IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDRE DISMOND,
Appellant,
vs.
KELSEY DAVIS N/K/A KELSEY MARZOLA,
Respondent.

No. 64940

FILED

DEC 15 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order modifying child custody and child support. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

In 2009, the parties stipulated to a custody arrangement, which they labeled as joint legal and physical custody. Although the parties stipulated that they would have an equal timeshare, the stipulation provided that appellant would have the child from Friday at 6:00 p.m. until Sunday at 6:00 p.m., with respondent having the child for the rest of the week. The stipulation also provided that neither party would pay child support. The stipulation and an order of the court approving the stipulation were subsequently filed in the district court.

In 2013, respondent filed a motion that sought, among other things, to modify physical custody and child support. In the motion, respondent asserted that appellant only had visitation for two days per week. Respondent did not seek to change this timeshare, but instead argued that the timeshare actually resulted in her having primary

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physical custody, and she sought an order designating the arrangement as such. Alternatively, respondent argued that, even if the court were to find the existing arrangement could properly be considered joint physical custody, modification to primary physical custody would be in the child's best interest. Respondent also requested that child support be ordered based on her having primary physical custody.

Appellant opposed the motion, arguing that there had been no change in circumstances warranting a change in custody. He also asserted that evidence existed which showed that respondent was attempting to alienate the child from him. Respondent filed a reply. After a hearing, the district court granted respondent's motion to modify custody, awarding primary physical custody to respondent without changing the parties' timeshare, and ordering appellant to pay monthly child support in light of the custody arrangement. This appeal followed.

Child custody

With regard to child custody, appellant argues that respondent could not move to change the designation from joint to primary physical custody without moving to modify the timeshare or demonstrating a substantial change in circumstances. Respondent argues that the modification was appropriate in light of the parties' actual custody arrangement and the child's best interest. We review the district court's child custody order for an abuse of discretion. *Wallace v. Wallace,* 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

Recently, in *Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1047-48 (2015), the Nevada Supreme Court addressed a situation in

which a mother sought to change a custody designation from joint to primary physical custody without changing the parties' timeshare. In that case, the court concluded that "the district court had authority to review the parties' timeshare arrangement, determine whether the parties shared joint physical custody under Nevada law, and modify the agreement accordingly." *Id.* at ___, 345 P.3d at 1048. Thus, appellant's argument that respondent could not seek a change to the designation of custody without requesting a change to the timeshare lacks merit. *See id.*

As to appellant's argument that respondent was required to demonstrate a substantial change in circumstances, a party seeking to change a primary physical custody arrangement is required to demonstrate a substantial change in circumstances in order to obtain a modification. *See Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) (explaining that a court may modify a joint custody arrangement based on the best interest of the child, but may only modify a primary physical custody arrangement if there is a substantial change in circumstances and modification is in the best interest of the child). Here, the district court looked at the parties' existing custody arrangement and concluded that the timeshare, under which appellant had the child for significantly less than half of the time, would generally be classified as a primary physical custody arrangement with respondent as the primary physical custodian. To the extent that respondent already had primary physical custody, she was not seeking a modification of that arrangement, but instead was seeking to have the arrangement recognized for what it already was. Thus, it was not necessary for her to demonstrate a change

in circumstances in order to obtain such relief. *See id.* at 417, 216 P.3d at 219 (providing that "once the parties move the court to modify the custody agreement, the court must use the terms and definitions under Nevada law," even if the parties used different terms and definitions in their initial stipulated custody agreement).

In this case, the district court went beyond its conclusion that the parties were already exercising a primary physical custody arrangement and also considered the best interest of the child, concluding that redesignating the custody arrangement as primary physical custody with respondent was in the child's best interest. We conclude that this was appropriate under the circumstances presented here.[1] *See Bluestein,*

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[1]Arguably, *Bluestein* could be distinguished from the instant action insofar as it involved a timeshare that was much closer to an equal split than the one presented here. *See Bluestein*, 131 Nev. at ___, 345 P.3d at 1047. If *Bluestein* is distinguished, the district court likely should have stopped at the determination that the parties had a primary physical custody arrangement and redesignated that arrangement as such in a new custody order. *See Rivero*, 125 Nev. at 417, 216 P.3d at 219 ("[O]nce the parties move to modify the custody agreement, the court must use the terms and definitions under Nevada law."). Even under this scenario, however, any possible error in moving on to evaluate the best interest of the child did not affect any party's substantial rights, as it resulted in the same outcome—respondent having primary physical custody. As a result, any such error does not provide grounds for reversing the district court's decision. *See* NRCP 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (noting that an appellate court need not reverse a district court decision for harmless error).

131 Nev. at ___, 345 P.3d at 1049 (clarifying that the precise timeshare is not necessarily controlling in determining the type of custody arrangement that exists and emphasizing that the best interest of the child is of paramount importance in determining whether to modify an agreement that provided for joint physical custody).

Appellant next argues that the district court abused its discretion by failing to consider all of the evidence in analyzing the best interest factors, but does not go so far as to identify any of the court's findings as erroneous. Appellant also recognizes that the court found that the majority of the best interest factors favored respondent, but he does not assert how those findings were erroneous. Without arguing that any of the district court's findings regarding the best interest factors were unsupported or otherwise improper, appellant has failed to cogently argue this issue on appeal, and, thus, we decline to consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing that an appellate court need not consider points that are not cogently argued or supported by authority).

Moreover, to the extent that appellant generally argues that certain evidence supported retaining the joint physical custody designation, the district court's decision was based on its evaluation of the evidence presented at the custody hearing, and we will not reweigh that evidence or witness credibility. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004); *Wallace*, 112 Nev. at 1019, 922 P.2d at 543 (stating that appellate courts presume that the district court properly exercises its discretion regarding child custody determinations); *see also*

Schwartz v. Schwartz, 126 Nev. 88, 91, 225 P.3d 1273, 1275-76 (2010) (explaining that, under an abuse of discretion standard, the appellate court "will not substitute [its] judgment for that of the district court"). Under these circumstances, we affirm the district court's order awarding respondent primary physical custody of the parties' minor child.

Child support

Appellant contends the district court should not have modified child support because there was no change in circumstances and because respondent waived her present right to child support. There was, however, a change in the custody designation to primary physical custody with respondent, which, as discussed above, was proper, and which provided a basis for recalculating the appropriate child support obligation. *See Bluestein*, 131 Nev. at ___, 345 P.3d at 1049 (recognizing that a change to the custody designation may result in a change to a child support obligation, even when there is no modification of the timeshare).

Under Nevada law, the formula for determining child support is set forth in NRS 125B.070, and the amount established under that statute "is presumed to meet the basic needs of [the] child." *See Garrett v. Garrett*, 111 Nev. 972, 973, 899 P.2d 1112, 1113 (1995) (internal quotation marks omitted). While parties can agree to deviate from the statutory formula, they "must stipulate sufficient facts . . . which justify the deviation to the court." NRS 125B.080(2). And in order to award less than the amount established under NRS 125B.070, the court must also consider certain factors and identify any relevant facts supporting the deviation. NRS 125B.080(6), (9); *see Anastassatos v. Anastassatos*, 112

Nev. 317, 320, 913 P.2d 652, 654 (1996) ("A district court has limited discretion to deviate from child support guidelines provided by NRS 125B.070, and any such deviation must be based upon the statutory factors provided under NRS 125B.080(9)."). Moreover, although the Nevada Supreme Court has held that a party may waive his or her right to collect child support arrearages, *see, e.g., McKellar v. McKellar*, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994), the statutory language regarding deviation contemplates deviation based on agreement of the parties, but mandates that such deviation must be supported by the deviation factors. *See* NRS 125B.080(2) ("If the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with subsection 9 which justify the deviation to the court, and the court shall make a written finding thereon."). In light of the statutory language, we conclude that any waiver of a present and ongoing child support award must be supported by sufficient facts, as required by NRS 125B.080(2).

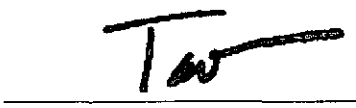
Thus, regardless of any representations by respondent that she was not seeking child support, the district court was not permitted to deviate from the statutory formula in the absence of specific findings supporting such a deviation. *See* NRS 125B.080(2), (6), (9); *Anastassatos*, 112 Nev. at 320, 913 P.2d at 654. On appeal, appellant does not argue that there were any facts present to support a deviation from the child support formula based on the statutory factors. As a result, we

affirm the district court's order awarding respondent child support according to the formula set forth in NRS 125B.070.

It is so ORDERED.[2]



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
McFarling Law Group
Kelsey Davis
Kelsey Marzola
Eighth District Court Clerk

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[2]On June 1, 2015, respondent submitted an amended answering brief. She did not move for leave to amend the brief, and it is not clear what, if any, changes were made from her original brief. As respondent's initial answering brief was adequate and in light of our decision herein, we direct the clerk of the court to return, unfiled, respondent's amended answering brief.