IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEREK M. JONES,
Appellant,
vs.
MAGGIE L. WHEELER A/K/A MARGARET L. WHEELER,
Respondent.

No. 70518

ORDER OF REVERSAL AND REMAND

This is an appeal from an order modifying custody and granting relocation. Eighth Judicial District Court, Family Court Division, Clark County; Rena G. Hughes, Judge.

The district court modified the parties' existing joint physical custody order to give respondent primary physical custody and allow her to relocate the child to Kansas. This appeal followed.

As an initial matter, appellant waived his argument that *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), *overruled in part on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004), precluded the district court from considering the fact that respondent had moved to Kansas in deciding whether to modify custody by failing to raise it in the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Thus, we do not address that argument here.

Appellant next argues the district court applied the wrong standard in deciding the relocation motion because it retroactively applied NRS 125C.007, which became effective after the motion for relocation was filed. Instead, appellant contends the court should have applied *Potter v. Potter*, 121 Nev. 613, 119 P.3d 1246 (2005), which he argues required the

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court to first determine whether modification from joint physical custody to primary physical custody was in the child's best interest before turning to whether relocation was in the child's best interest.

Rather than setting forth rigidly separate steps as appellant asserts, *Potter* provides that a parent with joint physical custody seeking to relocate with the parties' child "must move for primary physical custody for the purpose of relocating," which requires the party seeking relocation to demonstrate "that it is in the child's best interest to reside outside of Nevada with the moving parent as the primary physical custodian." 121 Nev. at 618, 119 P.3d at 1249-50. This is substantially the same standard as the one the district court applied under the new legislation. Thus, appellant has not demonstrated that the district court applied an incorrect standard in resolving the underlying motions.[1] *See id.*

Although we are not convinced that the district court applied the wrong standard, we nonetheless cannot conclude that the court's application of the standard was proper. In particular, the district court

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[1]Appellant also asserts that the district court found that he had de facto primary physical custody but failed to account for this finding in its custody decision. Appellant has not, however, argued that the court should have applied the standard for modifying primary physical custody, such that respondent should have been required to show a substantial change in circumstances. *See Ellis v. Carucci*, 123 Nev. 145, 150-51, 161 P.3d 239, 242-43 (2007) (providing that a party seeking to modify primary physical custody must show a substantial change in circumstances). As a result, he has waived this argument. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983; *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). Indeed, as noted above, appellant expressly argues that, under *Potter*, the best interest test for modifying joint physical custody applied. To the extent appellant argues the district court should have considered the de facto custody situation as a factor in the custody and relocation decision, the record demonstrates that the court considered the parties' circumstances relating to living arrangements leading up to the filing of the underlying motions.

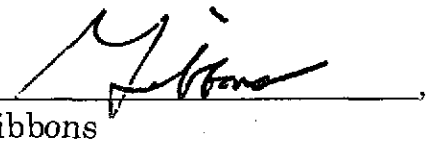
failed to include any findings relating to the best interest of the child or the relocation factors in its written order. Recent decisions from the Nevada Supreme Court have made clear that district court child custody orders must contain express written findings as to *all* of the statutory best interest factors, as well as any other pertinent factors, and we are bound by those decisions. *See Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016) (holding that a district court abuses its discretion in modifying custody if it "fail[s] to set forth specific findings as to all of [the best interest] factors"); *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) ("Nevada law . . . requires express findings as to the best interest of the child in custody and visitation matters," and the "order must tie the child's best interest, as informed by specific, relevant findings respecting the [statutory best interest factors] and any other relevant factors, to the custody determination made.").

Finally, although the court orally made limited findings regarding the child's best interest, it did not make specific findings as to all of the best interest factors or tie the best interest findings into the ultimate custody decision. *See Davis*, 131 Nev. at ___, 352 P.3d at 1143 ("Specific findings and an adequate explanation of the reasons for the custody determination 'are crucial to enforce or modify a custody order and for appellate review.'" (quoting *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009)). In light of these deficiencies, we cannot conclude that the district court properly exercised its discretion in modifying physical custody to permit respondent to relocate with the parties' child to Kansas.[2] *See id.* at ___, 352 P.3d at 1143-44. Accordingly, we reverse the district court's order and remand this matter to the district court for further proceedings consistent with this order, including the entry of

[2]In the absence of written findings, we decline to consider appellant's remaining arguments regarding the district court's analysis of the best interest and relocation factors.

specific, written findings as to the best interest of the child and the relocation factors.

It is so ORDERED.[3]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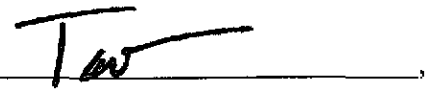
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cc: Hon. Rena G. Hughes, District Judge, Family Court Division
Law Offices of F. Peter James, Esq.
Maggie L. Wheeler
Eighth District Court Clerk

[3]In reversing the district court's decision on this basis, we express no opinion on the ultimate custody decision, which remains within the district court's discretion. *See Rivero*, 125 Nev. at 428, 216 P.3d at 226. Pending further proceedings on remand consistent with this order, we leave in place the custody arrangement set forth in the district court's order, subject to modification by the district court to comport with the current circumstances. *See Davis*, 131 Nev. at ___, 352 P.3d at 1146 (leaving certain provisions of a custody order in place pending further proceedings on remand).