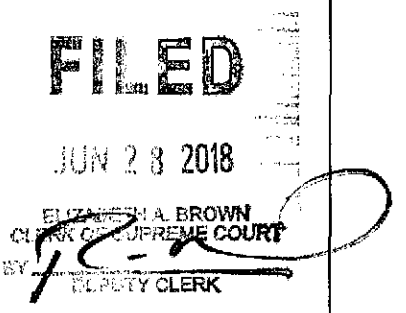
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIFFANY WAGNER,
Appellant,
vs.
MARK MARINO,
Respondent.

No. 73611



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Tiffany Wagner appeals a district court order modifying child custody. Eighth Judicial District Court, Family Court Division, Clark County; Rena G. Hughes, Judge.

Appellant Tiffany Wagner and respondent Mark Marino shared joint legal and joint physical custody of the parties' child pursuant to a stipulated custody decree. Thereafter, the parties filed competing motions to modify custody and following an evidentiary hearing, the district court modified custody, awarding Mark primary physical custody, sole legal custody for education purposes, child support, and costs. This appeal followed.

This court reviews a child custody decision for an abuse of discretion, but "the district court must have reached its conclusions for the appropriate reasons." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). In making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Moreover, the district court's order "must tie the child's best interest, as informed by specific, relevant

findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Without specific findings and an adequate explanation for the custody determination, this court cannot determine whether the custody determination was appropriate. *Id.* at 452, 352 P.3d at 1143.

We first note that, contrary to Tiffany's assertions, the district court applied the correct legal standard for modification of a joint physical custody arrangement—modification is appropriate if it is in the best interest of the child. *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009). Turning to Tiffany's challenge to the sufficiency of the district court's best interest findings, we agree with Tiffany that the district court's findings in support of its custody determination are deficient in several respects.

Here, the district court found by clear and convincing evidence that Tiffany committed an act of domestic violence against Mark in front of the child, applied the rebuttable presumption that joint physical custody was not in the child's best interest, pursuant to NRS 125C.0035(5), and found that Tiffany did not overcome the rebuttable presumption that joint physical custody was no longer in the child's best interest. But where, as here, the district court determines by clear and convincing evidence that a party engaged in domestic violence against the other parent, the district court is required to set forth "[f]indings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent" and the district court's order fails to make any such findings. NRS 125C.0035(5)(b). Because the district court failed to make these required

findings, we must necessarily reverse this matter and remand the case to the district court pursuant to NRS 125C.0035(5)(b).

Further, although the district court's order makes a number of factual findings, the order fails to address all of the best interest factors enumerated in NRS 125C.0035(4) and it is not clear from the record whether all of these factors were considered. Specifically, the district court seemingly failed to consider NRS 125C.0035(4)(a), (b), (d), (h), (i), (j), and (l). Although, based on the record, it appears that not all of these factors may be relevant here, the district court's order made no findings on these points and otherwise failed to address these factors at all.[1]

Similarly, Tiffany asserts that the district court failed to consider the parties' work schedules and the subsequent impact on each parent's time spent with the child. As the district court's findings make no mention of the parties' work schedules, we are unable to determine whether the district court considered this evidence and how, if at all, it affects the child's best interest. *Compare Silva v. Silva*, 136 P.3d 371, 377 (Idaho Ct. App. 2006) (recognizing that a parent's work schedule is relevant to a

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[1]Although the district court's order contains findings that arguably pertain to the remaining statutory best interest factors, the court's order simply sets forth factual findings without reference to or discussion of the associated best interest factors. While we can ascertain which best interest factor is being addressed by some of these findings, *Davis* requires the district court to tie the child's best interest, based on specific, relevant findings regarding the best interest factors and any other relevant factors, to the ultimate custody determination. 131 Nev. at 451, 352 P.3d at 1143. Because we are remanding this matter for further findings, as detailed above and below, on remand the district court should also clarify its existing findings to ensure they comply with *Davis*.

custody determination if it affects the well-being of the children) *with In re Marriage of Loyd*, 131 Cal. Rptr. 2d 80, 84-85 (Ct. App. 2003) ("a parent may not be deprived of custody based upon his or her work schedule if adequate arrangements are made for the child's care in the parent's absence"). Thus, given the district court's failure to address the parties' work schedules and to make findings regarding a number of the best interest factors, these issues must be remanded for the district court to make specific findings on these points that are tied to the best interest factors. *See Davis*, 131 Nev. at 451, 352 P.3d at 1143.

We likewise must reverse and remand the portion of the district court's order appointing a parenting coordinator that grants the coordinator authority to make substantive changes to the parties' parenting plan. The district court is generally permitted to appoint a parenting coordinator to assist the court in carrying out its functions. *See* NRCP 53 (allowing the appointment of special masters); *Bautista v. Picone*, 134 Nev. ___, ___, ___ P.3d ___, ___ (2018) ("The district court does not improperly delegate its decision-making authority by simply appointing a parenting coordinator." (citing *Harrison v. Harrison*, 132 Nev. ___, ___, 376 P.3d 173, 178 (2016))). However, the district court is not permitted to delegate its ultimate decision-making power regarding custody determinations to the coordinator, and the parenting coordinator's authority must be limited to nonsubstantive issues. *Id.* Here, the district court's order appointing the parenting coordinator grants temporary decision-making authority to resolve minor disputes, including making substantive and nonsubstantive changes to the parties' parenting plan. Granting the parenting coordinator authority to make substantive changes to the parties' parenting plan

constitutes an improper delegation of the district court's decision-making authority. *Id.* Thus, that portion of the district court's order appointing a parenting coordinator must be reversed. Aside from this reversible defect in the order, we affirm the district court's decision to appoint a parenting coordinator in all other respects, as the remainder of the order limited the coordinator's duties to nonsubstantive issues, provided the parties with a procedure to object to the coordinator's recommendations, and left final decision-making authority to the district court. *See Harrison*, 132 Nev. at ___, 376 P.3d at 179 (concluding that the district court did not improperly delegate its authority when the parenting coordinator's duties were limited, there was a process to object to the coordinator's recommendations, and when final decision-making authority remained with the district court).

Tiffany goes on to argue that the district court abused its discretion in appointing a psychologist to conduct a psychological evaluation and by admitting the results of that psychological evaluation. We discern no impropriety in this decision. *See* NRS 125C.0025(2) (allowing the district court to direct that an investigation be conducted to assist it in determining whether joint physical custody is appropriate); EDCR 5.305 (allowing the district court to appoint a neutral expert to conduct a psychological evaluation at the parties' expense); *cf. Duff v. Lewis*, 114 Nev. 564, 958 P.2d 82 (1998) (taking no issue with the district court's appointing a psychologist to provide information to assist the court in deciding custody).

Tiffany also argues that the district court violated her due process rights by changing custody without giving her notice and without taking evidence, by appointing the psychologist to conduct the psychological evaluation, by admitting the psychological evaluation as evidence, and by

appointing a parenting coordinator. "[D]ue process requires that notice be given before a party's substantial rights are affected." *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). And parents are entitled to a hearing and the opportunity to disprove the evidence presented before custody is changed. *Moser v. Moser*, 108 Nev. 572, 576-77, 836 P.2d 63, 66 (1992).

Here, the record is clear that, following both parties' competing motions seeking to change custody, the district court held an evidentiary hearing where Tiffany was represented by counsel and testified. Thus, we cannot conclude that Tiffany's right to notice and a hearing to contest the evidence was violated. And as noted above, the district court did not abuse its discretion in appointing a parenting coordinator generally, appointing a psychologist to conduct a psychological evaluation, or by admitting the report as evidence. Additionally, Tiffany stipulated to undergoing the psychological evaluation and nothing prevented her from calling the court-appointed psychologist or retaining her own psychologist to testify at trial. Thus, we cannot say Tiffany was denied due process by the district court's consideration of the psychological evaluation.

Tiffany next summarily asserts that the district court abused its discretion in excluding her evidence and testimony. While Tiffany asserts that she timely disclosed her exhibits, Tiffany admits in her fast track statement, and the record demonstrates, that she filed her list of exhibits in August 2016 for the initial trial date set for October 2016. Nothing in the record indicates, nor does Tiffany even assert on appeal, that she attended the meet and confer, provided copies of the exhibits, or provided her final list of proposed exhibits and witnesses to opposing

counsel or the court, pursuant to the court's trial management order filed in September 2016 or the court's revised trial management order filed in March 2017, both for the trial date set in April 2017. Based on the foregoing, we cannot say that the district court abused its discretion in excluding Tiffany's proposed exhibits. *See Abid v. Abid*, 133 Nev. ___, ___, 406 P.3d 476, 478 (2017) (we review the district court's evidentiary decisions for an abuse of discretion); NRCP 16.205(d)(2) (2013)[2] (allowing the prohibition of exhibits if not properly disclosed). Moreover, the record indicates that Tiffany testified at trial, but the district court found that she was not a credible witness. And this court does not reassess witness credibility. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Finally, Tiffany contests the district court's award of attorney fees and costs to Mark, and the district court's denial of her request for attorney fees, costs, child support and arrears. With regard to attorney fees, while the district court's order indicated Mark should be entitled to fees, the challenged order does not actually award attorney fees to Mark or otherwise finally resolve the attorney fees issues. Instead, it indicates that further proceedings are needed before a fees award can be made. Thus, because the challenged order does not establish an amount of fees, the issue of attorney fees is not properly before us. *See* NRAP 3A(b)(8); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 2000 (a post-judgment order awarding attorney fees is appealable as a special order entered after final judgment).

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[2]We note that NRCP 16.205 was amended effective May 1, 2017. This amendment has no effect on our disposition of this matter as the rule, as amended, still permits the prohibition of exhibits if not properly disclosed. *See* NRCP 16.205(f).

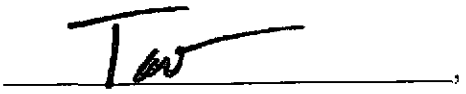
Additionally, the district court may order reasonable costs of experts and other costs of the proceeding in child custody cases pursuant to NRS 125C.250. Thus, we cannot conclude that the district court abused its discretion in ordering the payment of costs for the psychological evaluation. *See* EDCR 5.305 (allowing the district court to make provisions for the payment of a psychological evaluation in a custody case); *Campbell v. Campbell*, 101 Nev. 380, 383, 705 P.2d 154, 156 (1985) (we review an award of costs for an abuse of discretion).

Further, Tiffany fails to offer any cogent argument to explain why she believes the child support order was an abuse of discretion or why she believes she is entitled to an award of child support arrears. Prior to the modification, the parties shared joint physical custody and no child support was awarded due to the parties substantially similar incomes. Accordingly, we see no abuse of discretion in the district court's child support award or its decision to deny an award of child support arrears. *See Rivero*, 125 Nev. at 436-37, 216 P.3d at 231-32 (explaining the different formulas for calculating child support in primary and joint physical custody arrangements); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider claims that are not cogently argued).

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]


, C.J.
Silver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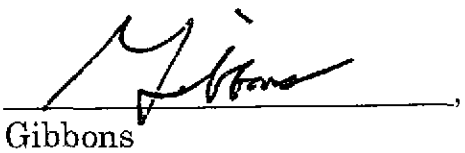
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Gibbons

cc: Hon. Rena G. Hughes, District Judge, Family Court Division
Tiffany Wagner
Messner Reeves LLP
Eighth District Court Clerk

[3]We deny Tiffany's motion to file a reply brief as our appellate rules do not provide for reply briefs in fast track custody matters. *See* NRAP 3E. And in light of this order, we deny as moot all other motions currently pending in this appeal.