and was therefore not entitled to an evidentiary hearing. Specifically, Galietti failed to present evidence that was neither cumulative nor impeaching. *Rooney*, 109 Nev. at 543, 853 P.2d at 125 (holding that a prima facie case requires a showing of relevant facts and "evidence [that] is not merely *cumulative* or *impeaching*" (emphasis added)). In his moving papers, for example, Galietti argued that because the district court considered Dr. John Paglini's child custody evaluation report when it drafted its original order in 2014, it was required to adopt all of the report's recommendations. In particular, Galietti argues that the court should adopt Dr. Paglini's recommendation that modification of the timeshare from 60/40 to 50/50 may be appropriate if no issues arise in the next three years. We find this argument unpersuasive.

First, the district court is not bound by recommendations in a third-party report. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007) ("[D]istrict court[s] [have] broad discretionary powers to determine child custody matters . . . ."). Second, since the district court previously considered Dr. Paglini's report, the evidence contained therein is cumulative and cannot serve as the primary basis for establishing adequate cause as it stated a 50/50 schedule *may* be appropriate in three years. Further, in his reconsideration motion, Galietti argued that because his work schedule is more flexible than De La Torre's, a 50/50 split would be in the best interest of the child because such a change would mean less time with caretakers and more time with family. That information, however, was also cumulative because the district court considered the parties' work schedules when it crafted the original timeshare order, and the record does not indicate that their work schedules have substantially changed since 2014.

Additionally, Galietti argued in district court that De La Torre violated the custody order on various occasions. After examining the record, we are not convinced that those allegations sufficiently establish adequate cause. *Rooney*, 109 Nev. at 543, 853 P.2d at 125 (stating that adequate cause "requires something more than allegations which . . . might permit inferences sufficient to establish grounds for a custody change"). Moreover, to the extent that there was any misconduct, the district court properly admonished the parties to comply with the 2014 order. *See Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993) (explaining that courts are not to use "changes of custody as a sword to punish parental misconduct"). Thus, Galietti failed to satisfy the second prong of the adequate cause test articulated in *Rooney*, as he proffered only cumulative and impeachment

evidence. Therefore, we conclude that the district court did not abuse its discretion in denying Galietti's motion for modification of the physical custody arrangement without first holding an evidentiary hearing.

Child Support

Next, we address the district court's denial of Galietti's motion to modify the 2014 child support order.[5] Galietti argues that the district court abused its discretion by denying his request for modification of the child support order; namely, that (1) the district court failed to review his modification request; (2) the court should have reviewed and modified the order pursuant to NRS 125B.070 and *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); and (3) the court failed to make specific findings on the issue. We agree.

We review a district court's order regarding child support for an abuse of discretion. *Wallace*, 112 Nev. at 1019, 922 P.2d at 543. "In cases where the parties have joint physical custody, the *Wright v. Osburn* formula determines which parent should receive child support." *Rivero*, 125 Nev. at 437, 216 P.3d at 231-32 (citing *Wright*, 114 Nev. at 1368-69, 970 P.2d at 1072). Under *Wright*, where the parties have joint physical custody, the child support calculation is based on the parties' gross incomes. 114 Nev. at 1368-69, 970 P.2d at 1072. Further, as directed by NRS 125B.070(1)(b), "[e]ach parent is obligated to pay a percentage of their income, according to the number of children . . . ." *Rivero*, 125 Nev. at 437, 216 P.3d at 232.

Once the appropriate percentages are determined, "[t]he difference between the two support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference."

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[5]The 2014 order contains no findings and states only that "there shall be no Child Support obligation from one party to the other."

Id. Where appropriate, however, the district court may adjust the child support amount pursuant to the factors enumerated in NRS 125B.080(9). *Id.* But a deviation from the statutory formula must be supported by specific findings of fact, including the basis for the deviation and what the support amount would have been without the adjustment. *Id.* at 438, 216 P.3d at 232. After a support order has been entered, a parent or legal guardian may request review of a child support order every three years, and the district court *must* review the order. *See* NRS 125B.145(1)(b).[6]

Here, the district court abused its discretion by not making specific findings of fact as to whether Galietti was entitled to receive child support under NRS 125B and failing to articulate why it deviated from the statutory formula, if that is what the court intended. Accordingly, we reverse the district court's denial of Galietti's motion to modify the child support order. On remand, because De La Torre and Galietti have joint physical custody, the district court must calculate child support pursuant to *Wright* and make specific findings of fact related thereto. Moreover, to the extent the district court finds it appropriate to deviate from the formula, it must also set forth specific findings of fact stating the basis for the deviation.

Attorney Fees

Finally, we turn to the issue of whether the district court abused its discretion when it awarded De La Torre attorney fees. Galietti argues that the district court abused its discretion in awarding attorney fees to De La Torre because its order did not contain specific findings pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

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[6]During oral argument, both parties conceded that the district court's three-year review did not fully comply with the demands of the statute.

De La Torre counters that the district court properly exercised its discretion because it considered, inter alia, her *Brunzell* affidavit. We agree with De La Torre.

This court reviews a district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). Awards supported by substantial evidence will be affirmed. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). When determining the amount of fees to award, the district court must consider the factors articulated in *Brunzell*. 85 Nev. at 349, 455 P.2d at 33. Under *Brunzell*, the district court must consider (1) the quality of the advocate; (2) the character and difficulty of the work performed; (3) the work actually performed by the attorney; and (4) the result obtained. *Id.* Although preferred, express findings on each factor are *not* necessary, so long as the district court demonstrates "that it considered the required factors" and the award is supported by "substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143.

Here, we conclude that the district court properly considered the *Brunzell* factors. While the district court's order does not contain specific findings related to each factor, the court stated that it considered the "factors enumerated in *Brunzell*" and that counsel had "met the criteria set forth" therein, based on, among other things, the "papers and pleadings." Specifically, the district court considered De La Torre's *Brunzell* affidavit discussing each factor as well as supplemental briefing that included itemized billing statements and invoices. Thus, the award was supported by substantial evidence. Further, the record reflects that De La Torre's attorney fees totaled roughly $34,000, but the district court's award was a mere $2,500—a reduction of almost 93 percent. Therefore, the district court

adequately considered the disparity between the parties. *See Miller*, 121 Nev. at 623, 119 P.3d at 730 (requiring family law courts to consider the disparity in income of the parties when awarding fees). Accordingly, the district court did not abuse its discretion in awarding attorney fees to De La Torre, as it properly considered the *Brunzell* factors and the award was supported by substantial evidence.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
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