IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALYSSA NAVRATIL,
Appellant,
vs.
MICHAEL NAVRATIL,
Respondent.

No. 72956

FILED

MAY 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Alyssa Navratil appeals from several district court orders regarding child custody, child support obligations, attorney fees, and sanctions in a family law matter. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge.

Alyssa and respondent Michael Navratil divorced in 2013. From that time, they shared joint physical and legal custody over their two children, one boy and one girl. In early 2016, Michael moved for primary physical custody over the two children, Alyssa opposed, and the parties engaged in substantial motion practice, discovery, and obtained a custody evaluation.

The parties finally attended an evidentiary hearing on the issue of custody. At the hearing, the court found that while the evidence suggested that Alyssa currently does not have a substance abuse problem, she had previously lied about past drug use. Ultimately, the court sanctioned Alyssa $2,000.00 under EDCR 7.60(b) for unnecessarily

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expanding the litigation through her untruthful actions and $2,540.40 in attorney fees for having previously brought a motion that lacked any merit.

As a result of the evidentiary hearing, Alyssa retained joint physical custody with Michael for their daughter. The court found, however, that it was in the son's best interest to have Michael as his primary physical custodian as Michael was more stable and showed greater capacity to assist with the son's behavioral issues. Michael's child support to Alyssa was reduced to $1,092.00 for their daughter. Michael was also allowed to deduct up to $292.00 a month from that amount to recover certain expenses, attorney fees, and the sanctions awarded to him. Alyssa now appeals the modification of the parties' son's physical custody arrangement, the changes to the child support order, and the awards of attorney fees and sanctions.

This court reviews child custody determinations for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). First, Alyssa argues that the court should have never allowed the parties to revisit the child custody matter as Michael did not attempt to contact her, as required under EDCR 5.11,[1] prior to filing the motion to modify custody. While failure to comply with this rule may lead to sanctions against the movant "if the issues would have, in the opinion of the court, been resolved if the movant had attempted to resolve the issues prior to the hearing," based on the extensive proceedings and disagreements following Michael's

[1]EDCR 5.11 was repealed and replaced with EDCR 5.501, effective January 27, 2017. This has no effect on the disposition of this appeal, as the proceeding at issue occurred prior to this change.

motion, we see no abuse of discretion in the district court considering the merits without prior resolution attempts. EDCR 5.11(a).

The majority of Alyssa's appeal, however, focuses on the court's decision to give Michael primary physical custody of the parties' son. Alyssa mistakenly argues that Michael must show a significant or substantial change in circumstances warranting the modification of custody. Alyssa relies on *Ellis,* which set forth this substantial change in circumstances standard for modification from a primary physical custody arrangement. 123 Nev. at 150, 161 P.3d at 242. But this rule is inapplicable here as the starting point was a joint physical custody arrangement. *See* NRS 125C.0045(2) (providing that a joint custody arrangement may be modified "if it is shown that the best interest of the child requires [it];" *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) ("A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest.").

When making a custody determination, the court must make "specific, relevant findings" that are tied to the child's best interest. *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015). Here, the district court articulated specific findings related to the parties' son's behavior and the parenting skills of the parties to determine that the best interests of the son required modification of the custody arrangement. This court will not set aside these findings as Alyssa has not shown that the findings were clearly erroneous or not supported by substantial evidence. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

Additionally, Alyssa's insistence that the court's decision is improperly based on her purported past substance abuse pursuant to *Castle*

v. Simmons, 120 Nev. 98, 86 P.3d 1042 (2004), is unsupported by the record. *Castle* does not prohibit the consideration of evidence that predates the latest custody order in determining the best interest of the child. *See Nance v. Ferraro*, 134 Nev. ___, ___, ___ P.3d ___, ___ (Ct. App. 2018). The court here found that the evidence regarding Alyssa's alleged drug use was a historical factor, but did not affect her current ability to parent the children and was not an ongoing issue. However, the district court did find that her habit and pattern of providing false information to the court undermined her credibility as to the factors the court considered in evaluating the best interests of the parties' son. Moreover, the various arguments that Alyssa posits undermine the court's decision, such as the parties' past custody arrangements, are not supported in the record, as the court's order diligently put forth significant reasoning based on the testimony of the parties and Dr. Paglini's evaluation that the change was in the best interest of the parties' son. Ultimately, we cannot conclude that the court abused its discretion in modifying the custody arrangement for the parties' son. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (noting that the appellate court does not weigh conflicting evidence or assess witness credibility).

Turning to the court's award of attorney fees to Michael for having to respond to Alyssa's motion to amend, we review such sanction awards for an abuse of discretion. *See Rivero*, 125 Nev. at 440–41, 216 P.3d at 234. "Although a district court has discretion to award attorney fees as a sanction, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass." *Id.* at 441, 216 P.3d at 234. Where, as here, the court has found that Alyssa's motion was without merit and the record supports the court where Alyssa

was present at the hearing and should have known the terms for splitting the costs of Dr. Paglini's evaluation and ongoing therapy sessions, we conclude it is not an abuse of discretion to award attorney fees under a liberal construction of NRS 18.010(2)(b).[2] *See Rivero*, 125 Nev. at 441, 226 P.3d at 234.

As for the second sanction, the court stated that, pursuant to EDCR 7.60(b), it was meant "to deter such behavior" that unnecessarily expanded the litigation and increased costs. *See id.* at 440-41, 216 P.3d at 234. Thus, we find no abuse of discretion in the district court's sanction of Alyssa for lying during the litigation about her drug use and accusing Michael of substance abuse without evidentiary support. *See id.*

We now turn to the child support issues raised. Because Michael is now the primary custodian for the parties' son, Alyssa is not entitled to receive child support payments for the son. *See* NRS 125B.030 (providing for recovery of child support payments by the physical custodian); *see also Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (providing that child support orders are reviewed for abuse of discretion). But Michael still has a child support obligation for the parties' daughter, and that obligation should not be mitigated by the legal

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[2]Moreover, the district court properly analyzed a reasonable amount of fees, considering all relevant factors including the parties' disparate income. *See Miller v. Wilfong*, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005) (discussing the applicability of various factors on assessing attorney fees in family law cases).

transgressions of Alyssa. *See* NRS 125B.080(9)[3] (enumerating factors that the court must consider when adjusting the amount of child support); *see also Khaldy v. Khaldy*, 111 Nev. 374, 376-77, 892 P.2d 584, 585 (1995) ("The district court may use equitable principles in considering a deviation, as long as the deviation is *based* on one of the factors enumerated in NRS 125B.080(9)."). While the district court made findings regarding the amount of child support and the arrears, the court failed to address how an offset for attorney fees and sanctions is appropriate. Therefore, the district court abused its discretion in allowing Michael to deduct funds from his support payments for his daughter to offset Alyssa's legal sanctions. *See Wallace*, 112 Nev. at 1019, 922 P.2d at 543.

Alyssa's remaining concerns about the district court's actions below, however, are unpersuasive. The record on appeal includes nothing to suggest that the district court's determination on the parties' cost-splitting of Dr. Paglini's evaluation and other child care expenses was clearly erroneous or not supported by substantial evidence. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704 (explaining that clearly erroneous or not supported by substantial evidence is the standard of review for factual findings in custody matters). As for Alyssa's assertions of prejudice from

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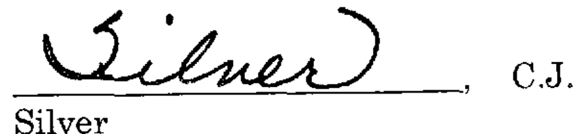
[3]This statute was amended in 2017, removing the factors from the statute and placing guidelines on this issue under the auspices of the Administrator of the Division of Welfare and Supportive Services of the Department of Health and Human Services in Nevada. This has no effect on the disposition of this appeal, as the proceeding at issue occurred prior to this legislative action.

the district court against her as an unrepresented party, she waived this issue by not raising it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).[4]

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.



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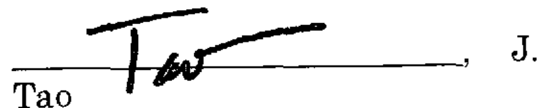

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[4]We would also note that Alyssa's summary allegations do not rise to an actionable claim of prejudice on the part of the district court. *See* NRS 1.235 (setting forth the procedure for disqualification of a judge for actual or implied bias or prejudice); *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006) (stating that judges are presumed unbiased, their attitudes toward parties is largely irrelevant, and disqualification requires an extreme showing); *see also In re Petition to Recall Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (providing that to disqualify a judge based on personal bias, the moving party must allege bias that "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (quoting *U.S. v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971))).

GIBBONS, J., concurring:

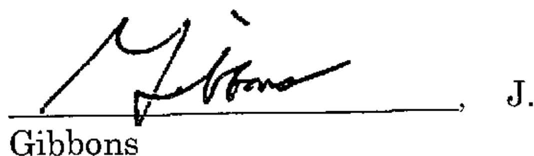
I agree with my colleagues in that the district court generally reached the right result, but it abused its discretion regarding its child support order. I write to alert the district court and the parties to matters that the district court should consider upon remand.

First, in *Miller v. Miller*, 134 Nev. ___, 412 P.3d 1081 (2018), the Nevada Supreme Court set forth the procedure for calculating child support when both parents share joint physical custody of one child and one parent has primary physical custody of the other child. This case involves this precise situation. Therefore, upon remand, and upon appropriate motion, the district court should set child support pursuant to the procedure established in *Miller*.

If Michael chooses to waive child support from Alyssa, the district court must make the appropriate findings pursuant to NRS 125B.080(6) and find that the waiver is in the child's best interest. *See Miller*, 134 Nev. at ___, 412 P.3d at 1085 (noting a district court commits reversible error if it fails to provide "in the findings of fact the amount of support that would have been established under the applicable formula" and findings of fact "as to the basis for the deviation [to the child support formula amount]"); *see also Fernandez v. Fernandez,* 126 Nev. 28, 33-36, 222 P.3d 1031, 1035-36 (2010) (noting child support affects the child's best interest).

Second, the district court effectively created a deviation from the child support formula by allowing Michael to reduce his child support payment by deducting amounts from his child support obligation to offset sanctions, litigation expenses and attorney fees Alyssa owed to him. It

appears that the district court created this deviation because it believed that this would be a practical solution and would be in the child's best interest. However, any deviation must be based on the factors enumerated in NRS 125B.080(9). *See Khaldy v. Khaldy*, 111 Nev. 374, 376-77, 892 P.2d 584, 585 (1995). The district court's offset for sanctions, expenses and attorney fees here does not appear to be based on any of the statutory factors. However, because the district court was correct in the result reached in its order, except in allowing Michael to deduct attorney fees, litigation expenses and sanctions from his monthly child support obligation owed to him by Alyssa, I concur with the majority order.



_______________, J.
Gibbons

cc: Hon. Rebecca Burton, District Judge, Family Court Division
Alyssa Navratil
Kainen Law Group
Eighth District Court Clerk