IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY MICHAEL STINZIANO,
Appellant,
vs.
AMBER MARIE WALLEY,
Respondent.

No. 70590

ORDER OF REVERSAL AND REMAND

Appellant Anthony Michael Stinziano appeals from a district court order modifying child support and changing the surname of the minor child. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

Stinziano and Respondent Amber Walley have one minor child, age 3 at the time of the hearing. Amber was granted primary custody of the child and permission to relocate to Ohio in 2013. The district court, after a motion hearing in 2015 ("December 8th hearing"), granted Anthony's motion to modify child support and Amber's countermotion to modify the child's surname from "Stinziano" to "Stinziano-Walley." The district court set the child support by determining 18% of Anthony's gross monthly income, then applying the NRS 125B.080(9) deviation factors to that amount. The court noted that the calculated amount, including the downward deviations, was greater than the statutory cap, and ordered Anthony to pay the statutory cap amount.

After the order from the December 8th hearing was filed, Anthony filed a motion to alter findings/amend judgment, to make clerical corrections to the order, and to reconsider the decision regarding the name

change and child support, and Amber opposed this motion.[1] The district court denied Anthony's motion regarding child support and the name change ("April 13th hearing").[2]

On appeal, Anthony contends that the district court erred because: (1) it lacked jurisdiction to modify the child's surname pursuant to NRS 125A.315 and, because the name had already been adjudicated, the court should have instead employed an analysis pursuant to NRCP 60(b); (2) it applied the wrong legal standard while deciding the name change issue; (3) there was insufficient evidence to support a finding that clear and compelling evidence necessitated changing the child's name; and (4) it used the incorrect methodology when calculating child support.

The district court had jurisdiction to decide the name change issue

Anthony first contends that the district court lacked jurisdiction to change the child's surname pursuant to NRS 125A.315 because changing a child's name is not a child custody issue. Amber counters that changing a child's name is a legal custody issue; therefore, pursuant to NRS 125C.0045(1)(a), the district court retained jurisdiction for the name change.

NRS 125C.0045(1)(a) states that a court may make and modify custody orders for a minor child "at any time . . . during the minority of the child." NRS 125A.315(1) provides in relevant part:

> [A] court of this state which has made a child custody determination . . . has exclusive,

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[1]We do not recount the facts except as necessary to our disposition.

[2]The district court resolved numerous other issues raised in the parties' motions that are not subject to this appeal.

> continuing jurisdiction over the determination until:
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> (a) A court of this state determines that the child, the child's parents and any person acting as a parent do not have a significant connection with this state[.]

NRS 125A.045(1) defines "child custody determination" as "a judgment, decree or other order of a court which provides for the legal custody, physical custody or visitation with respect to a child." Anthony still resides in Nevada and therefore has "a significant connection" with Nevada. Thus, if a name change is a legal custody issue, the district court had jurisdiction to decide that issue.

"Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing." *Rivero v. Rivero,* 125 Nev. 410, 420, 216 P.3d 213, 221 (2009). Legal custody also includes decisions regarding the welfare of the child. *Mack v. Ashlock,* 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing, J., concurring), *cited with approval in Rivero,* 125 Nev. at 420, 216 P.3d at 221. Changing a child's name is a "major decision" that impacts the child's welfare. *See Magiera v. Luera,* 106 Nev. 775, 778, 802 P.2d 6, 8 (1990) (describing how changing a child's surname may adversely impact a child). As changing a child's name is a major decision that affects the child's welfare, and legal custody includes decisions which affect the child's welfare, we hold the district court had jurisdiction to decide the name change issue.

Anthony's argument that Amber's request for the name change should have been made pursuant to NRCP 60(b) is without merit. As stated above, a minor's name change is a legal custody issue and the

district court retained jurisdiction to decide legal custody issues post-decree.

Anthony is not precluded from appealing the name change issue

Amber's argument that Anthony's failure to file an opposition to the name change below precludes him from raising the issue on appeal is also without merit. First, the time for filing the opposition had not elapsed before the hearing took place, *see* EDCR 2.20; EDCR 5.25 (providing the deadlines for filing and serving oppositions).[3] Second, at the December 8th hearing, Amber's counsel argued that Anthony had not filed an opposition, but nonetheless, invited an oral opposition to the countermotion by stating "[i]f they [Anthony] can articulate anything that has to do with the child . . . then yes, let's consider it and let's talk about it." Third, Anthony, in response to the district court's specific inquiry to

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[3]Anthony filed his motion on October 23, 2015 and Amber filed her opposition and countermotion for the name change on Tuesday November 24th. The court was closed for Thanksgiving and "Family Day" November 26-27. November 28-29 and December 5-6 were intervening Saturdays and Sundays. Amber served her countermotion by mail and email, adding three days to the timeline. Therefore, Anthony's opposition was due Monday, December 14, 2015. *See* EDCR 1.14 (Time; judicial days; service by mail); EDCR 2.20(e) (setting deadline for filing and serving oppositions); EDCR 5.25 (EDCR 2.20 applies to motions and responses filed in the family division). The hearing was held on December 8, 2015 and was changed from December 2 for reasons not stated in the record.

Also, it is evident that the reply brief filed by Anthony that our dissenting colleague refers to in his timeline pertains to a retaining lien between Anthony and his former counsel, and is completely unrelated to the December 8th hearing and matters on appeal. Moreover, the dissent repeatedly portrays the majority position as one asserting that Amber's countermotion was untimely. We do not.

respond on the merits of the countermotion, opposed the name change, and did so again in his motion for reconsideration.[4]

Our dissenting colleague misinterprets or distorts the record, and thereafter cites to numerous authorities to support his position that because Anthony failed to oppose the name change by filing a written opposition, he cannot raise this issue on appeal. We disagree. First, EDCR 2.20 states that a court *may* construe a failure to file a written opposition as an admission that the motion is meritorious; it does not *require* a court to grant the unopposed motion. *See Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004) ("'May,' as it is used in legislative enactments, is often construed as a permissive grant of authority[.]") Our review of the record shows that the district court did not grant Amber's countermotion for the name change pursuant to EDCR 2.20 based on Anthony's failure to oppose. Instead, at the December 8th hearing, the district court invited Anthony to orally state his position regarding the name change. Then, after considering Anthony's oral opposition, which included a statement traversing the veracity of Amber's factual allegations, the district court actually ruled on the merits of the countermotion, and gave no credence to Amber's argument that the failure to file a written opposition should result in a grant of the motion.

Our dissenting colleague makes much of the fact that Anthony never asked for a continuance or requested more time to file a written opposition. But contrary to the rhetoric in the dissent, either of these imagined scenarios is legally irrelevant as the district court *allowed* and

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[4]Because we remand this matter for further proceedings regarding the name change issue, we do not address Anthony's procedural due process claim that relates to the timing of the December 8th hearing.

entertained Anthony's oral objection to the name change before deciding that issue on the *merits*. Therefore, the cases cited within the dissent either support the majority order or are factually distinguishable.

Next, Anthony's motion for reconsideration and the district court's order denying the same are properly part of the record on appeal. Our dissenting colleague appears to suggest that Anthony waived his right to challenge the name change on appeal because the district court denied reconsideration on procedural grounds. The record reflects that Amber did not argue that the failure to file a written opposition in December rendered reconsideration improper. She made other arguments in the district court, but the court did not resolve the motion on procedural grounds; rather, it appears to have actually resolved Anthony's motion for reconsideration on the merits. As a result, this court may also consider Anthony's argument opposing the name change that Amber failed to meet her burden of proof made in his reconsideration motion. *See Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007).

Most important, the implication of our colleague's dissent – that Amber should automatically prevail on the name change countermotion because Anthony did not file a written opposition – violates established caselaw. In custody matters, the child's welfare is the court's paramount concern. *St. Mary v. Damon*, 129 Nev. 647, 654, 309 P.3d 1027, 1033 (2013). Therefore, even if, arguendo, Anthony missed a deadline, and the court and Amber's counsel had not invited Anthony's oral opposition, the district court would still need to make findings that the name change was in the child's best interest. *See Blanco v. Blanco*, 129 Nev. 723, 731, 311 P.3d 1170, 1175 (2013) ("[G]iven the statutory and constitutional directives that govern child custody and support

determinations, resolution of these matters on a default basis without addressing the child's best interest and other relevant considerations is improper."). For all of these reasons, we believe the views and conclusions expressed by our dissenting colleague are misguided and this court may review on appeal the district court's order granting Amber's countermotion for the name change.

The district court applied the correct legal standard to the request for the name change

Anthony argues the district court erred by not requiring Amber to prove by clear and compelling evidence that the name change was in the child's best interest. Amber argues the district court correctly applied the best interest analysis. We review whether a district court applied the correct legal standard de novo. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530 n.4, 170 P.3d 503, 506 n.4 (2007).

"[T]he only factor relevant to the determination of what surname a child should bear is the best interest of the child. . . . [T]he burden is on the party seeking the name change to prove, by clear and compelling evidence, that the substantial welfare of the child necessitates a name change." *Magiera*, 106 Nev. at 777, 802 P.2d at 7 (citations omitted). During the December 8th hearing, the district court stated "[Anthony is] not required to articulate the reason why not [change the name]. [Amber is] required to articulate a compelling reason why [the name should be changed]."[5] At the April 13th hearing, the district court

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[5]Amber argued below and the dissent implies that Anthony bore the burden of proof. However, *Magiera* clearly states that Amber, as the moving party, bears the burden of proof. *Id.* Anthony could oppose the motion and challenge the ruling on the failure to meet the burden and he

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stated "[in the December 8th hearing] the [c]ourt found [based on its questioning of Amber's counsel] that it would be in the child's best interest that the child bear the hyphenated name."

Therefore, our review of the record reflects that the district court required Amber to show by clear and compelling evidence that the name change was in the child's best interest. Consequently, we are not persuaded by Anthony's argument that the district court failed to apply the clear and compelling standard.

The district court erred by granting the name change request if Amber failed to prove by clear and compelling evidence that the substantial welfare of the child necessitated the name change

Next, Anthony argues there was insufficient evidence to support the district court's decision regarding the name change. Amber counters that the district court's findings from the relocation evidentiary hearing in 2013 supported its decision for the name change and the facts of the instant case closely align with the facts considered by the supreme court in *Magiera*. Strikingly, Amber does not argue that her countermotion and accompanying affidavit, standing alone, provided sufficient evidence for the name change.

In Nevada, the appellate standard for reviewing an order for a minor's name change appears to be unsettled. *See Magiera*, 106 Nev. at 777, 802 P.2d at 7-8 (citation omitted) ("[T]he burden is on the party seeking the name change to prove, by clear and compelling evidence, that the substantial welfare of the child necessitates a name change. [¶] When

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was not mandated to provide reasons why it was not in the child's best interest.

judged by this standard, it is apparent that the district court's order cannot stand."); *cf., Rivero*, 125 Nev. at 428, 216 P.3d at 226 ("This court reviews the district court's decisions regarding custody . . . for an abuse of discretion."). However, we do not decide which standard of review to apply as there appears to be insufficient evidence to support the district court's order under either a de novo or abuse of discretion standard.

Here, the district court was presented with minimal, if any, evidence at either hearing to support its conclusion that Amber had met her burden to show by clear and compelling evidence the name change was in the child's best interest. We note that Amber did not appear at the December 8th hearing and appeared telephonically at the April 13th hearing. Neither Amber nor Anthony ever testified at either hearing, nor did either counsel provide the district court with documentary evidence upon which to base its ruling. Moreover, neither Amber's original countermotion nor her opposition to Anthony's motion for reconsideration included any exhibits supporting the request for a name change. Amber's sworn pleading, referred to by our dissenting colleague, was the affidavit attached to the countermotion. That affidavit did not contain any facts regarding the name change and the motion itself contained conclusions and opinions, but few *facts* supporting her request. Overall, there was little that suggested the inexorable result to be reached by the district court would be that the best interest of the child necessitated a name change.

Significantly, the district court made no oral or written findings from the December 8th hearing. And, at the April 13th hearing, the district court merely concluded:

> Well, this Court, I think, *in my questioning of [Amber's counsel at the December 8th*

> *hearing]*—went over the issues fairly thoroughly . . . but the court found that based on the fact that the child's living in a small town far distant from her (sic) father and the father's family and all of their family has the same last name, that it would be in the child's best interest that the child bear the hyphenated name.

(emphasis added). Notably, the district court did not state that it relied on Amber's pleadings when making its ruling. Our review of the record indicates that the district court's conclusion was based on arguments of counsel instead of clear and compelling evidence presented by Amber for the name change request. In Amber's countermotion, and at the December 8th hearing, Amber's counsel *argued* that it was in the child's best interest to change his last name because Amber's relatives have the same last name and problems have existed with doctor visits and daycare.[6] But "[a]rguments of counsel . . . are not evidence and do not establish the facts of the case[.]" *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 338 P.3d 1250, 1255 (2014) (quoting *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993)). Anthony's counsel countered that there were no problems with doctor appointments and daycare. The district court then expressed skepticism with Amber's counsel's claims, yet still ruled in her favor without receiving evidence or making any findings, including the finding that Amber had met her burden of showing by clear and compelling evidence that the name change was in the best interest of the child.

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[6]In her countermotion, Amber argued that the child "is old enough to pick up on the fact" that he has a different last name than his relatives in Ohio.

We recognize that this case has a protracted history before the same district court, and it is possible that the court based its ruling on evidence or findings from prior court proceedings that was consistent with factors enumerated in *Magiera*. But the district court did not refer to prior proceedings in rendering its decision. Indeed, the court did not provide any explanation whatsoever at the December 8th hearing. Although the court explained the basis for its December 8th decision during the April 13th reconsideration hearing, the record does not reflect that *evidence* or *findings based on evidence* from prior or current proceedings was used by the district court when it considered whether clear and compelling evidence established that the name change was in the child's best interest. And, with little, if any, evidence and no findings based on evidence, this court is unable to affirm the district court's order.

Our dissenting colleague states that the district court "would certainly know" facts due to the parties' protracted litigation history. However, it requires speculation to conclude that the district court actually applied evidence or findings from prior proceedings as the court never said that it did that when ruling on the name change. Further, although, we agree with the dissent that the district court may have been able to take judicial notice of certain facts, such as the population of the town, *see* NRS 47.130, the record in this case reveals that the district court never took judicial notice of anything. In fact, at the December 8th hearing, the district court specifically asked Amber's counsel about the town's size in Ohio. Amber's counsel replied that she did not know the population, yet the court stated at the April hearing that it concluded in December that it was a small town. Finally, Anthony challenged Amber's

factual allegations in his motion for reconsideration and at the April hearing.

As the burden of proof was on Amber, not on Anthony as the dissent implies, and the matter involved legal custody, we are constrained to reverse the district court's order granting the name change and we remand this matter so that the district court may either make written findings consistent with this order or receive further evidence. *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (quoting *Rivero*, 125 Nev. at 430, 216 P.3d at 227) ("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'"). Should the district court determine that an evidentiary hearing is necessary, we note that Supreme Court Rules provide for appearances by electronic means under certain circumstances. *See* SCR Tel. Equip. Civ. 4; SCR Audio Equip. Civ. 4. Amber appeared by telephone during the April 13th hearing. The district court may consider this to be an economical way of allowing Amber to appear at an evidentiary hearing. Moreover, the court may be conducting such a hearing anyway to determine child support as explained below.

The district court abused its discretion in setting child support

Anthony, citing *Garrett v. Garrett*, 111 Nev. 972, 899 P.2d 1112 (1995), argues that the court should have used the statutory cap amount as the starting point for any downward deviation. Amber contends that the district court used the correct methodology because *Garrett* has been overruled sub silentio by *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003). Alternatively, Amber argues that the district court did not grant Anthony's request for a downward deviation.

This court reviews district court orders regarding child support for abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). "[A]lthough this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error." *Davis*, 131 Nev. at ___, 352 P.3d at 1142 (citing *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)).

A non-custodial parent is obligated to pay child support based on the percentages established in NRS 125B.070(b)(1). For one child, the parent must pay 18% of gross monthly income in child support. *Id.* That amount, however, is subject to a presumptive maximum "cap" amount based on that parent's income. NRS 125B.070(2). A district court may further change the amount, but it has "limited discretion" to deviate from the child support formula, and the deviation must be based upon the statutory factors provided in NRS 125B.080(9). *Westgate v. Westgate*, 110 Nev. 1377, 1379, 887 P.2d 737, 738 (1994). A downward deviation should be the exception to the statutory rule, and is left to the district court's discretion. *Lewis v. Hicks*, 108 Nev. 1107, 1111, 843 P.2d 828, 831 (1992).[7]

Garrett is factually similar to the case before us; both involve primary physical custody and a non-custodial parent whose obligation under the formula exceeds the presumptive cap amount. 111 Nev. at 972-74, 899 P.2d at 1113-14. In *Garrett*, the Nevada Supreme Court held that when the non-custodial parent's obligation would meet or exceed the cap amount, the starting point for applying a child support deviation factor is

[7]"[A]pplication of the formula must be the rule, and deviation from the formula for the benefit of the secondary custodian must be the exception." *Lewis v. Hicks*, 108 Nev. 1107, 1111, 843 P.2d 828, 831 (1992).

the cap, and not the higher amount that would be calculated using the percentage of the obligor's income. *Id.* at 973-74, 899 P.2d at 1113-14. Here, the district court applied the deviation factors to the percentage amount instead of the capped amount, which is the methodology advocated in Garrett's dissent, and explicitly rejected by the majority.

Amber's contention that *Garrett* was overruled sub silentio by *Wesley* is unpersuasive. In *Wesley*, the Nevada Supreme Court held that in joint physical custody situations, the *Wright v. Osburn*[8] offset should be employed before the statutory cap is applied. *Wesley*, 119 Nev. at 113, 65 P.3d at 253. Nevertheless, the *Wright* offset does not apply to the instant case because Amber has primary physical custody. *See Wright*, 114 Nev. at 1368-69, 970 P.2d at 1072 (holding that the analysis cited applies "when custody is shared equally[.]"). Further, the *Wesley* opinion cites the *Garrett* dissent only to support its conclusion that its decision comports with NRS 125B.070's "general philosophy . . . which is to make sure adequate monthly support is paid to our children." *Wesley*, 119 Nev. at 113, 65 P.3d at 253 (quoting *Garrett*, 111 Nev. at 976, 899 P.2d at 1115 (Rose, J., dissenting)) (internal quotation marks omitted). Therefore, even though the supreme court in *Wesley* was aware of the majority holding in *Garrett*, as well as the purpose of NRS 125B.070, it chose not to overrule *Garrett*.[9]

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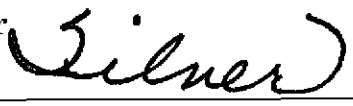
[8]114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998).

[9]The district court's decision also relied upon the belief that the child support statutes analyzed in *Garrett* have changed significantly. While the statutes have been amended several times since *Garrett*, the language analyzed in that case is also contained in the current statutes. *Compare* NRS 125B.070(b) (2015) *with* NRS 125B.070(b) (1994) *and* NRS 125B.080(6) (1994).

Further, Amber's contention that the district court denied Anthony's request for a downward deviation is without merit. Our review of the record shows that during the April 13th hearing, the court stated, "[t]he Court is granting a $50 downward deviation for the support of another child, [this will] make his obligation $800, which is still more than the statutory cap. The Court therefore shall set Father's child support at $748 (capped)." Thus, it is apparent that the district court granted a downward deviation. It is unclear, however, whether the district court would have granted the deviation had the correct methodology been applied.

As a result, we conclude that the district court abused its discretion by applying the deviation factors before imposing the cap. *See Wallace*, 112 Nev. at 1021-22, 922 P.2d at 544-45 (holding the district court abused its discretion by not complying with the child support statutes); *Davis*, 131 Nev. at ___, 352 P.3d at 1142. Therefore, we reverse the child support order and remand this matter to the district court so it may consider whether a downward deviation is appropriate when using the correct methodology.[10]

Accordingly, we ORDER the judgment of the district court REVERSED and we REMAND this matter to the district court for proceedings consistent with this order.



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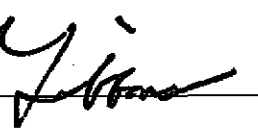

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[10]We have considered all other arguments and conclude they are unpersuasive.

TAO, J., concurring in part and dissenting in part:

I join with my colleagues in concluding that the district court's calculation of child support must be reversed because the district court improperly applied downward deviations prior to applying the statutory cap. I diverge, however, on whether a remand for any additional relief is needed on the district court's decision to allow the child's name to be changed, and would simply affirm that portion of the district court's decision.

I.

With respect to Amber's motion requesting the name change, my colleagues reverse the district court and require it on remand to conduct further proceedings (possibly including an evidentiary hearing) on a motion that Anthony did not oppose in writing below, having done nothing more than assert an "oral objection" unaccompanied by cogent legal argument or a written memorandum of points and authorities.[11] I would have thought it both obvious and settled that a party that fails to properly oppose a written motion in district court with a written opposition supported by legal authority has waived any right to appeal the ultimate granting of that motion to us. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (by failing to promptly

[11]Anthony didn't bother to substantively oppose Amber's countermotion until he filed a "motion to alter findings/amend judgment" weeks later. But such motions cannot raise arguments for the first time that could have been raised previously, but were not. *See Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) ("Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing."). And in any event, the granting of rehearing or reconsideration is a matter within the district court's discretion.

object to district court action, party "did not preserve the issue for appeal" and "his consent" waives any appeal); *Carroll v. Mandel,* Docket No. 68114, 2016 WL 6651508 (Ct. App. November 2, 2016) (unpublished disposition) (appellant's request for continuance "cannot be considered an opposition as appellant suggests because it did not contain a memorandum of points and authorities" and "appellant failed to file even an untimely opposition"); *see also* EDCR 2.20(e) (non-moving party "must" serve and file a written notice of non-opposition or opposition thereto, "together with a memorandum of points and authorities and supporting affidavits"; failure to serve and file a written opposition "may be construed as an admission that the motion is meritorious and a consent to granting the same"); EDCR 2.20(i) (opposition unsupported by legal argument "does not comply" with rules and court may decline to consider it). *Cf. King v. Cartlidge,* 121 Nev. 926, 124 P.3d 1161 (2005); *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996); *Nye County v. Washoe Medical Center*, 108 Nev. 896, 899-900, 839 P.2d 1312, 1314-15 (1992).

But the majority reasons that, because Amber submitted her request as a countermotion which was arguably (but only arguably) filed a few days later than it should have been (filed November 24 for a hearing date of December 8, or fifteen calendar days before the hearing), Anthony was deprived of a chance to fully respond. But Anthony didn't make this objection in a timely way to the district court, raising it for the first time only in his motion seeking to alter/amend filed weeks after the district court had already ruled on Amber's countermotion. Consequently, I don't know why we're allowing him to make that objection on appeal when he didn't properly raise it in district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial

court . . . is deemed to have been waived and will not be considered on appeal.").

And is it even true that Amber's countermotion was late? Anthony argues that Amber filed her countermotion in a way that gave him fewer than ten judicial days before the December 8 hearing to respond. But under EDCR 2.20, the time for filing a countermotion is dictated by the timing of the original motion: the deadline for Amber's countermotion would have been triggered by the date on which Anthony's motion was served on her, not by either when Anthony filed it with the court or when the hearing date for Anthony's motion was originally set. *See* EDCR 2.20(e), (f) (referring to "service" of motion).

Here, Anthony didn't bother to supply us with a copy of the certificate of service showing when his original motion was served on Amber so that we can see whether his argument is even plausible. But even if he had provided one, determining the service date ultimately represents a factual question. *See Robinson Engineering Co. Pension Plan and Trust v. George*, 223 F.3d 445, 452 (7th Cir. 2000) (determining whether service was proper is a factual question that depends on evidence; in challenging service, "Robinson did not support this position with evidence before the district court . . . Without such evidence, the court had no basis for determining whether" service was timely). And questions of fact are for the district court to answer in the first instance, not for us to answer for the first time on appeal. *See Ryan's Express v. Amador Stage Lines*, 128 Nev. ___, ___, 279 P.3d 166, 172-73 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance . . . An appellate court's ability to make factual determinations is hampered by the rules of appellate procedure, the limited ability to take

oral testimony, and its panel or en banc nature"); *see also Anderson v. Bessemer City,* 470 U.S. 564, 575 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact).

But the district court never made any findings regarding the date of service of Anthony's motion—because Anthony didn't properly raise this supposed problem to the district court. Absent any such factual findings, it's far from clear that Amber's countermotion was untimely, and the majority is merely speculating about when Amber's countermotion would have been due. For all we know from the record on appeal, it's entirely possible that Amber's countermotion was timely and it was Anthony's original motion that was untimely served on Amber, in which case Anthony has nothing to complain about. Ordinarily, we construe missing portions of the record against the appellant, but here the majority fills in a slew of missing facts (facts that the district court never entered findings on) in Anthony's favor, for reasons entirely unclear to me. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). If we were to apply this rule honestly, we'd have to presume that Amber's countermotion was filed in a timely manner because Anthony has failed to give us either any district court findings or even a complete appellate record from which we can conclude that it wasn't.

Moreover, putting aside the unanswered factual question of when Anthony's motion was served upon Amber, Anthony knew the countermotion was calendared to be heard on December 8, as the countermotion clearly indicates the date on its cover page. Indeed, Anthony's original motion was calendared to be heard on December 2, but the district court moved it back six days apparently so that it would be heard together with Amber's countermotion and some other pending motions, which gave Anthony six additional days to respond. Anthony knew this because he was able to file a Reply brief to one of his original motions on December 1, a full week after Amber's countermotion was filed, but he apparently didn't bother to respond to Amber's week-old countermotion (notably Anthony doesn't include a copy of his Reply brief in the appellate record either).

Yet between the time Amber's motion was filed and when it was heard, Anthony didn't object to the timing of Amber's countermotion; he didn't seek to continue the hearing date; he didn't request an extension of time to respond; he didn't ask the district court to strike Amber's countermotion as improperly filed; and when he showed up to the December 8 hearing he never complained about not having sufficient time to respond or ask for more time. He therefore consented to having the countermotion resolved that day without any written opposition from him. *See Bower*, 125 Nev. at 479, 215 P.3d at 717 (by failing to promptly object to district court action, party "did not preserve the issue for appeal" and "his consent" waives any appeal).

Had Anthony made a timely objection, the district court could have looked into it and we'd have a district court decision on the matter, complete with proper findings of fact, that we could review. But because

Anthony didn't timely raise these complaints to the district court, the district court never investigated or ruled on the matter—which means that there is no district court decision, and no findings of fact, for us to review. *See N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 111 n.3, 807 P.2d 728, 730 n.3 (1991) (declining to address an issue on which the district court did not rule first).

Instead of bringing this alleged defect to the district court's attention through any of a number of avenues available to him, Anthony merely showed up at the hearing and lodged an oral objection to the substance—notably, not the timing—of the motion. Somehow the majority deems this enough to give Anthony the appellate relief he asks for, and to remand for the district court to potentially give him even more relief.

But why does the majority allow Anthony to complain about Amber's alleged violation of the rules when Anthony's "oral objection" was itself a violation of the rules? The rules of civil procedure and the local rules don't permit "oral objections" unsupported by a memorandum of points and authorities any more than they permit supposedly late filings (even assuming that Amber's countermotion was indeed late). *See Carroll v. Mandel,* Docket No. 68114, 2016 WL 6651508 (Ct. App. November 2, 2016 (unpublished disposition) (appellant's request for continuance "cannot be considered an opposition as appellant suggests because it did not contain a memorandum of points and authorities" and "appellant failed to file even an untimely opposition"). But for some reason the majority focuses on one unobjected-to and unpreserved error that favors Anthony while overlooking the other that doesn't. And the supposed error that favors Anthony (that Amber's countermotion was late) might not even be true, while the error that doesn't favor him (that he never filed a

written opposition supported by a memorandum of points and authorities) is demonstrably and unequivocally true. I don't know why we're ignoring our own established rules of appellate practice to help him.

And all of this on behalf of the party that the district court found in its original decree to have a history of "non-compliance with prior orders of this Court." Why we're rewarding Anthony for not filing anything below and then putting together a deficient appellate record on appeal (which one could fairly characterize as non-compliance with the rules of civil procedure and our own appellate rules) is something I don't understand or agree with.

II.

Quite apart from Anthony's non-opposition, there's another reason why Anthony's appeal of the name change should simply be rejected out of hand. The majority concludes that not only is Anthony entitled to appellate relief, but he might even be entitled to a full evidentiary hearing before the district court on a matter whose facts are, as things stand, not even in dispute. I can hardly imagine a bigger waste of judicial resources than ordering either an evidentiary hearing, or more district court findings, on a matter whose facts aren't in dispute.

An evidentiary hearing isn't a discovery tool nor is it an open invitation for the parties to engage in a fishing expedition to see what comes up. Rather, the purpose of an evidentiary hearing is for the district court to see and hear from witnesses in order to gauge their respective credibility in order to resolve the truth of any facts on which the witnesses disagree. If nothing is in dispute—if the parties agree on a single operative set of facts—then no evidentiary hearing is necessary because there are no questions of credibility for the district court to sort out by watching the competing witnesses testify in person and be subjected to

cross-examination on any possible inconsistencies. *See U.S. v. de la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977) (trial court did not err in refusing to hold evidentiary hearing when defendant failed to make "initial showing by affidavit or otherwise" of prima facie entitlement to relief, and motion "never seriously challenged by allegations or evidence" any of the underlying facts); *U.S. v. Smith*, 499 F.2d 251 (7th Cir. 1974) (no error when trial court concluded that defendant was not entitled to an evidentiary hearing because he failed to make the necessary "initial showing" that any facts were in dispute); *see generally, Nardone v. U.S.*, 308 U.S. 338, 341 (1939) ("the burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that [there is some factual question in dispute]. Once that is established . . . the trial judge must give opportunity [for a hearing]").

If Anthony couldn't be bothered to file a written opposition, then it should be obvious that he has failed to show, by "affidavit or otherwise," that any facts are disputed and in need of exploration via an "evidentiary hearing." Tellingly, Anthony still didn't contest the underlying facts even in his "motion to alter/amend the judgment," filed weeks after the district court's ruling when he had plenty of time to come up with evidence or an affidavit. Even on appeal, he complains about not being given enough time to respond, but doesn't give an actual substantive reason why Amber's motion should have been denied. Throughout this appeal, Anthony complains about procedural irregularities, but doesn't ever offer any reason why Amber's motion wasn't in the best interests of the child. Technical procedure aside, if Anthony can't articulate a single substantive reason why Amber's motion should have been denied on the merits even when given three tries at it, then perhaps we shouldn't

conclude that the district court committed an "abuse of discretion" in granting it without an evidentiary hearing.

Maybe the reason why Anthony can't give us any reason to deny the motion is because there is no reason. Amber's motion was based largely upon facts that cannot genuinely be disputed, including such things as Amber's last name; how far the child lives from Anthony; and that the child lives in a small town where non-matching last names is more noticeable than it might be in a big city.[12] *See Magiera v. Luera*, 106 Nev. 775, 777, 802 P.2d 6, 7-8 (1990).

Specifically, Amber attested that she frequently encounters difficulty in proving that the child is hers because their last names do not match, noting that she cannot even schedule a routine doctor's appointment or register the child for after-school activities without providing independent proof that she is the mother. I would affirm changing the child's name on this basis alone, in order to alleviate any possible future risk that the child cannot get emergency care when needed because his name doesn't match his mother's. If "best interests of the

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[12]The only factual allegation that Anthony bothers to contest is whether the child truly suffers emotional distress from having a different surname than his mother. He doesn't present facts contradicting this, but only says that he doubts it to be true, so it's not even seriously disputed, only vaguely questioned. *See Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) ("general allegations" and "speculation" are insufficient to create a genuine factual dispute warranting a trial on the merits). Furthermore, how would Anthony have enough "personal knowledge" to doubt this when he lives in Nevada and the child's behavior took place in Ohio? And even if there may exist some doubt on this, the rest of Amber's motion that Anthony didn't even try to contest provided more than enough for the district court to grant her name change without an evidentiary hearing, even if we ignore this particular allegation.

child" means anything, it means ensuring that a child is able to receive medical care, whether routine or emergency, and nothing more needs to be said. *See In re Guardianship of L.S. and H.S.*, 120 Nev. 157, 162, 87 P.3d 521, 524 (2004) (a child is "neglected" if he lacks necessary medical care because of a parents' refusal to cooperate).

But there's more. In *Magiera*, the Nevada Supreme Court held that "the only factor relevant to the determination of what surname a child should bear is the best interest of the child." *Magiera*, 106 Nev. at 777, 802 P.2d at 7. The court recognized that a child having a different surname than the primary custodian may cause confusion about his identity, difficulties in school, embarrassment, and adversely affect the child's relationship with the mother, such that having the mother's last name is frequently in the child's best interest. *Id.* at 777, 802 P.2d at 8. And that's precisely what Amber's affidavit says.

Even though these facts aren't disputed, the majority quibbles that maybe Amber's affidavit doesn't have enough detail in it to meet the standard of "clear and compelling" evidence. It's true that Amber's affidavit doesn't contain official United States Government census data describing her town's population (but according to the U.S. Census Bureau's website, Niles, Ohio has a population of 18,000), and also doesn't include testimony from an expert cartographer attesting that Niles, Ohio is, in fact, located thousands of miles away from Nevada. So perhaps in a way Amber's affidavit is lacking in certain facts. But who cares? *Anthony contested none of this.* Furthermore, the district court would certainly know where the child lives, whether it's a small town, and where the town is located in relation to Anthony, because the child *lives there by court order* and there's no need for an "evidentiary hearing" to explore what the

court previously ordered and assuredly already knew. Thus, the facts of Amber's affidavit, plus the facts that the court already knew from its previous orders, stand entirely uncontested and the district court had before it only one undisputed set of facts.

When the evidence is undisputed and the parties effectively agree on all of the operative facts, there are no competing facts for the district court to balance and weigh against each other. When 100% of the evidence goes one way and zero percent goes the other, the party presenting 100% of the evidence has met both its burden of production as well as its burden of persuasion, and there is no need for an evidentiary hearing because there is no factual dispute or credibility question to be decided by the court. At the very least, we can hardly call it an "abuse of discretion" for the district court to make its decision without an evidentiary hearing based upon the contents of Amber's affidavit that Anthony did not dispute either in opposition to Amber's countermotion or even in his later motion to alter/amend the judgment filed weeks later.

If Anthony can't even assert that Amber's evidence is untrue or even seriously in doubt, then I don't see how her affidavit provides any less of an evidentiary basis to grant her motion than having her spend thousands of dollars to fly all the way from Ohio just to repeat, verbatim, those exact same uncontested facts in person. *See de la Fuente*, 548 F.2d at 533 (no evidentiary hearing necessary when defendant "never seriously challenged by allegations or evidence" any of the underlying facts); *Smith*, 499 F.2d at 253 (no evidentiary hearing necessary where defendant failed to make the necessary "initial showing" that any facts were in dispute). Where the facts are undisputed, the form of the evidence shouldn't matter and written affidavit testimony should be every bit as good as live oral

testimony, with the added benefit of being much less expensive and burdensome to boot.[13]

On the other hand, if what the majority means to say is that the content of Amber's affidavit, as opposed to its credibility, is insufficient to meet the legal standard of "clear and compelling" evidence even when totally undisputed, then the proper remedy would be to simply deny her motion outright with no remand because there's nothing she can say during an evidentiary hearing that would make the motion worth granting. But either way, no "evidentiary hearing" is required. *See de la Fuente*, 548 F.2d at 533 (no evidentiary hearing required when defendant failed to make "initial showing" of prima facie entitlement to relief).

But I doubt that's what the majority is truly saying. If making medical care easier to obtain (conversely, avoiding catastrophe on a day when the child seriously hurts himself and Amber forgets to carry a birth certificate with her) isn't "clear and compelling" proof supporting a name change, then nothing would be. And so long as that's the case, I wouldn't think it a good expenditure of time and money to require Amber to fly halfway across the country to testify to those very facts that Anthony didn't dispute in support of a motion that Anthony didn't even properly oppose.

Rather, under our normal rules of appellate practice, I wouldn't have thought Anthony entitled to any relief in any form

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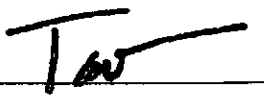
[13]If a district court couldn't ever rely upon undisputed affidavit testimony to resolve a case, then there would be no such thing as "summary judgment" because every summary judgment motion would require an "evidentiary hearing," otherwise known as a "trial." *See* NRCP 56.

whatsoever, whether an evidentiary hearing or merely a remand for more findings. Consequently, I would reverse the calculation of the amount of child support, but would simply affirm the portion of the district court's order granting the child's name change without imposing any further burden on the district court or on Amber.



_____, J.
Tao

cc: Hon. William S. Potter, District Judge, Family Court Division
Law Offices of F. Peter James, Esq.
Fine Carman Price
Eighth District Court Clerk