

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAUN MICHAEL HERZOG,
Appellant,
vs.
KELLIE HERZOG,
Respondent.

No. 69904

FILED

FEB 24 2017

CLARENCE BROWN
CLERK OF SUPREME COURT
BY *M. Wilcox*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court divorce decree. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

This appeal arises out of the parties' divorce decree, which awarded respondent sole legal and physical custody of the parties' children. The decree limited appellant's communication with the children to one letter per month while he is incarcerated, with no telephone contact or in-person visits. Upon appellant's release from prison, the court ordered that he would have supervised parenting time but did not specify the frequency or duration of that parenting time.

In entering the custody order, the district court failed to make any written findings with regard to the parties' circumstances or the best interest of the children. While we recognize that appellant's incarceration precludes certain child custody arrangements, the court was nonetheless required to make findings as to the best interest of the children and to tie those findings into its custody decision and, particularly, the limitations

17-90362

on appellant's communications and interaction with the children. See *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) ("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)); see also *Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016) (concluding that a district court abused its discretion by modifying child custody without making specific findings as to each of the best interest factors). And in the absence of such findings, we must conclude that the court abused its discretion in making the custody determination at issue here.¹ See *Davis*, 131 Nev. at ___, 352 P.3d at 1142 (recognizing that, although the district court has broad discretion in

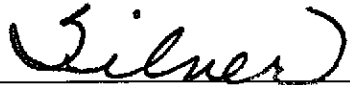
¹Appellant alleges that respondent was unfaithful and is living with someone who should not be around the parties' children. To the extent that respondent's current living arrangement may be relevant to the custody decision, it should be addressed in the district court's best interest findings on remand. But insofar as appellant argues that respondent's actions in this regard should have led to a different division of assets, such considerations are only relevant to a property division if they had economic consequences. See *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 1190, 946 P.2d 200, 203 (1997) (providing that marital misconduct does not provide a compelling reason to make an unequal distribution of property unless the misconduct had economic consequences). As appellant has not alleged that these actions had economic consequences, this argument does not provide a basis for revisiting the division of assets and debts.


custody decisions, which is generally reviewed deferentially, “deference is not owed . . . to findings so conclusory they may mask legal error”).

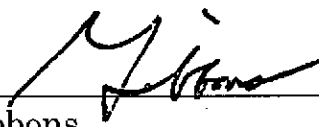
Additionally, the court ordered appellant to pay child support retroactive to February 2014 and directed that appellant’s mechanic’s tools would be sold at auction, with half of the proceeds going to respondent as her separate property and the other half being used, among other things, to pay appellant’s child support arrearages and to secure future support payments. While a court may order one parent to pay the other up to four years of retroactive child support when the parents do not live together and the parent seeking payment has been the children’s physical custodian, *see* NRS 125B.030, here, the court did not make any factual findings with regard to when the parties separated and did not explain the basis for awarding child support to a date nearly a year before the underlying complaint was filed. Likewise, the court did not make factual findings with regard to whether the mechanic’s tools were community or separate property and did not otherwise explain the factual or legal basis for ordering the tools to be sold. Thus, we cannot conclude that the district court acted within its discretion in making these decisions. *See Davis*, 131 Nev. at ___, 352 P.3d at 1142.

In light of the district court's failure to make findings on these key points, we reverse the decision of the district court and remand this matter to that court for further proceedings.²

It is so ORDERED.³


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²Because of the district court's failure to make findings as discussed above, we do not reach the merits of the district court's decision, and as a result, this order should not be read as a comment on the merits as to these issues. With regard to appellant's remaining assignments of error, we have reviewed each of appellant's arguments and conclude that, except as discussed above, none of his arguments provides a basis for reversal of the district court's decision. We also deny as moot appellant's request, contained in his fast track reply, for appointment of counsel.

³Pending 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).

cc: Hon. Frances Doherty, District Judge, Family Court Division
Shaun Michael Herzog
Kellie Herzog
Washoe District Court Clerk