IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID SORENSEN,
Appellant,
vs.
CHRISTINA M. SORENSEN,
Respondent.

No. 69854

FILED

DEC 30 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order establishing child custody and granting relocation with the minor children. Second Judicial District Court, Washoe County; Bridget E. Robb, Judge.

Appellant David Sorensen and respondent Christina Sorensen were a married couple residing in Sparks, Nevada with their three minor children. In December, 2014, David, Christina, and their three children visited extended family in Texas to celebrate the holidays. After vacationing in Texas for several weeks, David returned to their home in Nevada with the expectation that Christina and the children would join him the following week. Several days later, Christina called David and informed him that she was separating from him, and that she and the children would remain in Texas. Christina subsequently enrolled the children in school in Texas.

Shortly thereafter, David commenced divorce proceedings against Christina in Washoe County. After an initial evidentiary hearing, the district court granted Christina temporary primary physical custody

and allowed Christina to remain in Texas with the children until a full evidentiary hearing could be held. After the second evidentiary hearing, the district court awarded joint legal custody to both parties and primary physical custody of the children to Christina, and granted Christina's request to relocate with the children to Texas.[1]

On appeal, David challenges the district court's final order on the custody and relocation issues, asserting that the court erred by: (1) finding that Christina actually relied on inaccurate legal advice from a Texas domestic relations attorney when the court was determining whether she committed an act of abduction; (2) finding that Christina did not violate David's joint legal custody rights, and that David instead violated Christina's joint legal custody rights; and (3) considering post-relocation facts in the course of determining the parties' child custody

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[1]We do not recount the facts except as necessary to our disposition.

Moreover, we reject our dissenting colleague's characterization that "Christina took the children to Texas and refused to bring them back" when Christina and David in fact traveled together, David initially agreed they could remain in Texas when he returned to Nevada so they could complete their vacation, and Christina immediately submitted herself to the jurisdiction of a Nevada court regarding custody and relocation issues. We also reject the dubious claim that Christina did not confer with her Texas domestic relations attorney *until after* David expected Christina to return the children to Nevada. Specifically, Christina's testimony and the Texas attorney's affidavit collectively reveal that Christina conferred with the attorney on at least three occasions: (1) in the fall of 2014, (2) "just before Christmas[,]" and (3) after David returned to Nevada. Event (1) occurred before the Sorensens vacationed in Texas, and event (2) occurred before David returned to Nevada.

rights and ascertaining whether the relocation was permissible.[2] We conclude that none of these contentions merit reversal, and therefore affirm the district court's order.[3]

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[2]David further claims that the district court erred by considering Christina's reliance on the advice of counsel because the statute supplying the applicable definition of "abduction" does not contain an intent element. We hold that David failed to preserve this argument by not presenting it to the district court. *See Wolff v. Wolff*, 112 Nev. 1355, 1363-64, 929 P.2d 916, 921 (1996) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)) (rejecting an argument on appeal from an order issued in a domestic relations case because the appellant had failed to present it to the district court); *Truax v. Truax*, 110 Nev. 437, 438-39, 874 P.2d 10, 11 (1994) (citing *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983-84) (same). Further, this argument would fail even if David had presented it. This is because the statute he relies upon (*i.e.*, NRS 125D.030) does not define abduction for the purposes of the presumption against awarding the custody or unsupervised parenting time to the perpetrator of an abduction, and he fails to otherwise explain why advice of counsel would not be relevant under the applicable definition. *See* NRS 125D.010-.030 (providing that NRS 125D.030's definition applies to the Uniform Child Abduction Prevention Act, "unless the context otherwise requires"); NRS 125.480(10)(a) (2014) ("'Abduction' means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct."); NRS 125C.240(4) (2015) (same); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported by relevant authority).

Additionally, David complains that "[t]he district court abused its discretion by not making a finding of abduction or concealment and by not ordering the immediate return of the children" at the hearing in which the district court awarded temporary custody of the children to Christina. But David does not allege that this temporary ruling in any way affected the

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The District Court's Finding That Christina Actually Relied Upon the Advice of Counsel Was Supported by Substantial Evidence

A district court has "broad discretionary powers to determine child custody matters" such that this court "will not disturb the district court's custody determinations absent a clear abuse of discretion." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007) (footnote omitted) (citing *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005)); *see also Davis v. Davis*, 114 Nev. 1461, 1465-68, 970 P.2d 1084, 1087-88 (1998) (applying the clear abuse of discretion standard to a relocation case). Although this standard requires "the district court [to] . . . reach[] its conclusions for the appropriate reasons[,]" its factual findings will not be set aside "if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *See id.*, 161 P.3d at 241-42 (footnotes omitted) (citing *Rico*, 121 Nev. at 701, 120 P.3d at 816; *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993); *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)). "Moreover, in child custody matters, a presumption exists that the trial court properly exercised its discretion in deciding what constitutes a child's best interest." *Primm v. Lopes*, 109 Nev. 502, 504,

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district court's final order. Accordingly, we conclude that this claim is not properly before us.

[3]We have carefully considered David's other arguments on appeal and find that they are without merit.

853 P.2d 103, 104 (1993) (citing *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975)).

David claims that this court should set aside the district court's factual finding that Christina relied upon her Texas counsel's legal advice, apparently for the purpose of undermining the district court's conclusion that Christina did not commit an act of abduction. *See* NRS 125.480(7) (2014) (creating a rebuttable presumption against awarding custody or unsupervised visitation to the perpetrator of an "abduction"); NRS 125C.240(1) (2015) (same). In particular, he argues that: (1) certain discrepancies between the Texas attorney's affidavit and Christina's testimony demonstrate that Christina "misrepresented the facts" that she supplied to the attorney, and (2) Christina's testimony establishes that she avoided telling him where the children were residing, not because she feared him, but simply because she wanted to establish residency in Texas. We disagree.

Notwithstanding any inconsistencies between Christina's testimony and her Texas attorney's affidavit, the district court was permitted to credit Christina's testimony that she informed the attorney that she was "fearful of [David,]" and that counsel had advised her not to inform David of her decision to remain in Texas with the children because "there was a safety issue[.]" *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (footnote omitted) (citing *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004)) (holding that an appellate court should "leave witness credibility determinations to the district court and . . . not reweigh credibility on appeal[,]" even when confronted with conflicting evidence).

Moreover, there was substantial evidence showing that Christina believed that it was lawful for her to continue to withhold her address from David because after she informed him of her decision to remain in Texas, he threatened her by stating that he was "going to hurt her [and] that [she was] going to pay[.]"[4] Therefore, we will not disturb the district court's finding because it was supported by substantial evidence.[5] *See id.* at 149, 161 P.3d at 241-42.

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[4]The record does not clearly show whether Christina's Texas counsel specifically advised her that she could withhold her address information in response to David's threats. Nevertheless, the district court could have inferred that Christina believed that she could legally withhold her location from David in response to his threats to hurt her, given that Christina's attorney advised her not to disclose her decision to remain due to "a safety issue[.]" *See Ellis*, 123 Nev. at 149, 161 P.3d at 242 (citing *Williams*, 120 Nev. at 566, 97 P.3d at 1129) ("[S]ubstantial evidence . . . is evidence that a reasonable person may accept as adequate to sustain a judgment.").

[5]Our dissenting colleague contends that the district court committed legal error by concluding that Christina's reliance on the advice of counsel established that she did not abduct the minor children. However, the dissent does not even attempt to rebut this court's holding that David failed to preserve this argument below, or counter our conclusion that David fails to identify the applicable statutory definition of "abduction." Therefore, we reject the dissent's implied assumption that this court should decide whether the district court properly interpreted and applied the mens rea requirement found in the pre-AB 263 version of NRS 200.359(2). *See infra* note 6 (noting that NRS 200.359 was amended by AB 263 after the second evidentiary hearing was held).

Furthermore, even if David's contention was properly before us, we are not convinced that evidence of advice of counsel is necessarily irrelevant under the definition of "abduction" found in the pre-AB 263 version of NRS 200.359(2). In particular, our dissenting colleague relies

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The District Court's Findings That Christina Did Not Violate David's Joint Legal Custody Rights and That David Instead Violated Christina's Rights Do Not Warrant Reversal

David contends that the district court erred in failing to conclude that Christina violated his joint legal custody rights by enrolling the children in school in Texas, and in finding that he violated Christina's legal custody rights by not telling her who was caring for the children while he was at work. We conclude that neither of these findings warrants reversal.

Even assuming that the district court erred in its conclusions relating to the parties' violations of their respective legal custody rights, there is no indication that this error affected the court's determination of the custody and relocation issues. First, David's assertion that Christina

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upon a 75 year-old secondary source for the proposition that advice of counsel is relevant only if "the statute requires an elevated level of intent such as bad faith or willfulness," and that such reliance must be reasonable. Yet, at least one reputable secondary source from this year provides that a mistake of law—which can result from erroneous legal advice—may negate other forms of mens rea, even if that mistake is unreasonable. *See* 1 Wayne R. LaFave, Subst. Crim. L. § 5.6 (2d ed. 2016) (stating that "[i]gnorance or mistake as to a matter of fact or law is a defense if it negatives a mental state required to establish a material element of the crime[,]" providing an example where a mistake of law could negate the "knowledge" element of an offense, and explaining that "the notion that a mistake of fact is a defense only when reasonable is far too general and does not apply in many cases"). Although our dissenting colleague assumes without explanation that the former approach is consistent with Nevada law, we need not resolve this conflicting authority.

intended to interfere with his custodial rights by enrolling the children in school in Texas without his knowledge or consent is an evidentiary matter properly left to the district court. Even if such conduct actually occurred and it violated his joint legal custody rights, substantial evidence supports the district court's conclusion that Christina did not *intend* to interfere with his custodial rights because she had relied on the advice of counsel. Specifically, Christina testified that her counsel advised her not to inform David of her decision to remain in Texas with the children because "there was a safety issue," and the attorney also advised her to enroll her children in their new schools in Texas. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (footnote omitted) (citing *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004)) (holding that an appellate court should "leave witness credibility determinations to the district court and . . . not reweigh credibility on appeal").

Second, these findings relating to legal custody rights had no apparent impact on the custody and relocation rulings because they appear under the heading "General Findings" in the district court's final order and they are not mentioned in the district court's analysis of the NRS 125.480(4)[6] best interest factors or the relocation considerations

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[6]The district court held hearings on the child custody and relocation issues on April 15, 2015, and August 13, 2015, and issued its final order on those issues on January 21, 2016. On June 9, 2015, Governor Brian Sandoval approved Assembly Bill 263 ("AB 263"), which became effective on October 1, 2015. *See* 2015 Nev. Stat., ch. 445, at 2580; NRS 218D.330(1) (2015) (providing that a law "becomes effective on October 1 following its passage, unless the law . . . specifically prescribes a different effective date"). Among other things, AB 263 revised NRS 200.359;

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announced in *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). Further, David does not identify any other essential determinations that were purportedly affected by the district court's alleged errors.[7] Thus, David fails to establish that the district court committed "a clear abuse of discretion" meriting reversal. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241 (footnote omitted) (citing *Rico*, 121 Nev. at 701, 120 P.3d at 816); *see also Primm*, 109 Nev. at 504, 853 P.2d at 104 ("[I]n child custody matters, a presumption exists that the trial court properly exercised its discretion in deciding what constitutes a child's best interest.").

The District Court Did Not Commit a Clear Abuse of Discretion by Considering Post-Relocation Facts

David avers that the district court erred by considering post-relocation facts on two occasions: (1) the district court temporarily permitted the children to stay in Texas "to avoid any potential disruption in the children's lives"; and (2) the district court's final order on the child custody and relocation issues "cit[ed] Christina's employment that she

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repealed, revised, and recodified NRS 125.465 and NRS 125.480; and added NRS 125C.0075. *See* 2015 Nev. Stat., ch. 445, §§ 4, 8, 15, 18-19, at 2582-85, 2589-91. This order differentiates between the "pre-AB 263" and the "post-AB 263" versions of these statutes.

[7]In fact, the district court awarded David joint legal custody despite finding that he had violated Christina's legal custody rights. Furthermore, even the dissent acknowledges the district court made extensive factual findings in support of its rulings on the custody and relocation issues.

obtained post-relocation as substantially improving her life." We conclude that David's claims are unpersuasive.

First, we reject David's argument that the district court should not have granted Christina temporary custody because David does not allege that the grant of temporary custody had *any* impact on the final order.[8] Second, even if this court retroactively applied AB 263 or used its provisions as "persuasive support" for resolving this case as David suggests, consideration of Christina's post-relocation employment would not have been improper.[9] Under section 15 of AB 263, "*[i]f* a parent with primary physical custody or joint physical custody relocates with a child *in violation of NRS 200.359*[,]" then "[t]he [district] court shall not consider any post-relocation facts or circumstances regarding the welfare of the child or the relocating parent[.]" *See* 2015 Nev. Stat., ch. 445, § 15, at 2589 (emphasis added) (codified as NRS 125C.0075 (2015)).

Although David avers that the post-AB 263 version of NRS 200.359 imposes a written consent or court authorization requirement,

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[8]We observe that the fact that David's children lived with him for the majority of the summer between the temporary custody hearing and the final custody/relocation hearing mitigates the concern that the temporary order "create[d] unfair legal and practical advantages for" Christina—*e.g.*, allowing the children to "develop a routine and become accustomed to life in the new state." *See Druckman v. Ruscitti*, 130 Nev. ___, ___, 327 P.3d 511, 515 (2014).

[9]David's counsel cites an unpublished pre-January 1, 2016 order from the supreme court in support of the contention that retroactive application of AB 263 is appropriate. We remind counsel that parties may cite unpublished orders only if they were issued on or after January 1, 2016. *See* NRAP 36(c)(3).

that condition did not apply to Christina's relocation of the children because it is triggered *only if* custody has already been established "pursuant to an order, judgment or decree of a court[.]" *See* 2015 Nev. Stat, ch. 445, § 18(4)-(5), at 2591 (codified as NRS 200.359(4)-(5) (2015)). Accordingly, David fails to show that the district court "reached its conclusions for . . . [in]appropriate reasons." *See Ellis*, 123 Nev. at 149, 161 P.3d at 241-42 (footnote omitted) (citing *Rico*, 121 Nev. at 701, 120 P.3d at 816; *Sims*, 109 Nev. at 1148, 865 P.2d at 330). Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Silver

TAO, J., dissenting:

Christina took the children to Texas and refused to bring them back or tell David where they were. The district court nevertheless found that Christina did not commit an act of abduction because she sought and received advice from her attorney, who told her that keeping the kids away from David was not unlawful. The district court specifically found that this advice was legally incorrect (indeed, "tragically bad"), but that Christina relied upon it.

But this is a non-sequitur; advice of counsel isn't an element of the act of abduction, it doesn't mitigate intent, and it's not a justification

for interfering with parental rights. The majority errs as a matter of law when it concludes that Christina's reliance upon advice of counsel constituted "substantial evidence" supporting the district court's finding that no abduction occurred.

Abduction is defined in NRS 200.359(2) as occurring when a non-custodial parent keeps a child from the custodial parent with the specific intent to deprive the other parent of "the parent and child relationship," meaning custody of the children. Thus, abduction is something that requires Christina to have acted with "specific intent." But reliance upon legal advice has nothing to do with whether she either committed the act or possessed the requisite intent.

Broadly speaking, "general intent" requires only intent to perform some act without necessarily intending the consequences of the act, while "specific intent" requires the intent not merely to do the act but also the intent to bring about the consequences that follow the act. In the particular context of abduction, a test of general intent requires only that Christina intended to keep the children from David without necessarily having done so for the purpose of impairing his relationship with them, while a test of specific intent requires proof that Christina's very purpose in keeping the children was to deprive David of his relationship with the children.

But neither test of *mens rea*—either of general or specific intent—cares whether Christina knew that her acts were unlawful or believed that they were not. As the cliché goes, ignorance of the law is no excuse, but the converse is also true: reliance upon advice of counsel matters not a whit to whether one violated a law or intended to do so,

except when the statute requires an elevated level of intent such as bad faith or willfulness, which NRS 200.359 does not.[10] And even with statutes requiring willfulness or bad faith where advice of counsel might be relevant, much more must be shown than merely that some conversation occurred with some lawyer, but also that: the lawyer was in good standing at the time; the advice was sought, given, and acted upon in complete good faith; the client made a complete disclosure of all the material facts to the lawyer; the lawyer was disinterested; and the advice was not so patently erroneous that no reasonably careful person would have relied upon it. *See* Thomas L. Preston, *Advice of Counsel as a Defense*, 28 Virginia L. Rev 26, 26-27 (1941). Thus, Christina's claim that she consulted with an attorney says nothing about whether she statutorily abducted her children.

Christina suggests that she was entitled to rely upon advice of counsel because NRS 200.359(2) contains undefined terms (such as "deprive" or "parent-child relationship") and its meaning is therefore unclear to her without talking to an attorney; but this is just another non-sequitur. One doesn't have to know what a lawyer thinks a statute means to be held liable for violating it; if that were the case, only lawyers could commit crimes, and seeking advice of counsel would actually make one more likely to be found guilty than if one just remained blissfully unaware of the entirety of American law.

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[10]Oddly, the district court correctly observed during the hearing that reliance upon advice of counsel can mitigate willfullness, but erred in believing that willfulness is the *mens rea* requirement of NRS 200.359.

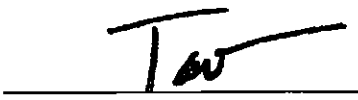
Consequently, whether Christina was told that her acts violated any statute is irrelevant to the question of whether she kept the children from David with the intent of depriving him of custody. Christina may well have specifically intended to deprive David of the parent-child relationship, and she may have thought doing so was legal. She can believe both things at the same time; one doesn't have anything to do with the other under our statutory scheme.

And here, Christina's alleged reliance upon her attorney's advice rings especially hollow because she didn't bother to retain her attorney until after she had already taken the children from David, although the attorney's affidavit is notably wishy-washy on the dates; at that point, the alleged abduction had already occurred. Advice of counsel isn't worth much as a defense to abduction in any event, but it's worth even less when the attorney isn't consulted until after the cows have already left the barn and the problem has already occurred.

Yet Christina's reliance upon advice of counsel appears to be the district court's sole basis for finding that no abduction occurred (*see* January 21, 2016, Order, paragraphs 5 & 6). I would therefore conclude that this finding was legally erroneous and unsupported by substantial evidence.

Because a finding of abduction triggers a statutory presumption, and there appears to be no other basis articulated in the district court's order for its conclusion that no abduction occurred, I would conclude that this error necessitates a remand, in spite of the other extensive factual findings made by the district court in its lengthy and detailed order. I would therefore remand this matter for further

consideration of the question of whether an abduction occurred that could trigger the statutory presumption.



_____, J.
Tao

cc: Hon. Bridget E. Robb, District Judge
David Wasick, Settlement Judge
Barber Law Group, Inc.
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Washoe District Court Clerk