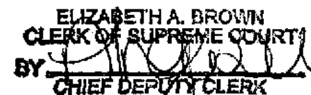
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDALL POWELL,
Appellant,
vs.
ZSUZSANNA ROBERSON,
Respondent.

No. 70538

FILED

SEP 14 2017



ORDER OF REVERSAL AND REMAND

Appellant Randall Powell appeals from various district court orders in a child custody and support action. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

Following a full evidentiary hearing, the district court awarded the parties joint physical custody of their two minor children based on its evaluation of NRS 125.480(4)'s[1] best interest factors. Shortly thereafter, respondent Zsuzsanna Roberson moved to, among other things, set aside that decision under NRCP 60(b), arguing that the district court improperly awarded Powell joint physical custody even though its order did not provide for him to have physical custody of the children at least 40 percent of the time. *See Rivero v. Rivero,* 125 Nev. 410, 425-26, 216 P.3d 213, 224 (2009) (providing, as a guideline, that joint physical custody requires each parent to have physical custody at least 40 percent of the time). The district court, however, denied that motion.

[1]The Nevada Legislature repealed NRS 125.460-.520 and replaced them with NRS 125C.001-.0055, effective October 1, 2015, without making any substantive changes. *See* 2015 Nev. Stat., ch. 445, at 2580-91. Because most of the proceedings relevant to this appeal predate that legislative action, and given the lack of substantive changes that would affect the disposition of this appeal, we cite to Chapter 125.

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Roberson later moved to modify the parties' physical custody arrangement to provide for her to have primary physical custody on the ground that Powell was not fully exercising his parenting time or taking the children to school on time. The district court subsequently granted that motion based on its determination that Roberson had de facto primary physical custody and that continuation of that arrangement would be in the children's best interest. Powell, in turn, filed three successive motions seeking to modify custody or to set aside or reconsider the district court's order modifying the parties' custody arrangement arguing, among other things, that the district court failed to conduct an evidentiary hearing or make findings with regard to the best interest factors and that the modified custodial arrangement constituted joint physical custody under *Rivero*. The district court denied each of those motions, and this appeal followed.[2]

On appeal, Powell asserts that the district court failed to make specific findings with regard to whether modification of the parties' custody arrangement was in the children's best interest. In evaluating Roberson's motion to modify, the district court was required to determine what type of custody arrangement the parties exercised in practice and, based on that determination, to apply the appropriate modification test, which necessarily entailed an analysis of NRS 125.480(4)'s best interest factors supported by specific factual findings. *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) ("Specific findings and an adequate explanation of the

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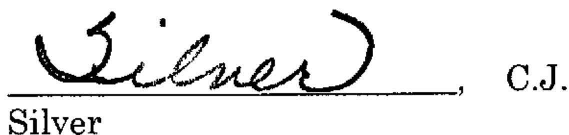
[2]To the extent Powell challenges the district court's orders establishing custody and denying Roberson's motion for NRCP 60(b) relief, his challenge is not properly before us because he failed to timely appeal from those decisions. *See* NRAP 4(a)(1) (requiring a notice of appeal to be filed within 30 days after service of the written notice of entry of the order appealed from); *see also In re Duong*, 118 Nev. 920, 922, 59 P.3d 1210, 1212 (2002) (noting that "the proper and timely filing of a notice of appeal is jurisdictional").

reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review.") (internal quotation marks omitted); *see also Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining the procedure for evaluating modification requests). But while the district court found that Roberson exercised de facto primary physical custody and that modifying the custodial designation to reflect that arrangement was in the children's best interest, it failed to make any of the required findings with regard to the best interest factors.[3] *See Davis*, 131 Nev. at ___, 352 P.3d at 1143. Consequently, we must conclude that the district court abused its discretion in granting Roberson's motion to modify custody. *See id.* at ___, 352 P.3d at 1142 (explaining that, although the district court has broad discretion in custody determinations, "deference is not owed . . . to findings so conclusory they may mask legal error" (internal citations

[3]Although the district court found in its written order that modifying the custodial designation was in the children's best interest, the court stated during the hearing on Roberson's motion to modify that its decision on the matter would be based on its calculation of the parties' respective timeshares. The extent to which that calculation drove the district court's decision in this matter is unclear from its written order—particularly in light of the court's failure to make any findings with regard to NRS 125.480(4)'s best interest factors. But because we remand this matter to the district court for further consideration as discussed below, we note that, after the district court entered its order modifying custody, the supreme court decided *Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1047-49 (2015), which explains the procedure that district courts must follow when modifying the designation for a custodial arrangement to reflect the parties' actual timeshares. Of particular relevance here, *Bluestein* instructed that the children's best interest, rather than the parties' respective timeshares, is paramount in custody matters. 131 Nev. at ___, 345 P.3d at 1048-49 (recognizing that the children's best interest is paramount in custody matters notwithstanding the 40-percent guideline set forth in *Rivero* and that the 40-percent guideline "should not be so rigidly applied that it would preclude joint physical custody" when that arrangement is in the child's best interest).

omitted)). Accordingly, we reverse the district court's order modifying custody and remand this matter to the district court for further proceedings consistent with this order.[4]

It is so ORDERED.[5]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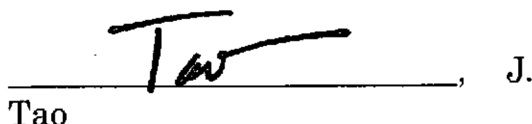
Silver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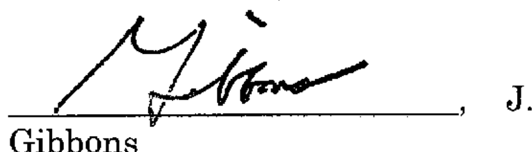
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Gibbons

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[4]Pending further proceedings on remand, we leave in place the custody arrangement set forth in the district court's 2014 order modifying custody, as adjusted by the district court's April 7, 2015, and May 4, 2016, orders, 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). And although we do not address Powell's child support obligation, as set forth in the 2014 order modifying custody, because he does not challenge it on appeal, *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived), we note that the district court may need to revisit child support depending on how its resolves Roberson's motion to modify on remand.

[5]Given our resolution of this appeal, we need not reach Powell's remaining arguments with regard to the district court's custody modification order or his challenges to the district court's orders denying Powell's subsequent motions to modify custody or to set aside or reconsider the custody modification order.

cc: Hon. Vincent Ochoa, District Judge
Randall Powell
Zsuzsanna Roberson
Eighth District Court Clerk