

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM R. BERCH,
Appellant,
vs.
MICHELLE L. BERCH,
Respondent.

No. 57172

FILED

MAY 11 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

This is an appeal from a district court divorce decree. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

The parties were married for four years and have a child who is four years old. During the underlying divorce proceedings, respondent was granted temporary primary physical custody and appellant was awarded supervised visitation. Following a bench trial, the district court, among other things, awarded respondent sole legal and physical custody of the parties' child, granted her permission to relocate with the child to Kentucky, awarded appellant supervised visitation, directed the guardian ad litem to suspend any visitation when it appeared that the child had been or would be harmed, and distributed the parties' community property and debts. This appeal followed.

On appeal, appellant contends that the district court abused its discretion in awarding respondent physical custody and by allowing respondent to relocate with the child to Kentucky by failing to find that, despite the child's relocation, reasonable alternative visitation was available to foster appellant's relationship with the child. He further

contends that the district court committed legal error when it gave the guardian ad litem authority to suspend visitation. Finally, appellant argues that the district court abused its discretion in making an unequal division of community debts without a compelling reason for such a division, and in awarding respondent attorney fees without citation to legal authority or reliance on supporting documentation. Respondent contests these assertions. Having considered the parties' arguments and the appellate record, we affirm in part, reverse in part, and remand to the district court the issue of property distribution, namely the disposition of the parties' community debts, and the award of attorney fees for further proceedings.

Custody, relocation, visitation, and the guardian ad litem's authority

Under the circumstances presented in the underlying proceedings, we conclude that the district court did not abuse its discretion in awarding primary physical custody to respondent. See Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996) (reviewing a district court's child custody decision for an abuse of discretion); NRS 125.480(1) (“[T]he sole consideration of the court [in child custody matters] is the best interest of the child.”).

Regarding the district court's decision to allow respondent to relocate with the minor child to Kentucky, appellant argues that the district court abused its discretion because substantial evidence does not support its decision and it failed to make a finding regarding whether adequate alternative visitation was available to appellant. We disagree.

In this matter, the district court found that respondent demonstrated a sensible, good faith reason for wanting to relocate, that both respondent and the minor child would realize an actual advantage

from the move, and that the child's best interests were served by relocating. Based on the trial testimony, the parties' psychological reports, the guardian ad litem's reports, and the court's observations, the district court determined that a proper visitation schedule for appellant and the child would constitute four weeks of visitation a year, which will change once the child begins kindergarten, and that visitation be monitored by the guardian ad litem until further order of the court.

We conclude that no abuse of discretion occurred, as substantial evidence supports the district court's decision and the record demonstrates that the district court weighed the availability of adequate visitation. Wallace, 112 Nev. 1015, 922 P.2d 541 (reviewing a district court's child custody decision for an abuse of discretion); Gepford v. Gepford, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000) (explaining that a district court's factual findings will be upheld if supported by substantial evidence in the record). With regard to the district court's weighing of the Schwartz factors and establishment of an alternative visitation schedule, we conclude that the district court's schedule maintains an appropriate relationship between appellant and the child under the circumstances presented to the district court. See Schwartz v. Schwartz, 107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991) (requiring a court to weigh certain factors once the moving party demonstrates a sensible, good faith reason for relocating). Thus, appellant's argument that the relocation decision should be reversed because the district court failed to make a factual finding regarding the availability of an alternative visitation schedule lacks merit as the district court record supports its decision.

Similarly, the district court did not abuse its discretion in allowing the guardian ad litem to suspend any visitation "if the Guardian

Ad Litem deems that the child has been or will be emotionally or physically harmed by the visitation.” See Wallace, 112 Nev. 1015, 922 P.2d 541 (reviewing a district court’s decision regarding visitation for an abuse of discretion). Based on the evidence presented to the district court, we conclude that the district court properly exercised its discretion. See Foster v. Washoe County, 114 Nev. 936, 944, 964 P.2d 788, 793 (1998) (explaining that CASA volunteers are an extension of the court and they “perform a valuable and integral function by assisting courts”). We note that if appellant’s visitation is suspended, he has the ability to challenge the suspension in the district court. Thus, we affirm the district court’s decision granting the guardian ad litem specific authority regarding appellant’s visitation with the minor child.¹

Property distribution and attorney fees

Under NRS 125.150(1)(b), to the extent practicable, the district court is required to equally dispose of the parties’ community property, unless the court finds a compelling reason to make an unequal disposition. The district court is required to set “forth in writing the reasons for making the unequal disposition.” NRS 125.150(1)(b).

Here, the district court awarded all of the parties’ community debts to appellant and required only that respondent pay for any debt that she incurred after the parties’ divorce became final.² Despite this unequal

¹Having considered appellant’s remaining arguments regarding custody, relocation, visitation, and the tractor loan and animal fees bill, we conclude that they lack merit and do not warrant reversal of the district court’s decisions.

²We note that because respondent had previously quitclaimed her interest in the marital home to appellant, the fact that the district court
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distribution, the district court's divorce decree is silent as to whether there is a compelling reason for this unequal distribution. Accordingly, we reverse the portion of the district court's divorce decree that disposed of the parties' community debts, and we remand this matter to the district court for either written factual findings that demonstrate a compelling reason for the unequal disposition of the debts, or for a redistribution of the debts.


Regarding the attorney fees award, while NRS 125.150(3) allows the court to award reasonable attorney fees to either party, as long as those fees are at issue in the pleadings, our holding in Miller v. Wilfong, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005), requires the district court to determine the reasonableness of a fees award by evaluating the Brunzell factors, see Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and considering the disparity in income between the parties. Miller, 121 Nev. at 623-24, 119 P.3d at 730. The party moving for attorney fees must support his or her request with an affidavit or other evidence to establish the Brunzell factors. Id. Because the district court failed to consider the Brunzell factors and the disparity in income between the parties, if any, we reverse the portion of the district court's order that awards attorney fees and we remand this issue to the district court for written findings regarding the reasonableness of the attorney fees award.

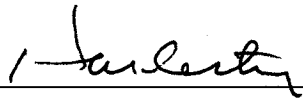
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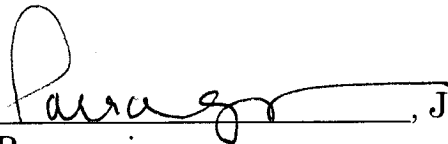
awarded appellant the debt owed on the home is irrelevant to the district court's distribution of the community debts, as that debt became appellant's separate property after the transfer of title.

Based on the above discussions, 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.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Richard Wagner, District Judge
Fahrendorf, Vilorio, Oliphant & Oster, LLP
Jack T. Bullock, II
Humboldt County Clerk