

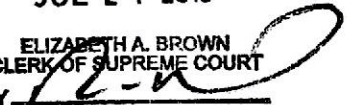
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DYRENE RENE DUFFY,
Appellant,
vs.
JAMARIS D'ANDRE DUFFY,
Respondent.

No. 74636-COA

FILED

JUL 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING*

Dyrene Rene Duffy appeals from a decree of divorce. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge.

Dyrene and respondent Jamaris D'Andre Duffy have one minor child together as well as minor children from previous relationships.¹ Jamaris is also the guardian of a minor child. Before the marriage, Dyrene received a large personal injury settlement, some of which she invested. Dyrene's sole source of income is from this investment, which generates interest of \$3,512 per month. She spends more than \$31,000 per month. The district court found that Dyrene makes regular deposits from savings to checking to support her spending. Jamaris earns \$2,075 per month.

Dyrene purchased a 5-bedroom, 4,000-square-foot home and furnished it using money from the settlement. When the parties separated, Jamaris removed some of the furniture. Dyrene purchased new furniture to replace the furniture Jamaris removed.

¹We do not recount the facts except as necessary for our disposition.

After the parties separated, Jamaris, his children, and his ward moved into his mother's three-bedroom house. His mother used one bedroom, Jamaris and the boys shared the second bedroom and his daughters shared the third bedroom. The parties' child shared the boys' bedroom when Jamaris had parenting time.

Dyrene filed for divorce, and the case went to trial. In its 53-page decree of divorce, the district court (1) granted Jamaris temporary primary physical custody of the parties' child until Dyrene completes an impulse control class, at which time the parties will be awarded joint physical custody of their child; (2) ordered Dyrene to pay the statutory maximum cap amount for child support (\$1,115 per month) in both the primary and joint custody arrangements, which was an upward deviation from the statutory formula amount; (3) ordered Jamaris to return Dyrene's furniture; and (4) awarded Jamaris attorney fees of \$5,000. Dyrene appeals the district court's orders regarding child support, attorney fees, and the furniture.

Child support

This court reviews a district court's child support order for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

Dyrene makes several arguments that the district court abused its discretion when setting child support. First, she contends that the district court included monies in its calculation that are not considered "income" under NRS 125B.070. We disagree. NRS 125B.070(1)(a) defines gross monthly income as "the total amount of income received each month from any source." (Emphasis added). When calculating the child support amount under the statutory formula, the district court considered only

Dyrene's investment income, which is income under NRS 125B.070.² Therefore, the district court did not abuse its discretion in calculating what Dyrene's child support would have been under the formula.

Next, Dyrene argues that the upward deviation from the child support formula will force her to use her separate property to enrich Jamaris. NRS 125.150(5) grants the district court discretion to use a spouse's separate property for the support of their child. The district court found that increasing Dyrene's child support to the statutory cap amount will "assist Jamaris in obtaining more adequate housing" for the parties' child. Thus, the district court's order is not to enrich Jamaris, but to benefit their child. Similarly, in *Lewis v. Lewis* the district court set aside a lump sum of a spouse's separate property to provide housing for the other spouse and their minor children post-divorce. 71 Nev. 301, 304, 289 P.2d 414, 416 (1955). The supreme court held that an award of separate property was authorized under the predecessor to NRS 125.150(5), *id.* at 304-05, 289 P.2d at 416, which was not materially different for the purpose of resolving the case at bar, *compare* Nev. Compiled Laws §9463 (Supp. 1943-1949), *with* NRS 125.150(5). Therefore, we are unpersuaded by Dyrene's argument.

Dyrene also asserts that in joint physical custody situations, a deviation to the formula amount is not appropriate to equalize the parties' standards of living. We disagree. Although one of the purposes of the child support methodology used in joint physical custodial situations is to "adjust

²Although the district court found Dyrene's gross monthly income included the monies she spent from the principal of the settlement, the court used only the interest amount from the loan investment when calculating the amount Dyrene would pay under the statutory formula. The court used the other monies when it considered whether to deviate from the formula amount.

child support to equalize the child's standard of living," *Rivero v. Rivero*, 125 Nev. 410, 437, 216 P.3d 213, 232 (2009), the district court has the discretion to deviate from the child support formula amount. *See Wright v. Osburn*, 114 Nev. 1367, 1369, 970 P.2d 1071, 1072 (1998) ("Of course, the district court also has the option to adjust the amount of the award where special circumstances exist."). Additionally, when setting child support "what really matters' under the formula and guideline statutes 'is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves.'" *Fernandez v. Fernandez*, 126 Nev. 28, 37, 222 P.3d 1031, 1037 (2010) (quoting *Barbagallo v. Barbagallo*, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989)). And, when considering whether to deviate from the formula under NRS 125B.080(9), the parties' standard of living and their relative financial condition are the most important factors. *See Barbagallo*, 105 Nev. at 551, 779 P.2d at 536. Setting Dyrene's child support obligation to the statutory cap achieves the goals set forth in *Barbagallo* and *Wright*, particularly when the standard of living between Dyrene and Jamaris is so disparate. Therefore, we conclude that the district court did not abuse its discretion by deviating the child support upward to the statutory cap amount.³

³We have considered Dyrene's other arguments regarding child support and conclude that they are factually and/or legally unpersuasive. Specifically, Dyrene contends the district court abused its discretion because (1) the district court did not base the deviation on Dyrene's earning capacity; (2) substantial evidence did not support the district court's findings regarding her standard of living; (3) the district court did not calculate Jamaris' income; and (4) the district court should have found an unfairness before deviating from the formula.

Separate property

“This court reviews district court decisions concerning divorce proceedings for an abuse of discretion.” *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).

Dyrene contends that Jamaris committed the tort of conversion by removing and keeping her furniture and that the district court abused its discretion by ordering Jamaris to return the furniture rather than ordering monetary damages. Jamaris contends there is no legal basis for the district court to award monetary damages because the elements for conversion have not been met.

From our review of the record, it is clear that Dyrene sought reimbursement for the replacement costs of the furniture Jamaris removed from her house.⁴ The district court apparently misunderstood this request, as it found that Dyrene wanted the property returned to her, and did not address whether Dyrene should be compensated for the furniture. Therefore, we reverse and remand on this contention for the district court to consider Dyrene’s request and to determine whether a factual and legal basis exists to order reimbursement. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 649 n.9, 331 P.3d 905, 909 n.9 (2014) (declining to consider an issue on which the district court did not rule, and directing the district court to make factual findings and resolve the issue on remand).

⁴Although Dyrene did not plead conversion in her complaint or amended complaint and only generically asked the court to confirm her separate property in her amended complaint, she did seek reimbursement for the replacement costs in her amended pretrial memorandum and at trial.

Attorney fees

This court reviews a district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). Parties seeking attorney fees in a family law case "must support their fee request with affidavits or other evidence." *Id.* at 624, 119 P.3d at 730. After determining that an award of attorney fees has a legal basis, the district court must use the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), to determine the amount. *Miller*, 121 Nev. at 623, 119 P.3d at 730. In family law cases, the court must also consider the disparity in the parties' respective incomes. *Id.* While we prefer explicit findings of the *Brunzell* factors, the district court "need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).


Dyrene contends, among other things,⁵ that the district court abused its discretion by ordering attorney fees without making the findings required by *Brunzell*. We agree.


Nothing in the decree indicates the district court considered any of the *Brunzell* factors. The record on appeal indicates that Jamaris did not file a *Brunzell* motion or affidavit, and he does not cite any parts of the

⁵Dyrene also contends that (1) the district court abused its discretion by basing its decision on the parties' disparity of incomes because the parties did not have disparate incomes; (2) NRS 125.040 is only for preliminary fees, and therefore cannot be used for an award based on a finding that Dyrene prolonged the litigation; (3) insufficient evidence supports the finding that Dyrene prolonged the litigation; and (4) the award improperly forces Dyrene to use her separate property for Jamaris' benefit. Because we reverse and remand due to the lack of *Brunzell* findings, we need not address these arguments.

record where the district court considered the *Brunzell* factors even though the court did state the legal basis for the award of fees. Therefore, we conclude the district court abused its discretion by awarding attorney fees to Jamaris, and we reverse and remand this matter to the district court for further proceedings to determine whether fees should be awarded, and if so, to make sufficient written findings. Accordingly, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Rebecca Burton, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Nevada Family Law Group
James S. Kent
Eighth District Court Clerk