

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MILLER,
Appellant,
vs.
PAMELA DUSSAULT,
Respondent.

No. 56668

FILED

NOV 21 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Angers*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court post-divorce decree order granting an NRCP 60(b) motion and granting a motion to modify legal custody. Eighth Judicial District Court, Family Court Division, Clark County; Bill Henderson, Judge.

This appeal arises from a November 2007 district court post-decree order, entered by Judge Cheryl B. Moss, that confirmed the parties' joint physical custody arrangement of their minor child. The order also found that respondent owed 18 percent of her gross monthly income in child support, with an offset based on the parties' timeshare and respondent's obligation to provide health insurance coverage for the child. The November order noted that appellant had updated his Affidavit of Financial Condition, but no further statements were made regarding appellant's gross monthly income, or his ability to earn income, as it was noted that he was unemployed.

Six months after the November order's entry, respondent filed a motion to modify custody and an NRCP 60(b) motion to set aside the district court's order concerning child support. In September 2009, the case was reassigned to Judge Bill Henderson who held an evidentiary hearing during which the parties, and at least the two parenting coordinators, testified. A child custody evaluation was also presented to the district court for its consideration. Ultimately, the district court

entered an order granting respondent's NRCP 60(b) motion to set aside the child support arrears and to terminate her child support obligation, and the district court modified the legal custody arrangement. This appeal followed.

The appellate record reveals that in respondent's NRCP 60(b) motion, she argued, among other things, that the child support award in the post-decree order should be set aside because Judge Moss failed to consider appellant's income and failed to apply the Wright formula. Because Judge Moss awarded joint physical custody to the parties, she was required, under Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998), to consider both parties' income and use a specific formula to calculate the monthly child support obligation and to determine which parent would pay that amount. Judge Moss failed, however, in the post-decree order, to apply the Wright formula. Thus, we conclude that district court Judge Bill Henderson did not abuse his discretion in granting NRCP 60(b) relief to set aside that portion of Judge Moss's order that obligated respondent to pay child support. Cook v. Cook, 112 Nev. 179, 912 P.2d 264 (1996) (holding that the district court's broad discretion to grant or deny an NRCP 60(b) motion will not be disturbed absent an abuse of discretion); see also Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (recognizing that a district court's child support award will not be disturbed absent an abuse of discretion). As the district court properly granted respondent's NRCP 60(b) motion to terminate respondent's child support obligation, it also correctly set aside the child support arrears arising out of Judge Moss's erroneous post-decree child support order. Accordingly, we affirm the portion of the district court's order that set aside any arrears that had erroneously accrued and that terminated respondent's monthly child support obligation.

As to the issue of modifying appellant's legal custodian designation, we conclude that Judge Henderson did not abuse his discretion in modifying the parties' legal custody status, as it relates to school zoning and selection of a primary care physician for the child to that of joint legal custody for these issues. Wallace, 112 Nev. at 1019, 922 P.2d at 543 (recognizing that a district court's child custody decision will not be disturbed absent an abuse of discretion); NRS 125.480 (providing that, in child custody matters, the court's sole consideration is the child's best interest); Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005) (providing that a district court's factual findings will not be set aside if supported by substantial evidence). In Judge Moss's November 2007 post-decree order, she awarded appellant primary legal custody for the purposes of school zoning and selecting a primary care physician. Following an evidentiary hearing prompted by respondent's motion to modify the legal custodial designations, Judge Henderson found that there was a change in circumstances warranting a modification. Specifically, Judge Henderson found that respondent had made more progress than appellant in counseling sessions and that appellant was rigid and unyielding concerning issues relating to the parties' child, such that appellant is "almost incapable of co-parenting."¹ The district court also noted that, while appellant had made compromises, he lacked any insight as to why the compromises were reasonable or necessary. Consequently,

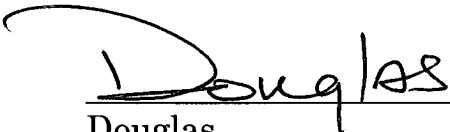
¹We note that Judge Henderson based this finding, in part, on the testimony of Dr. Stephanie Holland and Donna Gosnell, but appellant failed to provide this court with a copy of these individuals' testimony. Thus, we presume that the testimony supports the district court's findings. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

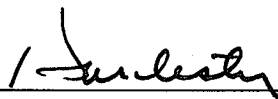
Judge Henderson found that respondent should be equally involved in making decisions relating to the child's school and medical needs,² and ordered the legal custodial designations modified by awarding the parties joint legal custody for these issues.

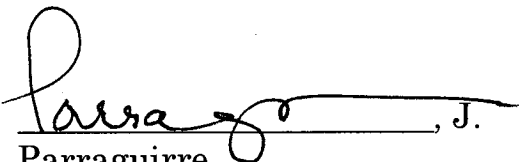
As substantial evidence supports the district court's findings that a change in circumstances had occurred warranting a modification to appellant's legal custodial designation, we conclude that Judge Henderson did not abuse his discretion in granting respondent's motion to modify the parties' custody designation. Wallace, 112 Nev. at 1019, 922 P.2d at 543 (recognizing that a district court's child custody decision will not be disturbed absent an abuse of discretion).

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

²On this point, we note that Judge Moss's post-decree order simply awarded appellant primary legal custody to select a primary care physician for the parties' child. It does not appear that that order limits, in any way, respondent's participation in the child's health care.

³Having considered the parties' briefs and appendices, we deny respondent's request for sanctions. And in light of this order, we deny as moot appellant's October 7, 2011, motion for temporary remand.

cc: Hon. Bill Henderson, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Robert W. Lueck, Esq.
Wells & Rawlings
Eighth District Court Clerk