IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ROUTON,
Appellant,
vs.
DELANN Y. ROUTON,
Respondent.

No. 59332

FILED

NOV 16 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is a fast track appeal from a post-divorce decree district court order concerning child custody, visitation, and support. Eighth Judicial District Court, Family Court Division, Clark County; William B. Gonzalez, Judge.

FACTS

Appellant Michael Routon and respondent Delann Routon were divorced in California in February 2006. In the divorce decree, the parties agreed to joint legal and physical custody of their two minor children. After appellant received a military re-assignment to Louisiana, the parties executed a temporary amendment to their parenting plan in September 2006, under which the children would live with respondent, and appellant would have visitation during the children's school breaks. Appellant also agreed to pay $850 in monthly child support.

Respondent eventually moved to Nevada. When appellant failed to return the children to respondent after their scheduled summer visit in August 2010, respondent domesticated the California divorce decree and filed in the Nevada district court the underlying motion to modify child custody, visitation, and support. In response, appellant filed

his own motion to change child custody. Both parties requested primary physical custody. After a bench trial, the district court denied appellant's request for primary physical custody, set forth a holiday visitation schedule for appellant, and ordered him to pay $913 in monthly child support. This appeal followed.

As an initial matter, appellant has filed a motion for sanctions in which he asks that he be granted the relief requested in his appeal based upon respondent's failure to file a response to his fast track statement, update her address with this court, or otherwise demonstrate any intention of defending this appeal. Considering our policy to decide cases on their merits when possible, particularly in domestic relation matters, see Dagher v. Dagher, 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987), we deny appellant's motion. Nevertheless, we admonish respondent for failing to file the fast track response mandated by NRAP 3E(d)(2).[1]

DISCUSSION

On appeal, appellant first contends that the district court abused its discretion in not awarding him primary physical custody of the children. He argues that awarding custody to him is in the children's best interests because he is the parent most likely to foster the children's relationship with the other parent, and that he is more able to meet the children's needs.

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[1]We have determined that this appeal should be submitted for decision on the fast track statement and appellate record without oral argument. See NRAP 34(f)(1).

A court may modify primary physical custody when there has been a substantial change in circumstances affecting the child's welfare, and the child's best interest is served by the modification. Ellis v. Carucci, 123 Nev. 145, 150-51, 161 P.3d 239, 242-43 (2007). In evaluating a custody order, this court must be satisfied that the district court's decision was made for appropriate reasons and that the factual determinations are supported by substantial evidence. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). Child custody matters rest in the district court's sound discretion, Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), and this court will not disturb the custody decision absent an abuse of that discretion. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

Here, the district court properly determined that, at the time of the hearing, respondent had primary physical custody based upon the parties' 2006 parenting plan and the fact that the children had been residing with respondent a majority of the time for the preceding four years. See Rivero v. Rivero, 125 Nev. 410, 427-30, 216 P.3d 213, 225-27 (2009). The district court then concluded that, based on the totality of the evidence, appellant had not demonstrated a change in circumstances warranting an award of primary physical custody in his favor. Having reviewed the record, we conclude that the district court's findings are supported by substantial evidence and that the district court did not abuse its discretion. Thus, we affirm the district court's denial of appellant's request that he be awarded primary physical custody.

Appellant next contends that the $913 in monthly child support exceeded the formula set forth in NRS 125B.080, and that he should only be required to pay $500 in monthly child support, which

constitutes 25 percent of his $2,000 monthly military retirement income. In calculating appellant's gross monthly income and support payment, the district court's order states:

> Plaintiff's child support obligation shall be set based upon the standard income in Nevada of $39,629.00 per year. The Court will calculate half of that amount and use a 20 hour work week for an income of $1,651.00 per month if Plaintiff were to have a part-time job to supplement his income. Plaintiff's retirement income is then added in for a total gross monthly income of $3,651.00 of which 25% equals $913.00 per month in child support that Plaintiff shall pay to Defendant.

Appellant argues that the higher support amount improperly penalizes him for retiring after serving 20 years in the military.

Although this court reviews a child support order for an abuse of discretion, Wallace, 112 Nev. at 1019, 922 P.2d at 543, the district court's discretion in awarding support is limited by statutory guidelines. Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996). The obligation for support of the noncustodial parent for two children is 25 percent of the parent's gross monthly income, not to exceed the presumptive maximum amount. NRS 125B.070(1).

NRS 125B.080(9) sets forth several factors the court may consider in deviating from the statutory child support formula, including the needs of the children, the parents' relative incomes, and the amount of time the children spend with each parent. Further, if the court finds that a parent "is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity." NRS 125B.080(8). We have held that "where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding

support . . . [and] the burden of proving willful underemployment for reasons other than avoidance of a support obligation will shift to the supporting parent." Minnear v. Minnear, 107 Nev. 495, 498, 814 P.2d 85, 86-87 (1991).

If the court deviates from the statutory support formula, it must set forth findings of fact as to the basis for the deviation, and set forth the amount that would have been established under the statutory formula. NRS 125B.080(6); Jackson v. Jackson, 111 Nev. 1551, 1554, 907 P.2d 990, 992 (1995). Failure to set forth those findings constitutes reversible error. Anastassatos, 112 Nev. at 321, 913 P.2d at 654.

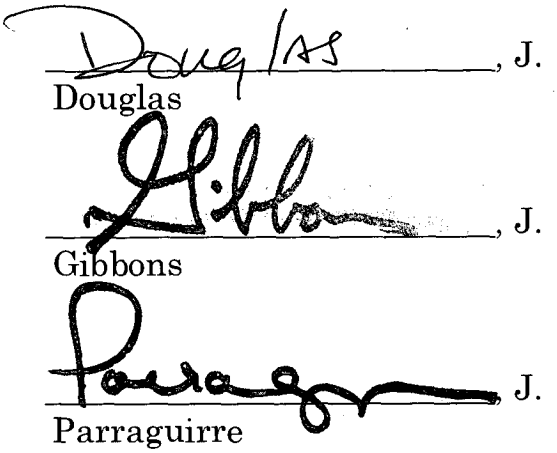
Here, the district court's order does not contain the findings necessary to support a deviation from the statutory formula. In particular, the order does not include a finding that appellant was willfully underemployed, or any findings as to the factors supporting a deviation under NRS 125B.080(9). See Lewis v. Hicks, 108 Nev. 1107, 1112, 843 P.2d 828, 831 (1992) (stating that "we have consistently found error where the trial court invented its own formula for calculating support awards"). Moreover, it is not clear that the record supports a finding that appellant's "true earning capacity" could be valued at the standard income level for Nevada.

CONCLUSION

Accordingly, we reverse the portion of the district court's order as to the award of child support, and we remand this matter to the district court for entry of findings of fact as to the child support award or for

recalculation of the child support accompanied by specific findings of fact. We affirm the order as to child custody and visitation.[2]

It is so ORDERED.[3]



Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. William B. Gonzalez, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Ciciliano & Associates, LLC
Delann Y. Routon
Eighth District Court Clerk

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[2]To the extent that appellant challenges the district court's award of attorney fees to respondent, that matter is not properly before us on appeal. An order granting attorney fees is independently appealable as a special order made after a final judgment, see NRAP 3A(b)(8) (providing for appeals from special orders entered after a final judgment); Smith v. Crown Financial Services, 111 Nev. 277, 280 n.2, 890 P.2d 769, 771 n.2 (1995) (noting that a post-judgment order awarding attorney fees is appealable as a special order after final judgment), and appellant did not file a notice of appeal from the attorney fees order.

[3]In light of this order, we deny as moot the motion to withdraw filed by counsel for appellant.